ICD NEWS

LAW FOR DEVELOPMENT

INTERNATIONAL COOPERATION DEPARTMENT
RESEARCH AND TRAINING INSTITUTE
MINISTRY OF JUSTICE

July, 2003

Features:

Brief Information of Japan's Legal Assistance and the ICD, RTI

Basic Policy for Legal Assistance of Japan

National Seminar on the Drafting of Civil Code and Code of Civil Procedure of Cambodia

Training Course on Court and Case Flow Management for the Philippine Judges and Court Personnel

Preface

Becoming the Focal Point for Information Distribution on the Japanese Legal Assistance

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The Japanese Legal Assistance Project has accomplished landmark achievements, such as the drafting of the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia, through the collaborative work and expertise of the Japanese and Cambodian jurists.

Over the past two years, since the establishment of the International Cooperation Department (ICD) of the Research and Training Institute, Ministry of Justice of Japan, Uzbekistan and Indonesia have been added to the recipient countries of Japan's legal assistance, in addition to Vietnam, Cambodia and Laos; the assistance activities have been diversified as well, in response to the needs of those countries. Now the subject of legal research and study of the ICD varies from ADR and Intellectual Property Right in the Asia-Pacific Region to the judicial system of the Philippines and the registration system of South Korea, and its achievements have been multiplied more and more.

In order to increase public awareness of the efforts of the Japanese legal assistance team and disseminate valuable information achieved through research and studies, our department publishes the ICD NEWS, a bi-monthly departmental journal, since January 2002, and nine issues have already been published. Now, this English version of the ICD NEWS, will enable us to distribute information around the globe.

The International Cooperation Department has three missions; (1) Development of basic laws of developing countries, (2) Research and study on the legal system of other countries, which is necessary to achieve the first mission, and (3) Global dissemination of information on legal assistance and the achievements of research and studies. Such information sharing facilitates effective cooperation among donor organizations; it would be wonderful if this information dissemination could eventually lead to a shared understanding of the principal legal system of Asian civil and commercial laws.

Looking at the actual state of developing countries, however, presents a clear example of the fact that expeditious establishment of modern legal system is difficult to implement through non-collaborative efforts, due to scarce human and material resources in those countries. According to the experience of some attorneys of the ICD in Cambodia and Laos, there are almost no books on law, law textbooks, nor Kommentar, except those written

in English, French or other foreign languages donated by donor organizations. Neither the Statute Books nor the report on court precedents is enough. In some developing countries, there are no court facilities in rural areas and an ordinary room is used as a temporary courtroom. These circumstances are quite surprising to those who live in Japan.

However, as a matter of fact, Japan also had a similar experience in the last half of the nineteenth century when we imported Western Law without having our own civil code or enough court facilities, in order to catch up and keep up with other countries. Japan was in the similar situation as the developing countries of today, as lectures were given on French Civil Code and other French laws in the French language, when Professor Boissonade was invited to the Training School of the Justice Ministry back then. During his keynote speech at the Seminar on Contract Law in the Civil Codes of Vietnam and Japan, H.E. MIKAZUKI Akira, Professor Emeritus of the University of Tokyo, reflecting on the history of the establishment of the Japanese modern legal system, made the following remarks; "Japanese law and its jurisprudence have only been paying attention to Western developed countries and so far, interest in Asian law and the study of Asian law is very unusual. As the economies of Asia become increasingly more developed, world history is being created trilaterally around Europe, North America, and Asia. Japan, by considering herself as being part of Asia, should take advantage of its experience built up over more than one hundred years, in order to make Asia competitive with Europe and America, in collaboration with neighboring countries". Certainly, Japan's experience of putting an end to the traditional Asian legal practice and studying and adopting French, British, German and American legal systems, within Asian custom and culture, since opening the country in the second half of the nineteenth century, may be referred to as a good example to be followed by other Asian nations.

Meanwhile, H.E. ETO Shinpei, then Minister of Justice, who devoted himself to the Japanese legislation in the beginning of Meiji Era that initiated in 1868, believed that, with the development of a legal and judicial system, the life of a country's citizens would be stabilized, the nation would be enriched and Japan would be able to compete with other Powers. Through the development of civil and commercial laws, the legal assistance, in which we are involved, is believed to be conducive, not only to the transition to a market economy and healthy economic development, but also, to the establishment of the rule of law, the enforcement of democratization and the security of individual rights and freedom in the recipient countries. The drafts of the Civil Code and the Code of Civil Procedure of Cambodia, which were delivered to its government last year, are also based on the same concept. The drafts declare the establishment and protection of public rights, and stipulate clearly the guarantee of citizens' rights to access to court to resolve civil disputes, the principle of "*la contradiction*" and open court, and access to a trial before a judge whose identity is guaranteed by law.

When providing legal assistance to Asian nations, it is important to take into

consideration their varied societies, political, economic and legal systems, as well as diverse cultures and religions, to make legal assistance accorded with the situation of their society, not intrusive. On the other hand, the rule of law and the realization of a free and fair society are now recognized as a common sense value of mankind. We would like to disseminate the process of Japan's legal assistance, by positioning legal assistance as a means of recognizing the diversity of law in Asian countries, and at the same time, establishing common sense values and clarifying common principles of law.

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[i] The Japanese names are written with the family name in capital letter, followed by the given name in lower case.

Brief Introduction of Japan's Legal Assistance and the ICD,RTI

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(March 2003)

I. Introduction

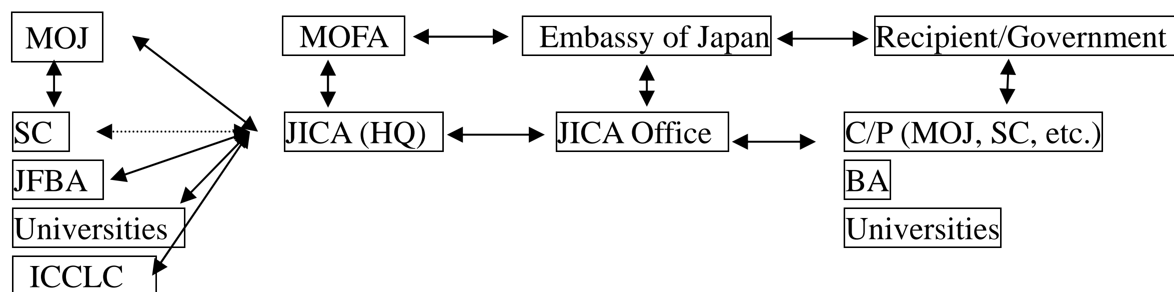
The Technical Assistance in the Legal Field (hereinafter referred to as "legal assistance") provided by JICA (Japan International Cooperation Department) dates back to 1994. Prior to that, in 1992, the Minister of Justice of Viet Nam requested that the Minister of Justice of Japan provide legal assistance for legal and judicial reform in Viet Nam. Dr. MORISHIMA Akio, Professor of Nagoya University at that time, upon request of the Minister of Justice of Viet Nam, then initiated legal assistance from Japanese universities.

Japan has been providing Official Development Assistance ("ODA") since 1954, and JICA was established in 1974 to deal with technical assistance ("TA") in various fields. However, JICA had no means or method of providing legal assistance in the early 1990s. Thanks to Dr. Morishima's activities and great efforts, JICA established a training course in Japan for legal assistance in 1994 with the consideration that the ODA had been shifting its focus from physical infrastructures to the social and intellectual when responding to a new type of request from countries in economic transition, which needed legal and judicial reform suitable to the market economy system. Then, the Supreme Court ("SC") of Japan, the Ministry of Justice ("MOJ"), Japan Federation of Bar Associations ("JFBA") [1] and universities became involved in the activities of legal assistance. Now, legal assistance has become well known among legal professionals nationwide.

[1] In Japan, judges, public prosecutors and practicing lawyers must pass the same national bar examination and after taking 1.5 year training under the Supreme Court, trainees choose their professions. The JFBA is an independent NGO.

II. Organizations Involved in Legal Assistance

A rough sketch of the organizations involved in the Japanese ODA is as follows:



In the Government of Japan, requests for legal assistance are made through the Ministry of Foreign Affairs ("MOFA"). The legal assistance of the ODA is categorized mainly as Technical Assistance, which is implemented by JICA. In doing so , JICA must cooperate with other organizations that have specific expertise. In the case of legal assistance, one of the organizers is the Research and Training Institute ("RTI") of the MOJ Japan. The RTI works in close cooperation with the General Secretariat of the Supreme Court, the Committee on International Cooperation of the JFBA and law professors of universities. The JFBA and some universities also implement their own ODA projects independently. In addition to these legal professionals, this activity has been supported by donations from the Japanese business sector. The International Civil and Commercial Law Centre Foundation ("ICCLC") has supported legal assistance since its establishment in 1996.

III. What is the RTI?

The RTI consists of seven departments:

A. General Affairs and Planning Department,
B. Research Department,
C. First Training Department,
D. Second Training Department,
E. Third Training Department,
F. United Nations Training Cooperation Department, and
G. International Cooperation Department.

The RTI maintains a diverse staff of officials from the MOJ, Public Prosecutors Offices, courts and universities. As the only national criminology research organization body, the RTI conducts a wide range of activities that include research on criminal justice policy and other MOJ affairs, trainings for MOJ officials (excluding correctional affairs and Public Security Investigation Agency personnel), and trainings for legal experts principally

from the Asia and Pacific countries). The last one is dealt with by the United Nations Training Cooperation Department, which is well known as UNAFEI (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders), and the International Cooperation Department ("ICD"). UNAFEI is a UN regional training institute established in 1962 for the purpose of ensuring sound development of the criminal justice system in those countries. Considering the fact that UNAFEI started organizing training courses under the MOJ budget before the establishment of JICA, its activities may have been the precursor of one of the activities of the present legal assistance.

IV. What is the ICD?

The Vietnamese request for legal assistance matched the changing trend of ODA. Then, the legal assistance for Viet Nam became the second[2] experience for JICA to give this kind of intellectual technical assistance, and later was followed by Cambodia, Lao P.D.R., Indonesia, Uzbekistan and some other countries. Due to the rapid increase of these requests, the MOJ Japan established the International Cooperation Department ("ICD") within the RTI in April 2001, the supreme mandate of which is to implement legal assistance. The JFBA, in addition to the MOJ, has been providing assistance to the Bar Association of the Kingdom of Cambodia since 1995 as an NGO, some activities of which are funded by JICA under the scheme of "Small-scale Development Partnership Activity".

The ICD is located in Osaka, Japan, and has approximately 10 members who work exclusively on activities of legal assistance, and several temporary staff members[3].

V. Backgrounds and Reasons of Japan's Legal Assistance

The reasons that Japanese legal experts provide legal assistance to Asian countries can be summarized as follows:

A. Historical background

As Japan has made similar efforts in introducing foreign legal systems, lawyers in Japan can give advice to Asian lawyers from the viewpoint of comparative legal study; and

B. Geographical background

Legal stability and predictability in the Asian region will play an important role in developing closer relationships among Japan and the other countries in the region.

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[2] The first one was a TA in economic policy reform in Viet Nam, known as "Ishikawa Project".

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A. Historical Backgrounds

Until the middle of the 19th century, Japan had a legal system that had first been influenced by Chinese culture and was later developed independently under the national isolation policy. However, after the Meiji revolution in 1868, Japan was urged by Western countries to establish a modern legal system, and therefore invited legal experts from European[4] countries and the United States and also sent officers and students abroad to let them study various legal systems. Consequently, the legal system of Japan was modernized, taking models first from France, secondly from Germany, and thirdly from the U.S.A. after World War II, modifying these models appropriately, in accordance with its own society and culture.

Due to the historical background, lawyers in Japan usually have a relatively broader perspective on foreign legal systems. For example, any legal scholar will research not only Japanese law but foreign laws as well. They usually study abroad for a few years and do research on a foreign legal system in detail by reading legal materials in the original language, and continue and deepen their research after returning to Japan. Whenever legal and judicial reform is considered, the MOJ, SC, JFBA and academicians research the latest state of foreign judicial systems of the U.K., the U.S.A., France, Germany and others. Japanese lawyers are usually well aware of the difference between Continental law and Common law, because they made extensive efforts in keeping a balance between the two different legal systems introduced into the Japanese system. Thus, Japanese lawyers can give Asian countries advice from the knowledge of which legal system would be most appropriate to the situation of the country and what might be problematic if a certain legal model is adopted.

B. Geographical Backgrounds

Japan shares a common background with Asian countries as well as economic relationships which are growing and becoming closer year by year. From Japan's historical efforts to introduce Western legal systems; Japanese lawyers are fully cognizant of the fact that judicial reform should take into consideration

[4] The first consultant was Mr. Georges Bousquet, a 28-year-old French advocate, staying in Japan from 1872 to 1876, who drafted the decree on organization of the MOJ and to teach MOJ officials on basic laws. He published "Le Japon De Nos Jours" in 1877 (Hachette, Paris). The second was Mr. Gustave Boissonade Fontarabie (1825-1910), a 48-year-old French assistant professor of the University of Paris, staying in Japan from 1873 to 1895 for 22 years, who drafted the Penal Code, the Code of Penal Procedure and the Civil Code, and continuously gave lectures for officials in the MOJ and students at the Imperial University (the current University of Tokyo) and other private law schools. The third was Mr. Carl Friedlich Hermann Roesler (1834-1894), a 44-year-old German scholar of the University of Roschtok, staying in Japan from 1878 to 1893, who drafted the Commercial Code and gave advice to drafting the Constitution. The reason that only Mr. Boissonade, among several foreign consultants, is still memorized as "Father of the Japanese Modern Legal System" is that he left not laws (his drafts were replaced by German-modeled laws later) but LAWYERS so that Japan could develop its legal system by herself.

social, economic, cultural and historical factors. In implementing legal assistance, knowledge and recognition of these factors is crucial. This is one of the reasons why Japan commenced its legal assistance first in Asia.

VI. Policy of Japan's Legal Assistance

The ODA Charter states, "Full attention should be paid to efforts for promoting democratization and introduction of a market-oriented economy, and the situation regarding the securing of basic human rights and freedoms in the recipient country."

In addition to the above, the following two points should be added as to legal assistance:

A. In order to pay full respect to the independence and ownership of recipient countries, the donor should provide alternatives for the legal system while leaving the decision-making to the recipient countries, and conduct thorough surveys of the situation of the recipient countries

B. In order to support the enforcement of laws, projects should be set for the middle and long-term basis, with a view to not simply drafting laws, but to placing importance on establishing a workable system of application and execution of laws and developing human resources to enforce or practice laws.

Any lawyers who have been involved in this activity have kept in mind never to force the recipient country to follow the Japanese legal system; and have listened to the voices of the people in the recipient countries. The first eight years were a sort of experimental period both for Japanese lawyers and JICA, and the recipient countries to find out how to implement legal assistance more effectively. Lawyers in Japan are now having serious discussions with JICA to develop their own approach to providing legal assistance, as well as researching improved evaluation methods.

VII. Contents of Japan's Legal Assistance

The contents of Japanese legal assistance could be classified as follows:

A. Assistance in drafting specific laws,

B. Assistance in systematizing law enforcement, and

C. Assistance in developing human resources, such as lawyers[5].

These are implemented by the following methods:

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[5] "Lawyers" herein means judges, public prosecutors, advocates and those of similar qualifications. In addition, legislators and legal trainers may be included when appropriate.

1. Training in Japan

JICA-funded trainings (Group Training, namely "Country-Focused Training Course" and "Multi-National Training Course", and personal training, namely "Counterpart Training"), MOJ-funded training (study tour for relatively high-ranking officials), and other opportunities to be invited as students in master/doctorate courses in some universities funded by either JICA or the Ministry of Education and Science.

2. Workshops in recipient countries in which lecturers are sent from Japan

Dispatching Short-Term Experts to recipient countries for needs-assessment research before starting a project and inviting experts from the recipient countries for the same purpose.

3. Dispatching Long-Term Experts to recipient countries as legal advisors (currently four in Viet Nam, two in Cambodia, and one in Lao P.D.R.)

4. Forming working groups of experts (scholars and practitioners) who assist in drafting laws (currently two for Cambodia and one for Viet Nam)

5. Forming steering committees and secretariats to support each project (currently one each for Cambodia and Viet Nam)

6. Publishing newsletters and reports, for example, "ICD NEWS" (currently only in Japanese, bi-monthly, by MOJ) and "ICCLC" (only in Japanese, by ICCLC).

In addition to the above, the Ministry of Education and Science provides a fund to enable Japanese universities to research and develop a more effective and accurate evaluation system for legal assistance. Those universities have been seeking cooperation agreements with their Asian counterparts.

The outcome reports of the Japanese legal assistance are now available, with the exception of a few, in Japanese[6].

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[6] Information available in English could be found on the following websites of the MOJ, JFBA and JICA.

http://www.moj.go.jp/ENGLISH/RATI/LTA/pt0.html

http://www.jica.go.jp/english/activities/regions/02asi.html#Basic

http://www.nichibenren.or.jp/en/about/activi6.html

As for the Japanese legal system explained in English, the website of the Supreme Court is useful.

http://courtdomino2.courts.go.jp/home.nsf/ehome?OpenPage

BASIC POLICY FOR LEGAL ASSISTANCE[*]

OF JAPAN

July 11, 2001

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

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    - e. Scholarship for foreign students

V. GOALS OF LEGAL ASSISTANCE

I. DEFINITION OF LEGAL ASSISTANCE

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

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

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

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

B. Inasmuch as Legal Assistance is defined as above and its substance understood to be as above, it should be noted that various individuals and organizations[2] are engaged in these activities in one way or another and that their policies may vary. However, each of the Japanese members attending this conference has played a key role in Legal Assistance provided as the ODA. The views expressed in this report are the results of the discussion of the members,

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

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

although they are not necessarily those of the organizations involved.

II. SIGNIFICANCE AND NECESSITY OF LEGAL ASSISTANCE

A. Law and Society

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

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

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

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

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

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

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

III. SIGNIFICANCE AND NECESSITY OF LEGAL ASSISTANCE OF JAPAN

A. Current State and Issues of Legal Assistance

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

Countries that have moved toward a market economy need both to realize well-functioning domestic markets and to introduce foreign investment. For this purpose, many have introduced Western law, regardless of the extent of the development of their domestic markets. In these countries, because the introduction of foreign investment requires laws such as land law, mortgage law, bankruptcy law and foreign investment law (which are all requisites for receiving loans), the legislation of these specific laws has been prioritized. This means that basic laws such as contract law and commercial law are often introduced on a piecemeal basis. Because recipient countries are themselves limited in planning capability, they tend to rely largely on bills that have been drafted by foreign legal experts working as consultants. As a consequence, the following cases are found among recipient countries:

1. For a mortgage registration system to function, first an insurance system that ensures compensation of losses incurred in the course of transactions should have been developed. However, despite the absence of this kind of system, a

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

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

country may pass a mortgage law that assumes ready access to such an insurance system.

2. In another scenario, despite the fact that in the absence of a developed registration system for real estate (or any plans to create one), it is practicably impossible to make registration the essential element in transfer of land ownership, a country brings into effect a land law that requires immediate registration without considering such alternative measures such as having certain interim provisions in place or making registration the essential element for verification of titles against third parties, not for transfer itself.

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

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

B. Significance of Legal Assistance of Japan

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

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

1. Japan has introduced civil law system from France and Germany over a period of around 130 years since the latter half of the 19th century, and common law system after World War II. Japan has harmonized both systems of law with Japanese circumstances. This has been a valuable experience in the adoption of law from different societies, and it enables us to share a sense

of the difficulty that recipient countries are experiencing at present.

2. Thanks to studies of each legal system in the course of introducing civil law and common law, Japan has accumulated an excellent store of knowledge through comparative analysis of the both. Thus, Japan is in a good position to point out how the introduction of certain systems influences the existing system. Having had experience in adopting laws from other countries, Japanese legal experts can relate to others their experience in terms of the effects of this process. Moreover, the experts can make a contribution by relating our experience in resolving conflicts between introduced law and existing social norms, finding out what is required for the actual implementation and application of such law, and ensuring that legal systems are consistent.
3. Importance should be placed on the establishment of a basic system of laws consisting of Civil and Commercial Law and the Civil Procedure Code, among others. These are key laws for a market economy. Also important for the same reason is establishment of legal systems that are instrumental to the fair and efficient solution of disputes. Civil and commercial law and a fair and efficient civil adjudication system are of prime importance in ensuring freedom of economic activities among independent and private economic participants. Assistance for drafting specific laws required in connection with foreign investment has been provided as well by other donors. Giving priority to the development of basic laws is therefore believed to be beneficial in terms of avoiding duplication with other donors as well as promoting cooperative liaisons among the donors. In addition, because of considerable differences in legal technicalities between common law and civil law, inconsistent introduction of both systems of law will only invite confusion. Thus, it will be greatly significant for Japan to make recommendations based on its own experience to other donors.
4. Of the members of the Group of 7, Japan is the only one located outside of Europe and North America. Many developing countries are also located outside the regions of Europe and North America. The legal system of Japan, having arisen from the aforementioned circumstances, may offer some significant alternatives for these developing countries. Japanese experience gained in the course of legal development through the adoption of common law will also offer significant guidance to these countries.
5. Japanese contribution to Legal Assistance in the intellectual arena will lead to the growth and security of the international community as a whole, including Japan. This is of great significance from the perspective of Japan's

contribution to the world community.

IV. BASIC POLICY FOR LEGAL ASSISTANCE OF JAPAN

A. Basic Policy of Official Development Assistance (ODA)

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

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

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

B. Basic Policy Regarding Legal Assistance of Japan

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

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

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

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

1. Respect for the Ownership of a Recipient Country

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

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

a. give these countries alternatives
b. explain the advantage and disadvantage of these alternatives, and
c. call on these countries to make their own final decisions.

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

2. Legal Assistance That Takes Root in a Recipient Country

Legal Assistance cannot attain its goal by merely assisting the drafting of bills or enactment of laws. It only has significance when law is actually implemented and applied. Accordingly, the government of a recipient country has to have a true desire to carry out legal

reforms, and it has to have the public support. However, from the standpoint of the assisting country, and in order to make the content of proposed cooperation satisfactory to the government and people of a recipient country, it must be always borne in mind how Legal Assistance will function amid the actual conditions of the recipient country.

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

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

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

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

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

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

among independent and private participants.

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

b. <u>Transfer of legislative technicalities and capacity building through participation</u>

To assist in the drafting of civil code and civil procedure code in Cambodia, sub-committees have been organized that are comprised of Japanese scholars, judges and other legal experts. These sub-committees, which comprise approximately ten members each, hold study meetings to draft provisions. They have adopted a method of operation by which committee members visit Cambodia five to ten times a year to make drafts of the laws and exchange opinions with parties such as judges and staff members of the Cambodian justice ministry.

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

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

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

c. Providing information needed for urgent and specific legislation

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

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

d. Capacity building for legal experts and practitioners

No law or legal system will function without training for legal experts who apply it. This has been the experience of Japan itself. Development of law begins with their enactment, followed by the establishment of various systems surrounding court systems and law. These are issues of formal procedure and thus not necessarily difficult issues. In contrast, however, fostering a pool of lawyers able to apply law is a matter of substance, and as such is not as simple as setting up the correct legal format. Fostering the right type of human resources in this case is a matter of great difficulty.

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

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

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

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

e. Scholarship for foreign students

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

Meanwhile, from the viewpoint of training practitioners, if these foreign students are to be practitioners, not only a scholastic education but also practical training and education should be provided. For this reason, coordination among universities and other relevant organizations is necessary.

V. GOALS OF LEGAL ASSISTANCE

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

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

Looking back at the history of Japan, although the country did not ask for economic help, it began in the latter half of the 19th century to establish a constitutional state and system of law that did not yet exist in concept. Japan called for the advice of foreign legal experts. It also

studied diverse legal systems in order to learn from them. In the beginning, those in Japan who were studying laws did so in the languages of their country of origin, as there were practically no books dealing with legal matters in the Japanese language. However, in order to disseminate law among the Japanese people, legal terminology in foreign languages had to be translated into Japanese. Having accomplished this, Japan began to conduct legal education in its own language. Now, although the population of its so-called "legal profession" is relatively small, Japan has many people that are engaged in jurisprudence and active in the study of foreign laws. Thus, both the quantity and quality of the study of jurisprudence in Japan are in no way behind those of other countries.

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

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

Technical Assistance and Its Achievement in Drafting the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia[1]

OZAKI Michiaki
Former Director of International Cooperation Department
Research and Training Institute, Ministry of Justice

Introduction

The technical assistance in drafting the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia is finally bearing fruit. It has been implemented by Japanese scholars, lawyers and other legal experts, making full use of their expertise since 1999.

A seminar to commemorate the accomplishment of this project was held on October 15 and 16, 2002 in Phnum Penh. In this seminar, the drafts of both the Civil Code and the Code of Civil Procedure were presented to the Prime Minister, Samdech Hun Sen, and the Japanese and Cambodian scholars and lawyers who had joined the project gave presentations and lectures on the drafting process as well as on important features and theoretical backgrounds of each draft.

In this seminar, the Prime Minister awarded Decorations of the Kingdom of Cambodia to Mr. MORISHIMA Akio, Professor Emeritus and President of Nagoya University, and Mr. TAKESHITA Morio, Professor Emeritus of Hitotsubashi University and President of Surugadai University, for their leading roles in the drafting process. Moreover, former Minister of Justice of Japan, H.E. Mr. MIKAZUKI Akira (special advisor to the Ministry of Justice, special advisor to the International Civil and Commercial Law Centre Foundation, President of the Friends of LAWASIA Association in Japan) gave a speech to elucidate the historical and pioneering significance of this project.

The following section of this volume contains speeches, lectures and presentations made in this commemorative seminar, as well as profiles of those who engaged in the drafting of the two codes.

Personal Observations

As one of the seminar participants, I would like to offer some observations on the project here.

Firstly, I was deeply impressed by this breakthrough achievement, the two Draft Codes, created by the Japanese/Cambodian teams of scholars, lawyers and other legal experts through their collaborative efforts, which required so much time and energy. The time and

[1] This article was originally written in Japanese for ICD NEWS No.7 (January, 2003) (Japanese version).

efforts needed for the workshops held in Cambodia, workshops held in Japan in the form of seminars, and their preparations were indeed daunting. I truly admire those involved in these efforts for their commitment and contribution to the drafting of the two codes.

Secondly, I would like to note that this project did aim at drafting the codes in the Khmer language[2] and with contents that satisfy the current Cambodian needs. Japanese working group members and their Cambodian counterparts discussed repeatedly contents of provisions to be included in the drafts, so that they are not only based on the fundamental legal principles but also to be effective in the Cambodian society. Moreover, the Japanese experts in Khmer and the Cambodian project members held discussions a number of times in order to translate the drafts from Japanese to Khmer. Through these efforts, necessary legal terminologies were created in Khmer, which express important legal concepts in the new drafts. As is shown in the case of Japan, which, after 1868, went through legislation of modern laws side by side with creation of legal terminologies in the Japanese language, new legal terms are indispensable in describing new legal concepts. The importance of the fact that this project assisted the creation of the Civil Code and the Code of Civil Procedure, the very basis of the modern legal system, in Khmer, cannot be overemphasized. With respect to the creation of the Khmer drafts, I would like you to refer to the article by Mr. SAKANO Issei, a JICA long-term expert.[3] He made great efforts in preparation of the draft codes in the Khmer language, using his broad and deep knowledge of Khmer and other languages.

Also noteworthy is the capacity building of the Cambodians lawyers as a result of their involvement in the project.

In the seminar, Judge Mong Monicharia, Judge You Bun Leng and Judge Hy Sophea made excellent presentations on guaranty, succession and demand procedure respectively. Their responses to the questions from the audience were also accurate and appropriate. It was clear to the seminar participants, that the Cambodian lawyers engaged in the drafting process had acquired a deep understanding of law and legal thinking through this process. It was reported to me that experts from other donor countries and from international technical assistance organizations were also greatly impressed. Such human resource development was one of the results achieved through the step-by-step, joint workshop approach, with emphasis on the initiatives by the Cambodians.

Cambodia recently established a school for judicial training to provide future judges and prosecutors with legal education, and the first entrance examination is being prepared now. I have heard that the above-mentioned three judges will be among the first faculty members of this school. The assistance in the drafting of the Civil Code and the Code of Civil Procedure not only produced the drafts but also created the core of human resources for

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[2] The English translations of the Draft Civil Code and the Draft Code of Civil Procedure are available at the website of ICCLC, http://www.icclc.or.jp/english/index.html.

[3] Mr. Sakano's article can be found in vol. 7 of ICD NEWS (January 2003) in Japanese.

application and implementation of the codes.

Lastly, but not least, the Prime Minister Samdech Hun Sen and other relevant high-ranking officials of the Government of Cambodia highly appraised the achievements, and declared their intention of the early enactment of the Civil Code and the Code of Civil Procedure, based on these drafts.

The Prime Minister pointed out the significance of the development of a legal system in order to establish the rule of law, a pluralist democracy and the protection of human rights, stressed the necessity for prompt enactment of both of these codes, and gave appreciative words to Japan's assistance. At the same time, he acknowledged that there still remained many unresolved issues in order to implement the codes, such as drafting of related laws and development of human resources, and requested further assistance from Japan.

Herewith, the Government's intention for the enactment based on the Draft Codes was expressed clearly by the Prime Minister Samdech Hun Sen. He reiterated his words when the Japanese project members visited him afterwards. What impressed me most was that the Prime Minister himself wished to keep a copy of each draft to read article by article every night. This one instance exemplifies the extraordinary determination of the Cambodian Government.

Conclusion

The drafts of both codes will be completed in March 2003 and be submitted to the National Assembly of Cambodia for deliberation. I hope that the prompt enactment of both codes will serve as a solid foundation of a legal system for the rebuilding and further development of Cambodia.

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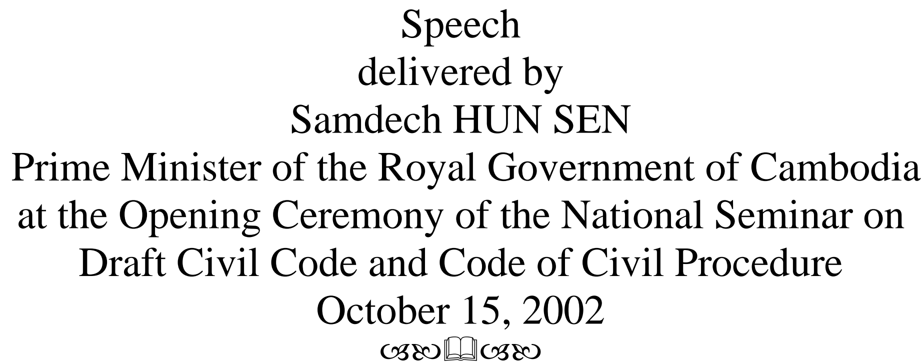

Speech
delivered by
Samdech HUN SEN
Prime Minister of the Royal Government of Cambodia
at the Opening Ceremony of the National Seminar on
Draft Civil Code and Code of Civil Procedure
October 15, 2002

Excellencies, ladies and gentlemen,

Today we can say with pride that the close cooperation between Cambodia and Japan, and the new theme of Japanese assistance have made the legal reform in Cambodia very fruitful. Even though the two draft codes have not been finalized yet, for the moment the drafts of the Civil Code and the Code of Civil Procedure have been physically appearing.

This new realization also enables the Policy Program of the Royal Government of Cambodia to take new steps toward the establishment of Cambodian Society with fairness, equity and peace. The commitment of the Royal Government of Cambodia to conduct the reform based on the provisions of the Constitution and the status of Cambodian society, in which the pluralist democracy is becoming a reality in response to its promise. In order to achieve the rule of law, democracy and human rights protection, the efforts of enhancing the state and private institutions through establishment of laws and regulations as well as building the solidity of the nation have being added forces by the birth of these two codes.

Based on this reality, on behalf of the Royal Government of Cambodia and myself, I would like to extend enthusiasm to the National Seminar held here today and I really hope that this National Seminar will serve as mirror to honestly reflect the realization related to the civil affairs of Cambodian society.

Excellencies, ladies and gentlemen,

The Civil Code is a fundamental law. The Civil Code plays the role of coordinating relationships with regard to properties of which the use and price are related to the natural and juristic persons, and of coordinating relationships between citizens, between natural and juristic persons or between juristic persons with regard to properties, transaction, payment, family and succession.

Based on the above-stated characteristics, the Civil Code is also a part of the policy of the state in ensuring a general agreement with regard to the relationship of the protection of rights and interests of persons and society in view of attaining social development.

The great importance of the Civil Code and the Code of Civil Procedure encourages us to take note in the history of codification of laws in Cambodia the respective and valuable assistance provided by the Japanese government and Japanese people; the efforts of the Japanese Embassy, Japan International Cooperation Agency (JICA) and Japanese experienced and well known jurists in drafting these two draft codes. Also should be noted in the history of codification of laws of Cambodia, the efforts of the Ministry of Justice of the Kingdom of Cambodia as well as other Cambodian jurists including unforgettable now deceased H.E Chem Sgnoun, former Minister of Justice. Your excellencies, ladies and gentlemen are active persons who have responsibly and effectively made the Reform Policy of the Royal Government come true.

I believe that the drafts of the Civil Code and the Code of Civil Procedure will become effective laws and take roots in Cambodian Society. Therefore, I would like to ask the Ministry of Justice to continue to enhance the cooperation with Japan in pushing the finalization of these two draft codes, which have attracted interest of the whole society. At the same time, the Ministry of Justice should organize study groups specialized in certain chapters of each code in order to facilitate the deliberation by the Council of Ministers as well as by the National Assembly. Also, besides making these two codes take roots in our society, the Ministry of Justice should continue to cooperate with the Japanese counterparts in drafting some other necessary additional laws such as law on notary, law on bailiff, law on deposit system, law on registration system, etc. The Ministry of Justice must take this occasion to encourage the cooperation Japan in developing human resources in the legal field as well as in promoting our reform simultaneously.

I hope and believe that Japan will not hesitate to continue providing Cambodia with assistances including assistance for this new theme and I believe that this new challenge in the history of Official Development Assistance of the Japanese Government will achieve great success in this Angkor Territory.

Establishment of laws is not only the principle of improving the rule of law, but also the basis of a nation's future development. Even after three and a half years of working with Cambodian jurists, the commitment and principles of the Japanese professors who have been directly involved in this drafting of the Civil Code and the Code of Civil Procedure remain solid.

The Ministry of Justice of Cambodia and its specialist officials as well as other Cambodian jurists involved in this work are still making their efforts in establishing these important fundamental laws. I hope and believe that opinions from various sources will be given with regard to these two draft codes. Such opinions will be reflected in our joint efforts in establishing justice in Cambodian society. Justice is an important contribution to peace, which we completely attained at the end of 1998.

Justice is indispensable for peace. Please allow me to firstly wish all Japanese jurists regardless they are present here or not, be endowed with good health, intelligence and success in their international mission to provide new theme of official development assistance.

I would also like to wish all participants in this National Seminar be endowed with energy and intelligence in order to take part in the promotion of peace, democracy and human rights of the Royal Government.

We cannot magically create everything immediately. Therefore, we shall establish Cambodian Society through this way with honesty, patriotism, compatriotism and by our hands and our beloved friends' hands.

Thank you

Guest Address[1]

H.E. OGAWA Gotaro
Japanese Ambassador Extraordinary and
Plenipotentiary to Cambodia

My respect to Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia,
My respect to Samdech Heng Samrin, First Vice President of the National Assembly,
My respect to Your Excellency Mr. Neav Sithong, Minister of Justice,
My respect to Your Excellency Dr. MIKAZUKI Akira, former Minister of Justice of Japan and professor emeritus of the University of Tokyo,
My respect to Prof. MORISHIMA Akio, Chairperson of the Steering Committee in Japan and Working Group for Drafting the Civil Code,
My respect to Prof. TAKESHITA Morio, Chairperson of the Working Group for Drafting the Code of Civil Procedure,
Ladies and Gentlemen,

I am greatly honored to have been given the opportunity to attend the "Commemorative Seminar on the drafts of Civil Code and Code of Civil Procedure" to support the formulation of key government policies of the legal and judicial system of the Kingdom of Cambodia, in the presence of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia.

It has been three and a half years since the Government of Japan commenced the project of technical assistance in drafting the Civil Code and the Code of Civil Procedure of Cambodia in March, 1999, to support the formulation of key policies of her government. Since then, through the persistent efforts of Professor Morishima, Chairperson of the Steering Committee in Japan and Professor Takeshita, Chairperson of the Working Group for Drafting the Code of Civil Procedure, and other involved persons in this project in Japan and Cambodia, the provisions of the prioritized areas of the draft of Civil Code have been finalized. With respect to the Code of Civil Procedure, the draft of almost all the provisions has been completed, except for some limited portions. I understand that in this seminar, the entire projection of the two draft codes is to be presented for the first time. This seminar represents an important turning point for the project and a meaningful accomplishment for both countries. I have a great respect for those Japanese and Cambodians who have accomplished such an enormous and complex task to date through their collaborative efforts, in spite of the differences in the legal concepts and the legal and social environments of these two countries.

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[1] This speech was presented originally in Japanese and then translated into English for this publication.

The Civil Code and the Code of Civil Procedure constitute a key part of the judicial system as basic statutes among civil-related laws, under the recognition that the development of a legal system, independent from the legislative and executive, is necessary in a modern state based on the rule of law. At the same time, the two codes comprise an important portion of the reform of the legal and judicial system, which the Government of Cambodia is undertaking at present.

Japan had the experience of developing her own legal system, when learning from the Western legal system in the last half of the nineteenth century. Throughout this drafting process, based on our experience in the past, we have been taking into consideration the adjustment of provisions to the social and economic situation, the traditional law system and the public awareness of law in Cambodia. From now on, we will exert our efforts, not only in the drafting process, but also to develop human resources so that the legal professionals in Cambodia will be able to apply the two codes properly after their enactment.

In order to put the Civil Code and the Code of Civil Procedure into practice smoothly, I recognize the importance of ensuring consistency between the two codes, which form the foundation of the civil law system and other civil-related laws. To this end, the initiative of the Legal and Judicial Council of Cambodia and donor coordination by the World Bank will become all the more important. Therefore, I would cordially like to invite the concerned parties to further their efforts.

I would like to conclude my speech by wishing that through this seminar, all of you involved in this project may deepen your understanding of the Civil Code and the Code of Civil Procedure of Cambodia, and that the friendship and cooperation between the two countries will be promoted more than ever.

Thank you very much.

Japanese Cooperation to Support the Formulation of Key Government Policies on Legal and Judicial System of the Kingdom of Cambodia and the Draft Civil Code of Cambodia

Prof. MORISHIMA Akio
Chairperson of the Board, Institute for Global Environmental Strategies
President and Professor Emeritus, Nagoya University

Respected Samdech Hun Sen, Prime Minister of the Kingdom of Cambodia,
Respected Samdech Krom Preah Norodom Ranariddh, President of the National Assembly,
Honorable Guests from the Royal Government of Cambodia,
Ladies and Gentlemen,

I am truly honored to have been given this opportunity to speak to you concerning JICA's Project on Supporting the Formulation of Key Government Policies on the Legal and Judicial Systems of the Kingdom of Cambodia on behalf of the Japanese Steering Committee for the Project.

JICA's Project officially commenced in 1998, but its inception can actually be dated back to two years before that. At that time, the Asia Foundation, which was headquartered in the United States, had plans for establishing the Mekong Regional Law Center as part of its project to develop legal systems in the countries along the Mekong River, and held a preliminary conference for that purpose. I was also invited to attend the conference, and that is where I met the now deceased HE Mr. Chem Snguon, then Minister of Justice, and received a request from him for Japan's cooperation in the rebuilding of the Kingdom of Cambodia. Soon after that, I visited Cambodia several times as a leader of the JICA project formulation team and conferred with the National Assembly, the Council of Ministers, and various ministries. Subsequently, the implementation of a JICA technical cooperation project was decided, with the Ministry of Justice serving as a counterpart. The objective of the project was to prepare drafts of the Civil Code and the Code of Civil Procedure and to foster human resources in the judiciary.

In preparation for the commencement of our task of drafting the Civil Code and the Code of Civil Procedure, we organized two working groups comprised of approximately ten members each, from among leading scholars in Japan, judges, and staff of the Research and Training Institute of the Ministry of Justice. We also called upon Cambodia to establish a steering committee in the Ministry of Justice headed by the Minister of Justice. The Japanese working groups then held regular study meetings in Tokyo and sequentially compiled proposals and outlines of provisions for the drafts. Almost every month, working group members traveled to Phnom Penh to hold a workshop with judges, officials of the Ministry of

Justice and other ministries of Cambodia, and together examined the drafts and worked on the Khmer translation of the provisions.

We proceeded to carry out our task in these ways for the following reasons. Although it goes without saying, the law must not deviate from the reality of the society to which it applies. The civil law of Europe and the common law that dominate the world as systems of legal methodology supporting today's market economy are products of the history, and are firmly rooted in the society of each country. Even without reflecting on the ideas of historical jurisprudence in 19th century Europe, it is evident from numerous cases that laws that are not rooted in a society never function appropriately in that society. As it is commonly known, Japan attempted to modernize her country and economy in the mid 19th century, and made efforts to introduce the legal systems and legal methodologies of the United Kingdom, France, and Germany, although they were countries that greatly differed from Japan both historically and culturally. However, Western laws did not take root in Japan easily. In many cases, although concepts and techniques were imported from abroad, the application and interpretation of the system completely differed from the original law.

In light of Japan's experience of adopting the laws of foreign countries, we held to the belief that the drafts of the Civil Code and the Code of Civil Procedure must be draft laws that can be accepted by Cambodian society. Therefore, we sought the opinions of people in the legal profession and of judges who were knowledgeable about the actual state of Cambodian society and who would be in charge of implementing the Civil Code and the Code of Civil Procedure after their establishment, and amended our drafts accordingly. At the same time, we adhered to our policy of achieving a full understanding of our drafts by the Cambodian counterparts as we proceeded with our drafting task. We have heard about examples of support by other countries in the past that tried to introduce the legal methodologies of donor countries without giving due consideration to the actual state of Cambodian society, but ultimately failed. As the fruit of our efforts will soon be put to the test, I would like to communicate our thoughts and intentions to all of you cherished guests and request your kind understanding.

I shall now proceed to describe the tasks undertaken by our Working Group for drafting the Civil Code. Following my presentation, Professor Takeshita, who is the Chairperson of the Working Group for drafting the Code of Civil Procedure, will speak to you on the activities of his group.

First of all, we need to determine what kind of law a civil code is. A civil code is said to be a principle law to be applied to all free citizens, who are the subjects in product exchanges, in a society whose very foundation is based on a product exchange economy (product exchange society, market economy society). Rights and obligations concerning general citizens are related to property and family. Property-related laws are applied when property is owned (real right) or when property is traded with another citizen (contract). Family-related laws, on the other hand, define marriage, family relations such as parent and

child relations, and succession. In these ways, the civil code contains legal rules that are applied among parties of equal standing. On the other hand, commercial laws, applied to business entities that engage in profit-oriented activities, adopt a different set of rules based on the modifications of rules for general citizens, out of necessity to process work speedily and uniformly in the pursuit of profit. Thus, as opposed to the civil code that is a generally-applied principle law, a law that is applied to a special activity or subject, such as commercial law, is called special law.

As I have just mentioned, the civil code is regarded as a principle law that supports a product exchange society, but in order for product exchanges to commonly take place, the subject of a product exchange must be able to dispose of a product according to his/her free will. To this end, it is necessary for all subjects to be guaranteed freedom from control by another person (freedom of legal personality). This means that, as seen in terms of a product, a subject of a product (owner) has the right to freely dispose of a product (property) (absoluteness of ownership). Furthermore, if all subjects of products to be traded are guaranteed a free personality not controlled by other persons, transactions between free subjects must come into effect only when the wills of both parties coincide (freedom of contract). In other words, the fundamental principles of a product exchange society are formed from "freedom of legal personality" in terms of a subject, "absoluteness of ownership" in terms of a product, and "freedom of contract" between subjects of a transaction. Together, they constitute an individual's "freedom of will" (the concept of responsibility of negligence that assumes no responsibility where no intent or negligence exists, can be said to be a responsibility for the result of the freedom of will).

The Draft Civil Code of Cambodia is also based on the fundamental principles of the civil code which I have explained. However, specific legal concepts and systems for realizing these principles differ between common law-based laws and continental law-based laws, and even within Continental Law, among French, German laws and the laws of other European countries. In creating the Draft Civil Code of Cambodia, we decided to base it upon the continental law system, because Cambodia has been mainly adopting the systems of continental law. Japanese members of the Working Group for drafting the Civil Code prepared a draft upon consulting Japanese, German, and French law as reference, as well as Cambodian Civil Code 1954, Decree No. 38 D referring to Contracts and other Liabilities, and the Law on Marriage and Family, all of which Cambodian society and the people in the legal profession are familiar with, and the Land Law that was just recently enacted. The draft was examined and discussed with the members of the Cambodian group, and after taking into consideration opinions raised by the Cambodian members as much as possible, a framework for the draft was established.

The draft is composed of eight books: Book 1 General Rules, Book 2 Persons, Book 3 Real Rights, Book 4 Obligations, Book 5 Particular Types of Contracts and Torts, Book 6 Security, Book 7 Family, and Book 8 Succession. For the outline of the chapters in each book,

please refer to the handout showing the detailed content of the draft. Due to time constraints, I cannot go into the details of each book, but later, Professor Yamamoto will give an overview of the Book on Persons and Book on Obligations, and Professor Niimi on the Book of Real Rights, Book on Particular Types of Contracts and Torts, and Book on Security. However, I would like to briefly mention that the “freedom of legal personality”, one of the previously-mentioned fundamental principles of a product exchange society, is mainly prescribed in Books 1 and 2. Book 7 chapters 5 and 6 provide for the protection of persons who are incapacitated, and can also be said to be related to the freedom of legal personality. The second fundamental principle, “absoluteness of ownership”, is prescribed in terms of real rights, including other real rights besides ownership in Book 3. Real rights such as hypothec are also prescribed in Book 6 on Security. “Freedom of contract”, the third fundamental principle, is prescribed in Books 4 and 5, but Book 5 also provides for the obligations that arise from torts and acts other than contracts.

Next, I will describe the progress of our drafting task. The task for creating the Draft Civil Code is considerably behind schedule due to the extremely large number of articles to be drafted, and also because the workshops held in Phnom Penh and the task of preparing Khmer translation are each taking a longer time than expected. Nevertheless, intensive discussions were held several times in Tokyo recently, and through them, proposals for articles of the draft in Japanese have been fixed for the most part, excluding some portions of the Books on Family, Succession, and Particular Types of Contracts. Also, among the articles of the draft, 634 articles have been completed, in Khmer as well, and efforts are now directed toward the completion of the Khmer translation of 644 more articles. At any rate, all articles, including the Khmer translations thereof, are slated for completion by the end of March 2003. When completed, the Civil Code will have more than 1200 articles. By the way, English translation of the articles is also being prepared, albeit in the form of a tentative translation, because many other donor countries and foreign NGOs have shown deep interest in the draft.

As I have mentioned earlier, the task of drafting the Civil Code, including the Khmer translation thereof, is slated for completion in March of next year. But even after the drafting is completed, JICA intends to continue its support for the enactment of the code, such as by dispatching Japanese experts on law, including working group members, to Phnom Penh, who will provide explanations on the articles and systems in view of deliberations to be held in the Council of Ministers, the National Assembly, and the Senate.

The drafting of the Civil Code and the Code of Civil Procedure of Cambodia, which began in 1998 with the cooperation of Cambodia’s Ministry of Justice, courts, and people of related ministries, has been almost completed in regard to the Draft Code of Civil Procedure, and is in its final stage of drafting the Draft Civil Code. This has been made possible by the deep understanding and extraordinary cooperation of successive Ministers of Justice and relevant persons in Cambodia’s Ministry of Justice. I would like to take this opportunity to extend my heartfelt thanks to the Ministry of Justice of Cambodia. Lastly, as the saying goes

in China, “when drinking water from a well, give thanks to the person who dug the well”, I would like to offer, with utmost respect and sorrow, my sincerest prayer for the now-deceased former Minister of Justice H.E. Mr. CHEM Sgnuon, who first set the stage for the Japanese-Cambodian Project on Supporting the Formulation of Key Government Policies on the Legal and Judicial System in Cambodia.

Thank you very much.

Significance of Providing Support for the Drafting of the Code of Civil Procedure of the Kingdom of Cambodia and Fundamental Principles of the Draft Code

Prof. TAKESHITA Morio
President, Surugadai University
Professor Emeritus, Hitotsubashi University

I. Congratulatory Address

My respect to Samdech HUN SEN, Prime Minister of the Royal Government of Cambodia,
My respect to Your Excellency Mr. OGAWA Gotaro, Ambassador Extraordinary and Plenipotentiary to Japan,
My respect to Your Excellency Dr. MIKAZUKI Akira, former Minister of Justice of Japan, Professor emeritus of the University of Tokyo and Special Advisor to the International Civil and Commercial Law Centre Foundation,
Ladies and Gentlemen,

It is my profound joy, as one who has participated in the project for supporting the drafting of the Civil Code and the Code of Civil Procedure, to see the "National Seminar on the Drafts of the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia" convened here today.

As the drafting of the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia is nearing completion, this commemorative seminar was planned with the objective of introducing to the governmental leaders of the Kingdom of Cambodia, representatives of the people of Cambodia, international organizations, and many other people from donor countries, the basic content of the drafts we have prepared of the Civil Code and the Code of Civil Procedure, and to obtain a mutual understanding to ensure the early enactment of both laws.

I would like to express my deep appreciation for the opportunity given to me to make this keynote speech on behalf of the Japanese members of the Working Group for Drafting the Code of Civil Procedure.

In my presentation, I would like to (1) examine the significance of Japan's support in this current project for developing a legal system, (2) elucidate the fundamental policies we have embraced for the task of drafting the Code of Civil Procedure, and (3) describe the general outline of the Draft Code of Civil Procedure of the Kingdom of Cambodia that we are about to see completed as well as the fundamental principles that form the foundation of the Draft Code, and gain the understanding of all who are concerned.

II. Significance of supporting the "development of the legal system" within the scope of the friendly relation between Japan and the Kingdom of Cambodia

1. The project for supporting the drafting of the Civil Code and the Code of Civil Procedure of the Kingdom of Cambodia began, [as Ambassador Ogawa earlier mentioned in his speech,] in March 1999 as one of the projects to promote friendly relations between Japan and the Kingdom of Cambodia.

   As for Japan, the project has significance as part of its Official Development Assistance (ODA) to developing countries, which it clearly acknowledges as an international responsibility of an advanced country.
2. The main focus of development assistance hitherto had been on social and economic areas, such as support for basic life, aid for the improvement of social and economic infrastructures, and structural adjustments.

   However, the legal and judicial cooperation project aims to support a developing country's efforts to institute domestic laws with the goal of realizing "good governance" based on the principles of the rule of law, and to assist in the development of human resources required to enforce those laws.

   This project may have introduced a new significant challenge to the ODA. The fact that this new challenge has been fully addressed by Japan and the Kingdom of Cambodia for the first time is, I believe, an especially noteworthy experience within the history of Japan's ODA.
3. On the other hand, for the Kingdom of Cambodia, the development of a legal system is indispensable to the establishment of a national framework for the rule of law.

   Moreover, its establishment as a country upholding the rule of law is one of the basic conditions required to obtain the confidence of the international community and to take part in the global economy. In this sense, the institution of laws indeed provides the foundation for the development of the Kingdom of Cambodia in the future.
4. Considering this way, this project not only promotes friendly relations between the two countries of Japan and the Kingdom of Cambodia. For Japan, it presents a new aspect of international responsibility, and for the Kingdom of Cambodia, it holds special significance as a means of fulfilling the prerequisite of establishing itself as a member of the international community. In this respect, I believe that the significance of this project should be regarded in a broad international context that includes our two countries.

III. Basic policies for drafting the Code of Civil Procedure

1. Bearing in mind the significance of drafting the Code of Civil Procedure of the Kingdom of Cambodia, we adhered to the following three basic policies of our task.

   (1) Firstly, in regard to the content of the laws to be drafted, we shall aim not only to

endorse the procedures currently practiced in the Kingdom of Cambodia and to provide a legal basis thereon, but to prepare a Code of Civil Procedure that can stand up to the future international assessment based on the principle of procedures of a country promoting democracy and the rule of law. Yet, at the same time, we also must give consideration to maintaining a good balance with social and economic matters as well as traditional legal systems and the level of legal awareness of the Cambodian public.

(2) Secondly, concerning the implementation method of the drafting task, though the original draft shall be prepared by the Japanese members, it shall be examined and discussed with the Cambodian members in a workshop to be held in Phnom Penh. Provisions which raise questions from the Cambodians in such workshop shall be fully deliberated, and ultimately adopted with due respect to the opinion of the Cambodian group. The Draft Code of Civil Procedure should be completed in this manner through joint efforts by the drafting groups of the two countries.

(3) Thirdly, bearing in mind that it is the Cambodian lawyers who must enforce the Code of Civil Procedure once it is established, we shall, through the joint task of drafting the Code of Civil Procedure, promote human resources development that will engage in the enforcement of the law in the future and make efforts in order to deepen their understanding of the Draft Code.

2. Throughout the three and a half year period from the commencement of the task to the present, we stuck firmly to these policies in preparing our draft. Especially in regard to the policy to respect the will of the Cambodian members, when new questions were raised by the Cambodian counterparts as a result of their terminology determination meeting, the Japanese group always made efforts to review the matter, answer their questions, or modify necessary expressions, even if such questions were raised after a final conclusion was reached in the joint workshop.

IV. Overview of the Draft of the Code of Civil Procedure of the Kingdom of Cambodia and its fundamental principles

1. Overview of the Draft of the Code of Civil Procedure of the Kingdom of Cambodia

The Draft of the Code of Civil Procedure of Cambodia prepared as described above is composed of a total of 550 articles in seven titles. The titles are as follows:

Title 1 General Provisions

Title 2 Proceedings at the Court of First Instance

Title 3 Appeal

Title 4 Retrial

Title 5 Demand Procedure

Title 6 Compulsory Execution

Title 7 Provisional remedy

Titles One through Five are what are referred to as adjudication proceedings, and comprise

333 articles; Title Six on Compulsory Execution and Title Seven on Provisional Remedy consist of 217 articles.

2. Fundamental principles of the Draft Code of Civil Procedure of the Kingdom of Cambodia

(1) Importance of fundamental principles

When drafting a country's code of civil procedure, fundamental principles that form the framework of the law need to be established in order for the draft code to accord with higher regulations or related rules of the country's constitution, such as Law on Organization of the Courts, and other laws, and to be substantial enough to stand up to international assessments as a procedural law of a democratic country based on the rule of law. Accordingly, in drafting the Code of Civil Procedure of the Kingdom of Cambodia, we first determined the fundamental principles for creating the basic framework. Some of them were decided through consultations held in the first and second workshops prior to the commencement of specific tasks for creating the Draft Code of Civil Procedure. Others were decided upon conferring with and obtaining the agreement of the Cambodian group during the examination of the original draft prepared by the Japanese group, which incorporated all the principles that were considered necessary, as a matter of course, to be reflected in a code of civil procedure of a democratic country based on the rule of law.

(2) Fundamental principles in the Draft Code of Civil Procedure

Next, I would like to describe the fundamental principles adopted through the process mentioned above that form the foundation of our Draft Code of Civil Procedure, with a special focus on the principles related to the requirements of a democratic country abiding by the rule of law. By doing so, I hope to gain the understanding of all participants in this seminar regarding the basic characteristics of the Draft Code of Civil Procedure that is the fruit of the joint task between Japan and Cambodia.

1) Purpose of civil actions

First of all, as a major principle that would determine the very nature of the Draft Code as a whole, we decided to seek the objective of the civil procedure system in the protection of rights of private persons. This is evident in Article Two paragraph One of the Draft which stipulates that "the purpose of civil procedures is for courts to resolve civil disputes in accordance with the law in order to protect the rights of private parties".

2) Guarantee of right of access to courts

Next, although the objective of the civil procedure system is the protection of

the rights of private persons, this should not be considered as a privilege given by the state to private persons. Rather, in terms of the philosophy of a democratic state ruled by law, it should be regarded as the duty of the state. As seen from the standpoint of a private person, it means that a private person has the right to file a suit to the court and demand a court proceeding in order to receive protection from the state when his/her rights are violated. For this reason, Article 2 paragraph 2 of the Draft Code stipulates that "the right of all persons to obtain a court trial in a civil dispute shall be guaranteed". For your information, I would like to point out that in Japan the guarantee of the right of access to courts is prescribed in the Constitution of Japan as a basic human right.

3) Guarantee of right to claim a hearing

Thirdly, the guarantee of the right of access to courts simultaneously calls for a court proceeding to be conducted in accordance with appropriate procedures. One of the most important conditions to be satisfied for a court procedure to be appropriate is that each of the parties is guaranteed the opportunity to state his/her own argument prior to a trial. Article 3 paragraph 1 of the Draft Code stipulates that "no party shall be tried without being heard or summoned", and guarantees the opportunity to each of the parties to come before the court to state his/her own argument. This means that a party has the right to claim the opportunity to state his/her own argument. This right is referred to as the right to claim a hearing. In Germany, the guarantee of the right to claim a hearing is prescribed in the constitution.

4) Principle of "La Contradiction"

Furthermore, in order for a trial to be considered just and fair, not only must parties be guaranteed the opportunity to state their own argument, but they also must be guaranteed the opportunity to rebut an argument presented by the other party. For this purpose, a trial must in principle be conducted in the form of an adversary hearing. To this effect, Article 3 paragraph 2 of the Draft Code stipulates that "the court shall in all cases comply with the principle of '*la contradiction*'".

5) Civil procedures and the jury system/citizen participation system

Before drafting the code, we discussed whether or not to adopt the jury system or citizen participation system in civil procedures. In the end, we reached the conclusion that considering the present state of Cambodia, the implementation of either one would be difficult. As a result, the civil procedures prescribed in this Draft Code are presupposed to be conducted at all times by a professional judge. From a different perspective, it can be said that the principle was adopted in which a proceeding is only to be conducted before a judge whose identity is

guaranteed under the Constitution of Cambodia and whose independence is therefore guaranteed (Article 109 paragraph 1, Article 113, Article 114 of the Constitution).

6) ***Organization of the court of first instance***

Whether to make the organization of the court of first instance a panel system or single-judge system is a basic issue to be determined by the Code of Civil Procedure, unless otherwise prescribed in the Law on Organization of the Courts. We discussed this issue in the workshop held prior to commencing the preparation of the Draft Code, and chose the principle of the single-judge system. In view of the actual number of judges existing in Cambodia, it was deemed difficult to create a collegiate system. Nevertheless, it was decided that some cases of a certain scope should be exceptionally tried under a panel system. The scope of the exception is prescribed in Article 23 paragraph 2 of the Draft Code.

7) ***Scope of the principle of open court***

The principle of open court is the most important principle in modern procedural systems, and therefore, should naturally be adopted in the Code of Civil Procedure of Cambodia as well. However, this poses a problem of how to regulate the relationship between investigative procedures that are presently being conducted in a practically closed court and the principle of open court. In the Draft Code, investigative procedures are positioned as preliminary procedures for organizing a party's assertions and evidence prior to the court proceedings (refer to Article 103 of Draft Code), and allow for closed courts in this respect. Yet, even in this case, the principle of *"La Contradiction"* is to be maintained (Article 105 of Draft Code).

8) ***Method of appointing judge to be in charge of case***

Lastly, in regard to the method of appointing the judge to be in charge of a case, if a chief justice can arbitrarily distribute cases, then a just and fair trial would be doubtable. In this respect, ever since the constitution of revolutionary France was created, the modern constitutions of European countries stipulate that a judge placed in charge of a case is to be decided in accordance with the order prescribed in advance by law. We adopted this principle in Article 26 of the Draft Code, so that the chief justice of each court predetermines the order of appointment of judges, and judges are automatically assigned to cases according to this order.

3. Fundamental principles and the specifics of the Draft Code

Above, we have seen the principles that form the basis of the Draft Code of Civil Procedure we have prepared. However, they are merely foundation stones for constructing the building. As for the specific form and content of the Draft Code of Civil Procedure that is the

actual structure to be constructed upon the foundation of these principles, their major points are planned to be presented tomorrow by the members of both the Japanese and Cambodian drafting groups.

V. Conclusion

Before concluding my speech, I would like to add a few words of gratitude and request, as a representative of the Japanese engaged in the task of drafting the Code of Civil Procedure of the Kingdom of Cambodia.

Presently, the Draft Code of Civil Procedure has been completed in the Khmer language as well, but a portion still remains unexamined by the joint workshop with our Cambodian counterparts. Yet, even this portion is slated to be completed within the year, [as Prof. Morishima, the chairman of the Working Group for Drafting the Civil Code, has just mentioned,] and the Draft of the Civil Code is also expected to be completed next March. With this in mind, in the event of the completion of the Drafts of the Civil Code and the Code of Civil Procedure, I beseech Prime Minister Samdech Hun Sen, President of the National Assembly Samdech Krom Preah Norodom Ranariddh, and other government leaders of the Kingdom of Cambodia to promptly take measures for the enactment of these laws.

I would like to conclude my speech by extending my sincere gratitude to Mr. Suy Nou and Mr. Ang Vong Vathana, Secretaries of State, and all the members of the Cambodian drafting group who have worked hand in hand with us on this crucial task of drafting the Code of Civil Procedure, as well as to Mr. You Bun Leng, President of Appellate Court, and Mr. Soth Sothonn, undersecretary of state, both of whom served as leaders of the Cambodian group in the early stages of the project, and furthermore to all the members of the drafting group of Japan. Thank you very much

Overview of the Book on Real Rights, Book on Particular Types of Contracts and Torts, Book on Security, and Book on Relatives in the Draft Civil Code of Cambodia

Prof. NIIMI Ikufumi
Faculty of Law
Meiji University

1. Introduction

The Draft Civil Code of Cambodia comprises eight books: Book on General Rules, Book on Persons, Book on Real Rights, Book on Obligations, Book on Particular Types of Contracts and Torts, Book on Security, Book on Relatives, and Book on Succession. Presentations by the Japanese members in today's seminar will give an overview of the Draft Civil Code of Cambodia. However, the Book on Succession and the chapter on guaranty in the Book on Security are planned to be presented by the Cambodian members of the working group, and will not be covered in the Japanese report. Also, as the Book on Relatives is closely related to the Book on Succession, the report by the Japanese group will only touch upon the subject briefly.

2. Presenters

Among the Japanese members, Prof. Yamamoto will report on the Book on Persons and Book on Obligations, and I, NIIMI, will present on the other books.

3. Book on Real Rights

3.1 The Book on Real Rights prescribes, based on a framework centering on ownership, possessory rights that acknowledge control of material property as a right, perpetual lease, usufruct, right of use, and right of residence, and servitude that are all rights which involve the utilization of an immovable asset (real usufructuary rights).

3.2 Ownership is defined as the absolute, exclusive, and comprehensive power over materials that are objects of ownership within statutory limits. However, in regard to adjoining lands, a conflict may occur if each owner asserts ownership, therefore adjustments need to be made based on a spirit of compromise. For this purpose, provisions concerning the relationship between neighboring properties have also been set forth. Furthermore, as activities of industries expand, it is feared that they will bring harm to the surrounding land and its residents, such as air pollution, water contamination, noise or vibration. Therefore, provisions to prevent such interference to people's daily lives have been prepared as well.

The acquisition of ownership is to be authorized by means of a contract, or through

succession, acquisitive prescription, or accession. The transfer of ownership of an immovable requires its registration to be set up with a third party, and the transfer of ownership of a movable requires the delivery of the object. Note that in regard to ownership of a movable asset, provisions for bona fide acquisitions have been prepared in order to ensure transaction safety. More specifically, when a person who has received the delivery of a movable which is the subject-matter of a contract to transfer ownership is a bona fide person without negligence, such recipient immediately acquires ownership of the movable even if the person who delivered it has not been the owner thereof. However, some modifications are made to this provision in case of stolen or lost articles.

Co-ownership and indivisible joint ownership are given as special forms of ownership. Co-ownership is defined as a form of joint ownership that is planned to be later transferred to individual ownership. In regard to collective forms of joint ownership, they are to be provided for in each relevant section or otherwise explained in interpretations. The provisions for indivisible joint ownership are based on Cambodia Civil Code 1954 and the Civil Code of France.

3.3 Possessory right acknowledges the state of de facto control over an object as a right, thereby eliminating self-help and maintaining the order of real rights based on law. Since the transfer of possession is a prerequisite for claiming a real right over a movable against third parties, provisions for forms of possession transfer have been prepared. Also, since the continuity of possession is deemed a requirement for acquisitive prescription, provisions concerning conditions and succession of possession have also been made.

With respect to possessory rights, it should be noted that a special possessory right over immovable assets has also been provided for. In Cambodia today, certification of possession is in fact issued, but because the land registry is not yet developed, there are people who utilize their immovable assets without being able to register ownership. It is expected to take a while yet for these people to be able to obtain ownership registration. Therefore, in the Draft Civil Code, such rightful persons who may become persons having ownership in the future are regarded as special possessors of immovable assets, and are to be given the same power as persons having ownership in relation to claims on real rights.

3.4 Provisions for perpetual lease, usufruct, right of use and right of residence, and servitude are based on the Land Law, and are made in reference to Cambodia Civil Code 1954 and the Civil Code of France. These real usufructuary rights are established by contract or by law, but documentation is required. Real usufructuary rights cannot be claimed against third parties unless they are registered.

4. Book on Particular Types of Contracts and Torts

4.1 The Book on Particular Types of Contracts and Torts prescribe the sources and causes of obligations. An obligation arising from a contract is called contractual obligation, and an obligation arising from provisions of law is called statutory obligation.

Under the principle of the freedom of contract, a great variety of contracts giving rise to contractual obligations supposedly exist, but there are certain types of contracts that are typical in a civil society. In regard to such typical contracts, in light of the fact that there are some items not clearly agreed upon by parties, provisions that supplement such contract matters considered reasonable in terms of common social belief have been prepared in the Draft Civil Code.

A statutory obligation most often arises when a tort is committed, but other causes include management of affairs without mandate and unjust enrichment. The Draft Civil Code prescribes the requirements and effects of torts, management of affairs without mandate and unjust enrichment that create causes for statutory obligations.

4.2 Thirteen types are prescribed as typical contracts. They include sale and purchase, exchange, and gift as contracts involving the transfer of rights, loan for consumption, lease, and loan for use involving the lending and borrowing of an object for the benefit of use or for consumption, mandate, contract for work, and labor contract regarding the provision of labor or services, as well as bailment concerning the storage of objects, partnership for the establishment of a group which is a non-juridical person, life annuity which provides money periodically to a person until his death, and compromise for the settlement of disputes by mutual concession.

Sales and purchase, which entail a payment in exchange for the transfer of a property right, form the core of market transactions. Therefore, the provisions for rules and regulations regarding sale and purchase have been made so that they may be applied as much as possible to other contracts that are concluded in market transactions. Especially important is the rule that a seller must deliver the property right or subject-matter that meets the purport of a contract.

4.3 Prescribed sources of statutory obligations include management of affairs without mandate, unjust enrichment, and tort.

Provisions for management of affairs without mandate regulate legal relations in cases where a person handles another person’s affairs with bona fide intentions, even though he had no legal duty to do so. An example of this would be a legal relation in which a person receives and temporarily keeps an object for a neighbor who is away from home.

Provisions for unjust enrichment require a person, who, without any legal ground gains a benefit from the loss of another, to return such benefit to that person. This applies, for example, when a person pays another person’s debt by mistake, thinking it is his own debt. Another example would be a case where money or property is transferred based on an ineffective contract.

Provisions for tort prescribe the compensation for damage from a tort-feasor to a victim in the case where a person illegally violates another person’s legal interests or rights. A principle of liability arising from negligence takes effect, where “if there is no negligence, there is no liability”. However, in regard to damages incurred from actions, facilities, and

products that accompany extreme danger, the principle of strict liability applies, in which "liability must be assumed even when there is no negligence," based on the principle of providing relief for a victim.

5. Book on Security

5.1 The Book on Security provides for security by property that aims to achieve preferential satisfaction from an obligation by securing the exchange value of the object and security by person that aims to secure satisfaction from an obligation by expanding the range of assets that may be targeted. Security by property falls under the category of real rights, but focusing on the function of security, we decided to provide for them in a separate book on security, together with security by person that has the characteristics of an obligation.

5.2 The following are prescribed as types of security by property: rights of retention and preferential rights that arise directly from statutes of law, and pledge, hypothec, and transfer of title for security purposes that are established according to a contract made between relevant parties.

Security rights created by legal rules are called statutory real security rights, and are based on equity between the parties and the presumption of rational intentions. Security by property established by contract are called contractual real security rights and are the most common form of security rights in a market economy. Among them, hypothec and transfer of title for security purposes, which are real security rights that allow a debtor to keep possession of the property and to have the power to use the property and benefit from its use, are particularly noteworthy as real securities in today's market-economy. That is, they allow an object's utility value and exchange value to be divided between a debtor and creditor, and in this way aims for the efficient utilization of the property. Hypothec is generally applied only to immovable assets that have been registered, but the transfer of title for security purposes can be applied not only to immovable assets but to all objects and rights that can be transferred as property, because it is established with the transfer of ownership. However, although the legal process is the transfer of ownership, they are in fact real securities, so a person having a security right by means of transfer of title also has a duty to settle the account when he exercises that right. Incidentally, the name "transfer of title for security purposes" is commonly used in German laws and Japanese laws, but they can also be called "mortgage of movables".

5.3 Security by person is defined as comprising guaranty and joint obligation. As mentioned at the beginning of this report, guaranty will be taken up separately, so here I will briefly introduce joint obligation only.

In joint obligations, a multiple number of obligors bear the responsibility of obligations of the same nature, and an obligee can call on any of the obligors, simultaneously or separately, to fulfill all or part of the obligation. By doing so, the objective of security can be achieved. Also, an obligor who has discharged his obligation through payment or other

means of burden can claim compensation from other obligors, so that equity among obligors can be maintained. As a strong connection mutually exists among joint obligors, the effect of certain matters arising between an obligee and obligor also extends to other obligors. Here, an exception to the principle of severalty of obligations is acknowledged.

6. Book on Relatives

6.1 The Book on Relatives, frankly speaking, is taking the most time to draft. This is because public awareness and perception of family relations is extremely diverse throughout Cambodia. Therefore, details of the Book on Relatives that we will examine here are only those that both the Japanese and Cambodian drafting groups have agreed upon at the present time.

6.2 In the general provisions, relatives is defined as relatives by blood up to the sixth degree of relationship; spouse and relatives by affinity up to the third degree of relationship. For relationship by adoption, the relationship between the adopted child and the parents by adoption and their relatives by blood is the same as that among relatives by blood. Members of relatives members are under the obligation of rendering mutual respect and support. Violence is strictly forbidden.

6.3. Regarding marriage, provisions have been prepared under the basic policy of respecting the traditions and customs of Cambodia as much as possible. Provisions have been first prepared for engagement. They acknowledge the effect of engagement by the promise of marriage in the future and a ceremony of engagement. Matters following the dissolution of engagement are also provided for.

6.4 In principle, the major premise for the marriage of a man and woman over the age of 18 is their voluntary agreement to marry, but the marriage is legally effective after they file for marriage, make a public notification, conclude a marriage contract in front of a civil status officer, and officially register their marriage. Prior public notification is required when holding a marriage ceremony, but if an objection is sustained, the ceremony is not allowed to be held. Restrictions concerning marriage are also prescribed, such as the duration of prohibition for re-marriage, prohibition of marriage between certain blood relatives, and prohibition of marriage between certain lineal relatives by affinity.

A marriage is void when there is no intention of marriage, such as those due to mistaken identity or duress, or when the marriage ceremony is not observed. Also, in case of a marriage effective in contravention to legal prohibitions such as in violation of marriageable age, an application may be made to the court for its annulment.

When two people enter into marriage, husband and wife should cohabit and cooperate with each other. If a minor enters into marriage, he/her is deemed to have attained majority. In regard to matrimonial property, unless husband and wife have entered into a matrimonial property contract, their property relations are to be governed by law. Other provisions include the sharing of expenses of marriage, property management, co-owned

property system, and joint liability for obligations.

A divorce can be appealed to the court only in cases where the marriage relationship breaks down due to certain acts such as unchastity or malicious desertion, and there is no chance of reconciliation. When divorce is granted, matrimonial property is to be distributed and matters concerning the upbringing of children are to be determined.

6.5 In regard to parent-child relationships, blood relations are the principle, but arrangements based on the wishes of the parties may be acknowledged as exceptions.

6.6 Provisions for adoption were being prepared that would restrict an adopted child from being under the age of eight, in consideration of the fact that an adoption should be the healthy upbringing of the adopted child. However, a suggestion was raised for the adoption of adults, so final adjustments are now being made to that effect.

6.7 Parental power is based on the principle of joint parental authority of father and mother. In the case of divorce, one of the parents is to have parental authority by agreement or by decision of the court. The person having parental authority has the right and duty to provide for the custody of a child who is subject to that parental authority, and also has the authority to manage the property of the child.

6.8 If there is no one to exercise parental authority over a minor, guardianship is to be commenced, with the guardian having the same rights and duties as a person who has parental authority. A guardian of a minor is either designated by the person who last had parental authority over the minor, or appointed by the court.

6.9 If an adult lacks the ability to make decisions due to dementia or other mental handicap, guardianship or curatorship may be commenced in accordance with the degree to which he/she lacks abilities.

6.10 Finally, relatives is to be under the obligation to furnish support within a certain scope and according to prescribed order.

7. Book on General Rules

The Book on General Rules has already been presented by Prof. Morishima, so repetition is certainly not necessary. Yet, I would like to simply point out once more that it is extremely important for the Civil Code to be considered as a general law of civil statute. When other civil laws make provisions that differ from the Civil Code, their rationality and suitability will necessarily be examined in light of the Civil Code. This would be especially emphasized in the realm of Consumer Protection Law.

Guaranty

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Introduction:

Civil Law is a basic law playing an important role in the social development, since it is related to the life of each citizen, and to the customs and tradition of each nation. Furthermore, it is codified based on the intention of the citizens and on the relationships between persons, as well as between persons and the society in which such persons are involved. Guaranty, the topic to be raised here, is one of the legal relations prescribed in civil law.

Guaranty is a contract via which one or more third party(ies) intending to become guarantor(s) undertake(s) to the obligee that in the event the principal obligor fails to perform his/her obligation, the guarantor will perform the whole or part of such obligation together with the principal obligor.

Guaranty has been noted in the history of codification and amendment of the Civil Law of the Kingdom of Cambodia. Actually, the Cambodian Civil Code enacted on February 25, 1920 stipulated the provisions concerning "Guaranty" in its Chapter 1, Content 4, Book 3, from article 1314 to article 1327. These provisions remained even after successive amendments.

Then under the regime of the "State of Cambodia", even though in those days the Civil Code had not been codified yet, the provisions pertaining to the "Guaranty" were stipulated in 9 articles of Chapter 9 of the Decree No. 38 enacted on October 28, 1988 regarding contracts and extra-contractual responsibilities. The said Decree has been taking effect until today.

Realizing that there are some deficiencies existing in the above-mentioned civil law, and in order to strengthen the policy of Free Market Economy with transparency, a draft of the Civil Code in which the provisions related to "Guaranty" are stipulated has been established by the Ministry of Justice, with the support of and cooperation from the Japanese Government. The essence of such provisions is as follows:

1 Formation of Guaranty Contract:

a / Meaning of the formation of guaranty contract:

A guaranty contract shall be formed when a prospective guarantor undertakes to the obligee that in the event the principal obligor fails to perform his/her obligation, the prospective guarantor will perform the whole or part of such obligation together with the principal obligor, and the obligee accepts such undertaking.

b / The formality of guaranty contract:

The guaranty contract must be established in writing and the amount of the guaranty obligation must be set forth in the guarantor's handwriting. The purpose of these requirements is to make the guarantor be careful and thoughtful with regard to his/her responsibilities when undertaking a guaranty in order to avoid bad consequences caused by negligence. We realize that most of the contracts of guaranty are made based on the trust, and lack of attention.

The new draft also provides that in case where a guaranty is concluded without documentation, or with regard to a guarantor made in connection with a monetary obligation, the amount of the guaranty obligation is not set forth in the guarantor's handwriting, the guarantor may revoke such guaranty at any time, except where the guarantor has voluntarily started performing the guaranty obligation.

Notwithstanding the above-mentioned formality requirements, the new draft also stipulates the provision pertaining to "floating guaranty" due to the necessities in implementing a free market economy. Floating obligations refer to unspecified future obligations accruing from a certain continuing legal relationship. A floating guaranty shall be valid only if the continuing legal relationship forming the basis of the underlying obligation is specified. In this sense, if the legal relationship is not specified, the floating guaranty is invalid. Otherwise, the guarantor may bear terrible risk.

If in a floating guaranty, the term of guaranty is not fixed, the guarantor may terminate the floating guaranty contract after a reasonable period of time has elapsed since the date of the conclusion of the contract. If the principal obligor's business or financial position has deteriorated substantially since the date of the formation of the floating guaranty contract, the guarantor may immediately terminate the floating guaranty contract.

The above-stated provision is also stipulated in Article 112 of the Decree No. 38 regarding contracts and extra-contract responsibilities. However, that provision does not go into detail. It only states that guaranty contracts shall be made in writing.

2 Effect of Guaranty:

a / Scope of guaranty obligation:

A guaranty obligation shall include interest accruing from the underlying obligation, penalties, damages and all other charges incidental to the underlying obligation.

b / Nature of guaranty:

Where an underlying obligation does not exist, a guaranty shall not be created. However, a guaranty can be created with regard to an underlying obligation that could arise in the future or an underlying obligation subject to a condition.

In the following cases, the burden of guaranty obligations shall be determined as described:

- If the guarantor's burden is more onerous than that of the underlying obligation with respect to either the object or the terms and conditions of the obligation, the guarantor's obligation shall be reduced in accordance with the scope of the underlying obligation.
- The extinction of the underlying obligation shall operate to extinguish the guaranty obligation as well.
- A demand for performance or any other ground for interruption of a prescription period against the principal obligor shall also be effective against the guarantor.
- Except as otherwise provided for in the guaranty contract, when the claim against the principal obligor was assigned, the claim against the guarantor shall also be deemed to have been assigned to the assignee.

c / Rights of Guarantor:

The guarantor is entitled to:

- invoke prescriptive extinction of the underlying obligation,
- raise any defenses available to the principal obligor,
- refuse to perform the guaranty obligation to the extent that the underlying obligation would extinguish by set-off where the principal obligor is entitled to set-off of the underlying obligation by virtue of a counter-obligation owed by the obligee,
- refuse to perform the guaranty obligation where the principal obligor is entitled to rescind or terminate (the contract giving rise to the underlying obligation).

Where a guarantor who offers a guaranty or security against loss as part of his/her business assumes a guaranty obligation regarding a voidable obligation while being aware of grounds for rescission (of the contract giving rise to the underlying obligation), the guarantor shall be presumed to have assumed an independent obligation regarding the same subject matter as that of the underlying obligation. For example, in a case where the guarantor assumes a guaranty obligation learning that the principal obligor is a minor upon conclusion of a contract.

d / Qualification as guarantor:

Generally, the qualification of guarantor is not specifically determined because this is a private relationship between the obligee and the guarantor. In order to protect his/her interests within the risk that he/she forms a contract with the obligor, the obligee has to check the actual situation of the guarantor, especially his/her legal capacity and financial condition.

This new draft sets forth that, in the event where an obligor has a duty to furnish a guarantor to the obligee, the guarantor must be a person of full legal capacity who has sufficient financial ability to effect performance.

In case where a guarantor is no longer able to fulfill the above-mentioned conditions, the obligee may demand that the obligor replace the guarantor with a person who fulfills such conditions. In such case, if the obligor is unable to furnish a guarantor who fulfills the above conditions, the obligee may demand that the obligor furnish other security in lieu thereof.

e / Principle of Joint Guaranty:

The provisions pertaining to the principle of "joint guaranty", contained in the Decree No. 38 regarding contracts and extra-contractual responsibilities, remain in this new draft.

According to the principle of joint guaranty, the guarantor is bound to perform the guaranty obligation jointly and severally with the principal obligor, except as otherwise agreed. Thus, a guarantor who is obligated to perform jointly and severally with the principal obligor may not demand the obligee that performance be demanded from the principal obligor prior to the guarantor, or exempt himself/herself from enforcement of the guaranty obligation by establishing that the principal obligor has sufficient resources to tender performance and is easily subject to execution. In this sense, the obligee is entitled to demand performance either from the guarantor prior to the principal obligor, or from the principal obligor prior to the guarantor. This is the principle of joint obligation between the guarantor and principal obligor.

f / Co-guaranty:

An obligor may be guarantied by several guarantors. Where multiple persons undertake to be guarantors, each guarantor is obligated with respect to the entire amount of the underlying obligate, except as otherwise agreed, just as in case of a sole guarantor. In the absence of an agreement to apportion the guaranty obligation among the co-guarantors and limit each co-guarantor's liability vis-à-vis the obligee to the apportioned share thereof, the burden of the guaranty obligation shall be presumed to be shared equally among all co-guarantors. This provision is stated in Article 118 of the Decree No. 38 regarding contracts and extra-contractual responsibilities. Such provision remains in the new draft which stipulates, in addition thereto, the presumption of co-guarantors' burden of the guaranty obligation.

3 Indemnification:

a / Guarantor's right to indemnification:

Normally, if a person forms a contract with others, such person is obligated to perform the obligation he/she promises. In a guaranty contract, the guarantor undertakes with the obligee. The guarantor is therefore obligated to perform his/her promised obligation. In reality, however, the guarantor performs obligation of the other (principal obligor). Thus, in order to protect the interests of the guarantor, who has good will and good faith, the provision concerning his/her right to indemnification has to be provided.

Such provision has been stated in Article 119 of the Decree No. 38 regarding contracts and extra-contractual responsibilities, but it is not sufficient in the current situation.

The new draft stipulates provisions related to the right of the guarantor to indemnification in two cases:

- Guarantor's right to indemnification in case of commissioned guaranty
- Guarantor's right to indemnification in case of voluntary guaranty

The scope of the indemnification covers:

- The expense for extinguishment of whole or part of underlying obligation
- The actual amount of disbursement by the guarantor and interest accruing therefrom

b / Requirements for indemnification:

Notwithstanding the provision pertaining to the guarantor's right to indemnification as stated above, the new draft provides some requirements for such indemnification as follows:

- Where the guarantor has, without notifying the principal obligor that he received a demand for performance from the obligee, effected performance of the obligation or otherwise procured the discharge thereof at his/her own expense, and if the principal obligor has had any means of defense against the obligee, the principal obligor may set it up against the guarantor's demand for indemnification.
- If, as a result of the guarantor's failure to notify the principal obligor that he has procured the discharge of the obligation at his/her own expense, the principal obligor has also effected in good faith performance of the obligation or otherwise procured a discharge at the principal obligor's expense, the principal obligor may treat his performance or other act of discharge as effective.

c / Share of responsibility:

As a general rule, the principal obligor may effect a payment to or a set-off of payment against the guarantor only to the extent of the guarantor's share of responsibility. It becomes more complex in case where there are several joint obligors or co-guarantors.

According to the new draft, a person who is a guarantor to one of several joint obligors or obligors of an indivisible joint obligation may demand from the obligor to whom he/she is a guarantor the payment of the full amount of the indemnity and such obligor may demand indemnification from the other obligors in proportion to their respective shares.

If one of several co-guarantors has performed the guaranty obligation or otherwise procured a common discharge thereof at his/her own expense, such guarantor may demand indemnification from the other guarantors in proportion to their respective shares of the burden, which include the actual amount paid and interest accruing therefrom, as well as compensation for damages. This provision is stated also in Article 120 of the Decree No. 38 regarding contracts and extra-contractual responsibilities.

4 Subrogation:

Subrogation means transfer of position as obligee to any third party.

As we know, if the principal obligor is unable to effect performance at the determined date, the guarantor shall effect such performance on behalf of the principal obligor. Thus, since the guarantor has effected performance or otherwise procured discharge of whole or part of the underlying obligation, the obligee is no longer entitled to the right to demand performance of the same obligation from the principal obligor. The guarantor shall become the obligee of the principal obligor with respect to the obligation he/she has performed.

The provision pertaining to Subrogation has been stated in Article 119 of the Decree No. 38 regarding contracts and extra-contractual responsibilities, but it is not sufficient in the current situation. The new draft has therefore added some more provisions regarding:

- Subrogation following performance
- Duty to deliver documents, etc.
- Duty to preserve security . . . etc.

Overview of the Draft Civil Code of the Kingdom of Cambodia: Book on Persons and Book on Obligations

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I. Objective of this report

The objective of this report is to examine provisions of the Book on Persons and the Book on Obligations in the Draft Civil Code of the Kingdom of Cambodia.

The Book on Persons roughly provides for two issues. The first is concerning the subject of rights and transactions, or more specifically, the issue of who is able to possess rights, and who can participate in economic transactions. The other is the issue of protection of personal rights.

The Book on Obligations, again roughly speaking, deals with the issue of how such juristic subjects perform transactions, and how obligations arise, change, and extinguish.

Below, I will briefly describe the details of such provisions and present a fundamental framework of provisions concerning persons and obligations in the Draft Civil Code.

II. Book on Persons

1. Natural persons

The Book on Persons is composed of two chapters, Chapter 1 Natural Persons and Chapter 2 Juristic Persons. Let us first take a look at provisions for natural persons.

(1) Subjects of rights and duties (legal capacity)

In regard to natural persons, Article 1-1-1 of the Draft Civil Code stipulates that “All natural persons are entitled to have rights and assume obligations in their name,” and prescribes explicitly the principle of equality of legal capacity. This provision explicitly sets forth that all human beings, with no discrimination based on birth, gender, age, occupation, or religion, have the capacity to become subjects of rights and duties.

(2) Subjects of transactions (capacity to act)

The capacity to be a subject of rights and duties, and the capacity to perform acts necessary to be a subject of rights and duties are different. All human beings have the capacity for rights, so even a five-year old child can inherit his parents’ properties and become the owner of land, for example. Yet, if asked whether the five-year old child should

be unconditionally allowed to conclude an agreement of sales for the land, everyone would probably be skeptical. No matter if all human beings have legal capacity, a five-year old child should not in reality be unconditionally allowed to perform acts that may bring about a change in rights and duties on his/her own judgment.

Accordingly, a system needs to be established that would prevent a person without sufficient capacity to make decisions from making transactions and thereby incurring damage. The institution for mental capacity provided for in Chapter 3 of the Book on Persons and the institution for the capacity to act in Chapter 4 are such systems.

The institution for the capacity to act restricts a person who falls under a certain category to conclude a fully valid contract. Specifically, this applies to three types of persons, including minors, adults in guardianship, and adults under curatorship (Article 1-4-1). The Draft Civil Code refers to these persons as incompetent persons because of their limited capacity to make a valid contract.

Persons other than incompetent persons have a full capacity to act, and contracts concluded by such persons are valid unless there is any cause for invalidity or rescission.

However, an act of a person who is incapable of understanding the meaning and effects of his action is voidable even if he is not declared incompetent. This is prescribed in Article 1-3-1 as the institution for (mental) capacity. For instance, a contract is voidable if it is signed by a person whose capacity to make a decision was considerably decreased due to a large consumption of liquor or use of drugs.

Details of the institution for the capacity to act are as prescribed in Articles 1-4-1 to 1-4-18. Here, I would like to point out the fact that incompetent persons are not completely excluded from transactions, but are allowed to participate in transactions within a scope that accords with the call for the protection of persons with insufficient capacity to make decisions.

For example, in the Draft, persons under the full age of 18 are considered minors (Article 1-4-2), and a contract concluded by a minor without obtaining the consent of a person with parental power or guardianship may be rescinded (Article 1-4-3). Yet it also provides for several exceptions in which a minor may conclude a fully valid contract. As one of the exceptions, Article 1-4-5 stipulates that a minor who has been permitted by a person with parental power or guardianship to conduct business has in relation to that business the same capacity to act as a person of full age. Cambodian society is young in the sense that the proportion of young persons to the population is very large. For minors who wish to obtain the consent of a guardian and run a business, the Draft Civil Code provides for a scheme that responds to such needs.

(3) Protection of personal rights

Provisions for natural persons in the Draft Civil Code do not necessarily treat people only in terms of subjects of rights and of contracts. Provisions concerning personal rights in

Chapter 2 make it clear that the personal rights of human beings are protected by law, and sets forth that, under certain requirements, an injunction claim can be made against the violation of personal rights.

Article 1-2-1 defines personal rights. As it is difficult to strictly define personal rights in abstract terms, juristic interests that are largely accepted as subjects of personal rights, such as “life, personal safety, health, freedom, identity, dignity, and privacy”, were first listed, followed by the phrase, “other personal benefits or interests”, so that the rights for juristic interests that are comparable to those listed could also be included. In addition to the above, please refer to the handout for details of the provisions concerning personal rights.

2. Juristic persons

So far, I have spoken about natural persons, but subjects of rights and duties are not restricted to natural persons. It is reasonable to consider organizations, which are gatherings of people, and foundations, which are gatherings of property, as entities that can be subjects of rights. This enables organizations, etc. to participate in transactions in the name of the organization and to own immovable assets, and simplifies the processing of legal matters. Also, in regard to creditors who transact with organizations, since they need not worry that a property of the organization may be exposed to compulsory execution by creditors of the members, they can transact with the organization with a sense of security.

The Draft Civil Code, therefore, contains detailed provisions concerning an institution for juristic persons in Chapter 2 of the Book on Persons.

Juristic persons, as simply stated, can refer to non-profit juristic persons, whose objective is not the acquisition of gain, and for-profit juristic persons (Article 2-1-1 paragraph 2). The Draft Civil Code mainly concerns non-profit juristic persons. For-profit juristic persons such as corporations, etc. are prescribed mainly by commercial company law and other relevant laws (Article 2-1-1 paragraph 6).

Non-profit juristic persons can also be divided into non-profit incorporated associations and non-profit incorporated foundations. Incorporated associations are further separated into limited liability incorporated associations and unlimited liability incorporated associations. Limited liability incorporated associations are incorporated associations that bear responsibility over the obligations of the association within the scope of the assets contributed by its members; unlimited liability incorporated associations are incorporated associations that bear responsibility over the obligations of the association with the general assets of its members (Article 2-1-1 paragraph 3).

In establishing the system of juristic persons, the most important issue is determining to what level the involvement of the government is necessary for incorporation. In the Draft Civil Code, a juristic person is incorporated when persons wishing to become members execute articles of incorporation that include certain particulars and register its incorporation (Articles 2-1-4, 2-2-1, 2-2-6, 2-2-20, 2-2-21). This concept is called rule-oriented policy, and

grants a juristic personality as long as the requirements established by law are fulfilled. Contrarily, an incorporated foundation is subject to a principle in which its incorporation as a juristic person is granted not only when requirements prescribed by law are fulfilled, but when it receives permission from the state (permission policy). Furthermore, only an incorporated foundation whose objective is public interest is allowed to be established.

In these ways, there are many requirements for the establishment of an incorporated foundation. An inspection by the administration at the establishment stage was considered unavoidable, because once an incorporated foundation is established, its business affairs cannot be adequately controlled by a general meeting of its members, for example.

By the way, as just mentioned, the fact that the rule-oriented policy allows a non-profit incorporated association to be established relatively easily also means that the inspection by the administration at the time of its establishment is to be omitted. Therefore, an incorporated association must create a standard for business to be performed by its directors and ensure that no improper business is conducted. At the same time, it must create a mechanism in which ex-post inspections by other persons (meaning supervisors and members) can function. In response to this requirement, Article 2-1-13 of the Draft Civil Code provides that “directors shall be subject to the duty to execute the company's business faithfully, in compliance with relevant laws, rules and tenor of the articles of incorporation”, and other provisions are established regarding supervisors and the general meeting of corporate members.

III. Book on Obligations

As previously mentioned, the Book on Obligations basically covers the issue of how obligations arise, change, and extinguish. Sources of obligations include contracts, unilateral legal acts, management of affairs without mandate, unjust enrichment, torts, and statutory provisions. Among them, contracts are the most basic cause of obligations. The Book on Obligations, therefore, does not start off with an explanation of the abstract concept of obligations, but is drafted from the standpoint of first establishing detailed provisions on obligations that arise from specific contracts, and then extending as much as possible the nature of these provisions to obligations arising from other causes (this concept is evident in Article 1-1-2 paragraph 3 of the Book on Obligations). Furthermore, the Book on Obligations also provides for formation and validity of contracts, contracts by agency, and the contract system in itself.

Even from an international viewpoint, the Book on Obligations is a realm displaying remarkable legal development. Besides referring to the laws of various countries, for the creation of this Draft Civil Code efforts were made to take into account as much as possible the fruits of international harmonization found in contract laws, such as the United Nations Convention on Contracts for the International Sale of Goods, the Principles of International Commercial Contracts of UNIDROIT, and the principles of European contract laws.

1. Formation and validity of contracts

Chapter 2 Section 1 of the Book on Obligations prescribes formation of contracts by offer and acceptance. No provisions are available for types of contracts in which offer and acceptance cannot be clearly distinguished, and are to be left up to interpretation.

When a contract is concluded, the most fundamental rule is that the effect as described in the contract is produced. However, based on certain reasons, some cases of contracts or declarations of intention that are requisite to contracts should be null and void or voidable. Chapter 2 Section 2 of the Book on Obligations prescribes fictitious declaration of intention, mental reservation, and absence of a true intent as three causes for the voidance of a declaration of intention, and mistake, fraud, duress, misrepresentation, and actions of excessive benefits as five causes for its recision. Furthermore, it also prescribes violations of public order and good morals and violations of mandatory provisions as two causes for the voidance of a contract.

2. Agency

Chapter 2 Section 4 of the Book on Obligations provides for agency. If contracts always must be assumed by a principle himself, it would be of great inconvenience, as it would prevent him from conducting widespread social and economic activities. There is also the case where a person is needed to protect someone who has been declared incompetent to make decisions and to make a contract on his behalf. In these ways, the system of agency serves an important function in today’s society, and therefore has been prescribed in much detail.

3. Remedies for breach of contract

It is standard procedure for a contract to be fulfilled by a party, but a party may breach a contract and fail to fulfill it in some cases. The Civil Code must therefore prescribe remedies that are to be provided to obligees in such cases. Chapter Four of the Book on Obligations is devoted to this issue on “remedies for breach of contract”, and prescribes three remedial measures. The first is specific performance, which allows an obligee to compulsorily realize performance of obligation as contracted. Enforcement procedures are prescribed in Book 6 of the Code of Civil Procedure. The second is damages, for realizing an economic value equal to that when a contract has been fulfilled, by having an obligor make a monetary payment. Finally, the third, it goes without saying, is the termination of contract.

4. Extinction of obligation

Furthermore, the extinction of obligation is another issue to be prescribed by the Civil Code. Chapter 7 of the Book on Obligations contains throughout the chapter necessary provisions for five causes of extinction, including payments that extinguish by proper performance of an obligation, as well as set-off, release, novation, and merger.

Extinctive prescription is also given as a cause for extinction of obligation, and is provided for in detail in Chapter 8 of the Book on Obligations. The extinctive prescription of a claim is prescribed as a system for extinguishing the claim in question by a method complying with substantive law, based in principle on the passage of five years and the invocation of the prescription by the party.

5. Assignment of claim and assumption of obligation

Chapter 9 of the Book on Obligations, which is the last chapter, provides for the assignment of claim and the assumption of obligation. The assignment of claim refers to the transfer of a claim by contract from an assignor to an assignee while maintaining the identity of the claim. It is a scheme used for various purposes, for example, as a means to recover a claim, as security, and for the liquidation of assets. The assumption of obligation is the transfer of obligation when a new obligor joins an original obligor (concurrent assumption of obligation) or the transfer to a new obligor while maintaining the identity of the obligation (absolved assumption of obligation).

This ends my report, although it was presented in much haste. I hope that this report, together with Professor Niimi's report, may serve to present a broad overview of the system of property laws in the Draft Civil Code.

Draft Law on Succession

Mr. You Bun Leng
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Succession is one of those provisions regarding the acquisition of ownership and this rule is particularly born from the relationship between a decedent who bequeathed his property after his death, and the persons who are entitled to succeed to that property of the decedent. Succession may be acquired by law or by will.

Therefore, succession is the transfer of heritage of the decedent to the successors vivos, in accordance with the intention of the decedent or with the law.

According to the above definition, succession is closely related to the customs of the society, marriage and family relationship, alimony obligation, ownership, as well as to other civil rights and obligations in which the persons are involved.

In Cambodia, we had our Civil Code of Sang Kum Reas Niyum [1], but we cannot copy all the provisions contained therein to make a new draft that is suitable for the current circumstances, because some articles of the conventional code are contrary to the Constitution of the Kingdom of Cambodia enacted in 1993[2]. On the other hand, we need the new draft to be applicable to the current situation of the society.

Pursuant to the Policy of State Reform conducted with the goal of attaining the rule of law in Cambodia, the Royal Government of Cambodia has initiated[3] this drafting of the Civil Code and the Civil Procedure Code with the support of and cooperation from the Japanese Government and Japanese jurists.

In order to ensure the equality of citizens in enjoying rights and benefits, the draft of the Law on Succession is based on the principle of equal rights of citizens as prescribed in Article 31 of the Constitution of the Kingdom of Cambodia and on the good tradition and customs of Cambodian society.

The Book regarding Succession of the Draft of the Civil Code contains 8 chapters, each of which is divided into several sections.

Due to time constraints, I would like to describe here some principles of each chapter and some differences between this Draft Code and the Cambodian Old Civil Code :

Chapter 1. General Provisions

Chapter 1 defines the meaning, time and place of succession, based on the principles of the "**succession system** " that is different from the " l**iquidation system**". In the succession system, successors have to succeed to all rights and obligations

[1] Khmer Civil Code published in 1967, by Mr. Eng Soth
[2] The Constitution of 1993
[3] Article 91 of the Constitution of the Kingdom of Cambodia

pertaining to the heritage of the decedent at the time of opening the succession. Selecting this succession system is appropriate to the living situation of Cambodian society.

The relationship between decedent and successors is the basis of determination of the qualifications of such successors. This concept is different from that stipulated in our old Civil Code[4], which allowed interested persons to file a petition of disinheritance of a successor in order to deprive a successor inherited person of his right of inheritance. Contrary to this, according to the new draft, the disinheritance of a successor is possible only if it is specifically provided in the will created by the decedent[5], in accordance with the intention of the property's owner. The expression of the intention of the property's owner is the same as stipulated in the old Civil Code, Chapter 4 "Testamentary Succession"[6].

In case where the successor is not Cambodian, such person may not receive land either via succession or legacy[7].

Chapter 2: Succession by Law

When a person deceased without leaving a will or when the will is not valid, then his/her heritage shall be divided in accordance with the Law. The successors who are entitled to receive such succession by law are classified in accordance with the relationship of alimony obligation, and of marriage and family.

The new draft of the classification of successors is different from that provided in the old civil code. Actually, there were 7 ranks of successors in the old civil code[8] while in the new draft code, there are only 3 ranks of successors[9]. This new classification was made in accordance with the alimony obligation, living situation and family relationship in the current Cambodian society. Those successors of the three ranks are:

- Successors of the first rank: children of the decedent.
- Successors of the second rank: decedent's lineal ascendants, provided that between persons standing in different degrees of relationship, the person in the nearer degree of relationship shall be preferred.

Successors of the third rank: siblings of the decedents.

Pursuant to the above stated succession by law, if any successor of the first rank does not exist, the successors of the second rank will succeed. If neither successor of the first rank nor successor of the second rank exists, the successors of the third rank will succeed. In case where there exist several successors in the same rank, those

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[4] Article 490, paragraph 2, items 4, 5 and 6 old Civil Code
[5] Article 1-3-3 of the new draft
[6] Articles 542 to 546 of Cambodian Old Civil Code
[7] Article 44 of the Constitution of the Kingdom of Cambodia, Article 1-3-7 of the new draft
[8] Articles 493 to 502 of the Cambodian Old Civil Code
[9] Articles 2-1-1 to 2-1-5 of the new draft

successors shall have equal shares in the succession in accordance with the principal of equal rights.

The main difference between the old civil code and the new draft with regard to this chapter is that in the old civil code, the spouse of the decedent was entitled to be a successor of the fifth rank, [10] while in the new draft, the spouse of the decedent is entitled to be a successor in every case. This means that if a person other than the spouse of the decedent is to become a successor in addition to the spouse, the spouse shall rank equally with such person[11]. This change was made in consideration of the close relationship between the decedent and his spouse and on the rights and obligations of the spouse when the decedent was alive.

In order to ensure equal rights between successors of the same rank, the new draft prescribes the succession share of persons receiving special benefit or gift[12] from the decedent when he/she was alive and the contribution[13] made by any successors to the maintenance or increase of the decedent's property. All these shares and contribution shall be calculated in order to divide succession in accordance with the equality of the rights and benefits of each successor.

Chapter 3: Succession by Will

The provision of this chapter is more extensive than that stipulated in the Cambodian old civil code. Actually, the new draft expands the rights and freedom to constitute the will of the property's owner such as the major in guardianship[14], the person in imminent danger of death[15], the person in quarantine[16], the person unable to speak[17]. However, in order to protect the interests of the testamentary donee and successors, this new draft provides specific conditions to ensure that the will take effect only if it is created from the real intentions of the decedent.

Testamentary gift is a gift granted by a will made by testator to any person other than heirs who are entitled to legally secured portions of the succession. The provision of the new draft is more detailed than that provided in the Cambodian Old Civil Code, with regard to the notice by interested person to the testamentary donee to effect either acceptance or renunciation of the testamentary gift[18], acceptance or denunciation of the testamentary gift by the testamentary donee[19], acceptance or renunciation where the

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[10] Article 497 of Cambodian Old Civil Code
[11] Articles 2-2-1 and 2-2-2 of the new draft
[12] Article 2-3-1 of the new draft
[13] Article 2-3-4 of the new draft
[14] Article 3-2-7 of the new draft
[15] Article 3-2-8 of the new draft
[16] Article 3-2-9 of the new draft
[17] Article 3-2-10 of the new draft
[18] Article 3-6-3 of the new draft
[19] Article 3-6-4 of the new draft

testamentary donee is a successor[20] etc. The purpose of providing such conditions is to protect the interests of interested persons and also the legacy of the decedent.

Chapter 4: Legally Secured Portions

Based on the sanguinary relationships of the decedent as well as the alimony obligations between him/her and concerned parties, the provision of this chapter protects the interests of all those related persons in order to avoid the situation where person not involved in the above relationship receives benefits from the decedent, while persons involved therein cannot receive benefits from the decedent.

According to the provision of the new draft, the decedent may freely create a will granting his property to one or more persons according to his preference. However, the successor entitled to a legally secured portion[21] may file a claim of abatement of a testamentary gift, special benefits, etc. to the extent necessary for retaining a legally secured sum. However, if the person entitled to a legally secured portion does not file such claim, the will remains valid. This is one of the differences between the provisions of the new draft and those contained in the Old Civil Code[22].

The new draft also provides in detail the method of calculating the legally secured portions[23] and method of abatement for retention of the legally secured portion, such as order of abatement[24], abatement of testamentary gifts[25], order of abatement of gifts inter vivos[26], etc.

Even though a person entitled to a legally secured portion may file a claim of abatement for such a sum, he is also entitled to the right to renounce such legally secured portion[27].

The extinctive prescription of right to claim abatement[28] is specifically provided in the new draft in order to protect interests of successor(s), legatee(s), donee(s) or beneficiary(ies) of special benefits as well as to avoid difficulties concerning the evidences of these facts.

Chapter 5: Acceptance and Renunciation of Succession

The legacy left by a decedent usually includes both assets and liabilities. In some cases, assets exceed liabilities while in other cases, liabilities exceed assets.

According to the provisions of the new draft, the successors, in principle, succeed to all of the rights and duties pertaining to the property of the decedent.

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[20] Article 3-6-6 of the new draft
[21] Article 4-1-1 of the new draft
[22] Articles 536 to 539 of the old civil code
[23] Article 4-1-2 of the new draft
[24] Article 4-2-2 of the new draft
[25] Article 4-2-3 of the new draft
[26] Article 4-2-4 of the new draft
[27] Article 4-3-2 of the new draft
[28] Article 4-3-1 of the new draft

In order to protect the interests of the third party and successors, the new draft provides the rights and freedom of the successors, in a different way from the old civil code, which obligates the successors to perform all obligations related to the property of the decedent even in the case where liabilities exceed assets[29].

Actually, the provision of the new draft does not force the successors to perform obligations exceeding the benefits they receive, except in the case of their acceptance. In this sense, the new draft stipulates the absolute acceptance[30], statutory absolute acceptance[31], qualified acceptance[32] and the renunciation of succession[33].

Absolute acceptance is the intention of successors who accept to succeed to the rights and duties of the decedent, without limitation.

With regard to the absolute acceptance, statutory absolute acceptance, qualified acceptance and renunciation of succession, the provisions pertaining to the period and time limit for acceptance or renunciation[34] are specifically stipulated in the new draft in order to protect interests of the third party.

Chapter 6: Administration, and Partition of Succession Property

The administration and partition of succession property is stipulated in the new draft in order to avoid a loss of property caused by any reason and also to ensure a clear and fair partition of property to successors and for the benefits of the third party. The new draft stipulates, therefore, provisions concerning the temporary custody of succession property[35], temporary administrator[36], criteria of partition[37], payment of debts of succession[38], etc.

Chapter 7: Non-Existence of Successors

There may be some actual cases where after the death of the decedent, it is uncertain whether or not there are any successors. Thus, in order to ensure the rights of successors who are not aware of the death of the decedent for various reasons, and to maintain the succession property, the new draft sets forth that the succession property is to be deemed as a judicial person, in the case where there is uncertainty as to the existence of successors[39], and also stipulates regarding the public notice and

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[29] Article 605 of the old civil code
[30] Article 5-2-1 of the new draft
[31] Article 5-2-2 of the new draft
[32] Article 5-2-3 of the new draft
[33] Article 5-3-1 of the new draft
[34] Articles 5-1-1, 5-1-2 and 5-1-3 of the new draft
[35] Articles 6-1-1 and 6-1-2 of the new draft
[36] Article 6-1-3 of the new draft
[37] Articles 6-2-1 and 6-2-2 of the new draft
[38] Article 6-2-4 of the new draft
[39] Article 7-1 of the new draft

peremptory notice to creditors[40], and public notice of a search for successors[41], etc. for a specific period of time.

As provided in Chapter 2, there are only 3 ranks of successors by law in the new draft. Therefore, if any successors of the first rank, second rank and third rank do not exist, the succession property shall revert to the State[42]. However, in order to protect the interests of a person having a special connection with the decedent, such as a person who has shared his or her daily life with or devoted himself to the medical treatment and nursing of the decedent, or has otherwise had a special connection with the decedent, the new draft allows such person to file an application to the court for conferring one part of the succession property upon him[43]. This is the measure of protecting interests of persons having good relationship and having devoted himself to the benefits of the decedent when he/she was alive.

Chapter 8: Demand for Recovery of Succession[44]

This chapter provides for the measures of protecting the interests of successors in cases where there is a person who has acquired succession property through a succession right that has been later deprived.

The demand for recovery of succession is divided into two categories in accordance with the good faith or bad faith of the party being demanded, in order to determine the extent of the property to be returned to successors. The new draft also provides specifically for the extinctive prescription of the right to demand recovery of succession.

I am afraid that this brief presentation cannot explain the whole meaning of all the articles. However, I hope it will serve as assistance in consulting and understanding of the principles of the draft code. In addition, I hope this draft will become effective as law and protect the legal interests of citizens in succession issues in the near future.

Finally, I hope all the participants of this seminar will provide many good ideas to correct any inadequacies of the draft.

Thank you!

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[40] Article 7-7 of the new draft
[41] Article 7-8 of the new draft
[42] Article 7-11 of the new draft
[43] Article 7-10 of the new draft
[44] Chapter 8, Articles 8-1 to 8-4 of the new draft

Annex

to the Presentation on Draft Law on Succession
by Mr. You Bun Leng, Judge, Appellate Court, Cambodia

The Constitution of the Kingdom of Cambodia:

Article 31

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

Article 44

All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land.

Legal private ownership shall be protected by Law.

The right to confiscate properties from any persons shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.

Article 91

The members of the Senate, the members of the National Assembly and the Prime Minister have the right to initiate legislation.

Deputies have the right to propose amendments to the laws but these proposals cannot be accepted if they aim at reducing public income or increasing the burden on the people.

Draft Law on Succession:
(Note: The legal terminologies selection of theses articles has not been done yet by the Study Group)

Article 1-3-3 (Disinheritance of successor)

1 If a presumptive successor with a legally secured portion engages in any of the following conduct, the decedent may apply to the court for the disinheritance of such presumptive successor. The intention to disinherit may also be declared by will:

(1) Being cruel to the decedent;
(2) Treating the decedent with great contempt;
(3) Failing to care for the decedent when the decedent was sick, despite being able to do so;
(4) Being found guilty of a crime that is subject to life imprisonment;
(5) Engaging in other egregious misconduct.

2 A presumptive successor against whom disinheritance is sought may contest the grounds of disinheritance [alleged by the decedent].

Article 1-3-7 (Case where the successor, etc. is an alien)
1 If the successor or person acquiring property under a will does not hold Cambodian nationality, such person shall be able neither to succeed to land nor to acquire land by testamentary gift.
2 If one or more co-successors do not hold Cambodian nationality, the succession property shall be partitioned having regard to the terms of Paragraph 1.
3 (This paragraph is revising)

Article 2-1-1 (Successors of the first rank)
1 Children of the decedent shall become successors of the first rank.
2 Children of the decedent shall have equal shares in the succession regardless of whether they are legitimate, illegitimate or adopted.

Article 2-1-2 (Succession by representation[1])
1 If a child of the decedent dies prior to the commencement of succession, or loses the right to succession due to falling under the terms of Article 1-3-2 (Persons disqualified for succession, etc) or due to disinheritance, the children of such person become successors by virtue of succession by representation; provided that this shall not apply to persons who are not lineal descendants of the decedent.
2 The terms of Paragraph 1 shall apply in turn to successors by representation to whom any ground in the said Paragraph applies.

Article 2-1-3 (Succession shares in case of succession by representation)
The share of a lineal descendant who becomes a successor under Article 2-1-2 (Succession by representation) shall be equal to the share that the lineal ascendant of such descendant would have received. If there is more than one lineal descendant, they shall each succeed in equal shares to the share that their lineal ascendant would have received.

Article 2-1-4 (Successors of the second rank)
1 In case there is no lineal descendant to become a successor of the decedent, the decedent's lineal ascendant(s) shall become successor(s); provided that as between persons standing in different degrees of relationship, the person in the nearer degree of relationship shall be preferred.

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[1] Translator has followed the EHS translation of the Japanese Civil Code (Succession) Article 887. Perhaps the term "per stirpes succession" would be more familiar to English lawyers. The Japanese term "daishu" comprises the ideographs for "subsitute(d)" and "succession".

2 If there is more than one lineal ascendant to become successors, they shall succeed in equal shares.

Article 2-1-5 (Successors of the third rank)

1 If there exist neither lineal descendants nor lineal ascendants to become successors of the decedent, the sibling(s) of the decedent shall become successors.

2 If there is more than one sibling, they shall succeed in equal shares; provided that the share of a sibling who has only one parent in common with the decedent shall be half the share of a sibling who has both parents in common with the decedent.

3 The terms of Article 2-1-2 (Succession by representation), Paragraph 1 and Article 2-1-3 (Succession shares in case of succession by representation) shall apply *mutatis mutandis* to cases where siblings of the decedent becoming successors pursuant to the preceding two Paragraphs of this Article died before the commencement of succession.

Article 2-2-1 (Succession by spouse)

1 The spouse of the decedent shall become a successor in every case.

2 If a person other than the spouse of the decedent is to become a successor under the preceding Section in addition to the spouse, the spouse shall rank equally with such other persons.

Article 2-2-2 (Shares in succession in case of succession by spouse)

The shares of the successors shall be as follows where there are other successors in addition to the spouse:

(1) If the successors are the spouse and lineal descendants, the spouse and each of the decedent's children shall succeed in equal shares.

(2) If the successors are the spouse and the decedent's parents, the spouse shall succeed to a one-third share and the parents to a two-thirds share. However, in case where only one parent of the decedent is alive, that parent and the spouse shall succeed equally.

(3) If the successors are the spouse and direct ascendants other than the decedent's parents or siblings or their successors by representation, the spouse shall succeed to a one-half share and the lineal ascendants other than the decedent's parents or siblings or their successors by representation shall succeed to a one-half share.

Article 2-3-1 (Share of person receiving special benefit)

1 If any of the co-successors has received from the decedent prior to the decedent's death any gift on the occasion of marriage, adoption or other event or as capital for livelihood, or has been given an education higher than the other successors or a special education, or has received a testamentary gift, the value of the property owned by the decedent upon the commencement of succession plus the value of the gift and/or the education shall be deemed

to be the succession property, and such person's share of the succession shall be the balance after deduction of the value of such gift, education or testamentary gift from the share calculated in accordance with the preceding Section.
2 If the value of the gift, education or testamentary gift equals or exceeds the value of the share in the succession, such co-successor may not receive such share.

Article 2-3-4 (Contributions)
1 If any of the co-successors has made a special contribution to the maintenance or increase of the decedent's property by offering labor or property to the decedent's business, providing nursing services or in some other manner, the property owned by the decedent at the time of commencement of succession less the amount of the successor's contribution as aforesaid determined by agreement by the co-successors shall be deemed to be the property to be succeeded to, and the share of such successor in the distribution shall be the sum of the share calculated in accordance with the provisions of Section I and II and the amount of said contribution.
2 If agreement under the preceding Paragraph is not or cannot be reached, then on the application by the person who made the contribution described in the said Paragraph, the court shall determine [the amount of] such contribution, taking into account the timing, mode and extent of the contribution, the amount of the succession property and all other circumstances.
3 The contribution cannot exceed the value of the property owned by the decedent at the time of the opening of succession less the amount of the testamentary gift and the value of the property designated by the decedent as the share of co-successors or as partition of the succession property.

Article 3-2-7 (Will by major ward)
1 For a major ward to make a will when he or she has temporarily recovered the capacity to understand the legal consequences of his/her act and to judge thing, at least two medical practitioners must be present.
2 The medical practitioners present at the making of such will must make a separate entry on the testamentary document to the effect that the testator was not in a condition of lacking the capacity to discriminate things by reason of mental handicap at the time of making the will, and shall affix a statement that they are medical practitioners and their signatures thereto.

Article 3-2-8 (Will of person in imminent danger of death)
1 If a person who is in imminent danger of death from disease or any other causes wishes to make a will, he or she may do so in the presence of at least three witnesses by orally declaring its tenor to one of them. In this case the person to whom the oral declaration is made shall write it down, and read it aloud or submit the writing for perusal of the testator and the other witnesses, and each witness shall sign the writing after confirming that it is correct.

2 A will made under the terms of the preceding paragraph shall not be valid unless within one month from the date on which the will was made one of the witnesses or an interested person applies to the court and obtains confirmation thereof.
3 The court may not confirm such will unless convinced that it represents the true intention of the testator.

Article 3-2-9 (Will of person in quarantine, etc.)
1 A person confined in quarantine by judgment or administrative order may make a will in the presence of a police officer or official of the place of quarantine together with at least one witness.
2 A person on board a ship may make a will in the presence of the ship's master or one of the ship's clerks together with at least two witnesses.

Article 3-2-10 (Making of will by person unable to speak, etc.)
1 In order for a person who is unable to speak to make a will by oral declaration of the tenor of a will to a notary or other person prescribed by this law or to make a will in the form of declaration that a document is the testamentary document of the person himself or herself, instead of making an oral declaration himself or herself, the testator may declare the tenor of the will through an interpreter, or declare through an interpreter that the testamentary document is his or her will, or may write any of the foregoing in his or her own words, before the notary or witness(es).
2 In a case where after noting the tenor of the will, the notary or other person prescribed by this law is to read aloud the contents thereof to the testator and the witnesses, if the testator or any witness is a deaf person, the notary etc. may communicate the written contents to the testator or witness as the case may be through an interpreter in lieu of reading the contents aloud.
3 The notary or other person prescribed by this law shall note the action taken in any case described in Paragraphs 1 and 2 of this Article on the notarial document.

Article 3-6-3 (Notice by interested person)
A person charged with a testamentary gift or other interested person may give notice to the testamentary donee to effect either acceptance or renunciation of the testamentary gift within the reasonable period fixed in the notice. If the testamentary donee does not declare his/her intention to the person charged with the testamentary gift within said period, the testamentary donee shall be deemed to have accepted the testamentary gift.

Article 3-6-4 (Renunciation or acceptance by successor of donee)
If a testamentary donee dies without effecting either an acceptance or a renunciation of the testamentary gift, his successor may effect an acceptance or renunciation within the scope of

his own right of succession; provided that if the testator has declared a different intention in his will, such intention shall prevail.

Article 3-6-6 (Acceptance or renunciation where the testamentary donee is a successor)
1 If a testamentary donee who is also a successor renounces succession, he shall be deemed to have also renounced the testamentary gift. A testamentary donee cannot at the same time renounce succession and accept a testamentary gift.
2 A testamentary donee described in Paragraph 1 can, however, accept the succession and renounce a specific testamentary gift.

Article 4-1-1 (Persons entitled to legally secured portions)
1 Lineal descendants, lineal ascendants or the spouse of the decedent shall obtain the following amount as legally secured portions:
(1) In case where only lineal ascendants of the decedent are successors, one third of the property of the decedent.
(2) In other cases, one half of the property of the decedent.
2 If there are two or more successors, the co-successors shall each receive the legally secured portion in proportion to their share in the succession.
3 The terms of Articles 2-1-2 and 2-1-3 governing succession by representation shall apply *mutatis mutandis* to legally secured portions.

Article 4-1-2 (The property that is the basis for calculation of legally secured portions)
1 Legally secured portions shall be calculated by adding to the value of the property which the decedent had at the opening of succession the value of any special benefit as described in Article 2-3-1 together with the value of any property gifted by the decedent as described in Article 4-1-3, and subtracting therefrom the total amount of [the decedent's] obligations.
2 The value of a conditional right or a right of uncertain duration shall be determined in accordance with the assessment of an appraiser appointed by the court.
3 Obligations described in Paragraph 1 shall include funeral expenses appropriate to the descendant's status, succession property administration costs and other obligations to be borne by successors.

Article 4-2-2 (Order of abatement)
Gifts inter vivos and special benefits cannot be abated until after testamentary gifts and designations of shares in a succession have been abated.

Article 4-2-3 (Abatement of testamentary gifts, etc.)
1 In the first place testamentary gifts and designations of share in the succession to successors are simultaneously abated, and if there is any deficit, testamentary gifts to persons who are not successors shall be abated.

2 Testamentary gifts shall be abated in proportion to the value of their subject matter. The same shall apply in the case of designation of shares in a succession by the method of transfer of one or more specified items of property; provided that where a testamentary gift and designation of share in the succession to a successor is subject to abatement, the value of the subject-matter shall be deemed to be that portion which exceeds the amount of the legally secured portion of such successor.
3 Designation of shares in a succession in a certain ratio of the succession property shall be abated by changing such ratio of shares.
4 Notwithstanding the terms of the preceding Paragraph 1,2 and 3, if the testator has declared a different intention in his will, such intention shall prevail.

Article 4-2-4 (Order of abatement of gifts inter vivos)
1 Abatement of gifts or special benefits shall commence with the latest and extend in successive order to the earliest.
2 If a gift or special benefit was granted 20 years or more prior to the opening of succession, the donee or successor who received same shall be entitled to reject the claim of abatement for legally secured portion.

Article 4-3-1 Extinctive prescription of right to claim abatement
The period of extinguishment by prescription of a right to claim abatement shall be one year, counting from the time when the person entitled to a legally secured portion becomes aware that the succession has opened and that a designation of share in succession, testamentary gift, gift inter vivos or special benefit has been granted, or in any event if 5 years have lapsed since the opening of succession.

Article 4-3-2 (Renunciation of legally secured portion)
A legally secured portion may be renounced in whole or part; provided that such renunciation effected prior to the opening of succession shall be effective only if the approval of the court is obtained.

Article 5-1-1 (Period for acceptance or renunciation)
1. Within three months after becoming aware that a succession has opened in his favor, a successor must effect an acceptance, either unconditional or qualified, or a renunciation thereof; provided that such period may be extended by the court upon application by the successor.
2. A successor shall be entitled to inspect the succession property prior to effecting acceptance or renunciation thereof.

Article 5-1-2 (Special provisions concerning time limits for the case of successor's death)

If a successor dies without effecting either acceptance or renunciation, the period described in Paragraph 1 of the preceding Article shall be computed from the time when his successor becomes aware that the succession has opened in his favor.

Article 5-1-3 (Special provisions concerning time limits for the case where successor is minor, etc.)
If the successor is a minor or major ward, the period described in Paragraph 1 of the preceding paragraph shall be computed from the time that the legal representative is aware that the succession has opened in favor of the ward.

Article 5-2-1 (Unconditional acceptance)
Upon effecting an unconditional acceptance, the successor succeeds without limitation to the rights and duties of the decedent.

Article 5-2-2 (Statutory unconditional acceptance)
In the cases described below, the successor shall be deemed to have effected an unconditional acceptance:

(1) If the successor has disposed of the whole or a part of the succession property; provided that this shall not apply to acts of preservation and mere acts of management;
(2) If the successor fails to effect a qualified acceptance or a renunciation within the period prescribed in Paragraph 1 of Article 5-1-1;
(3) If despite having effected a qualified acceptance or a renunciation, the successor has concealed or secretly consumed the whole or a part of the succession property and has not included it in the list of property in bad faith. However, this shall not apply when agreed by the person who has become successor due to renunciation by such successor

Article 5-2-3 (Qualified acceptance)
1 A successor may effect an acceptance with reservation that the obligations and testamentary gifts of the decedent shall be performed only to the extent of the property acquired through succession.
2 If there is more than one successor, qualified acceptance may be effected only by the joint act of all co-successors.

Article 6-1-1 (Custody of succession property)
1 The successor in possession of the succession property at the time of the decedent’s death shall have the custody and administration of the succession property until the succession property is partitioned; provided that this shall be subject to the terms of Article 6-1-2.

2 Even before accepting or renouncing succession, the successor shall administer the succession property with the same care as his own property. The same shall apply after a successor renounces succession until the person who becomes successor by virtue of such renunciation is able to commence administration of the succession property.

Article 6-1-2 (Custody of executor)
The executor under the will shall administer the succession property upon assuming office; provided that if the will only covers specified property, the executor shall administer such property only.

Article 6-1-3 (Temporary administrator)
1 If there is no executor to administer the whole succession property, a successor, testamentary donee or creditor of the decedent may apply to the court for appointment of a temporary administrator pending the partition of the succession property.
2 Notwithstanding the terms of Article 5-1-4, a temporary administrator appointed under Paragraph 1 shall be in charge of suits involving claims against the succession property pending acceptance by the successor, under the name "person in charge of lawsuits of successors of decedent so-and-so".

Article 6-2-1 (Agreement on partition of succession property)
1 The co-successors may, at any time after the lapse of one month from the opening of succession, effect the partition of the succession property by agreement, except where the decedent has forbidden partition in his will.
2 The transfer of rights over things through partition of a succession property shall be done in accordance with required formalities such as documents, etc. for the transfer of respective rights.

Article 6-2-2 (Criteria of partition)
1 Where the manner of partition is not designated in the will, partition of an succession property shall be carried out taking into account the kind and nature of things or rights constituting the succession property, the age, occupation, state of mind and body and living conditions of each successor and all other circumstances.
2 If the value of the succession property would be severely damaged by partition, where considered reasonable, the succession property may be caused to devolve on one successor, subject to payment of compensation to other successors.

Article 6-2-4 (Payment of debts of succession)
If the decedent has left debts, the co-successors must take account of the payment of such debts when partitioning the succession property and the portion of the debt which each successor should bear shall not be changed unless it is confirmed by the creditor.

Article 7-1 (The succession property a juridical person)
If it is uncertain whether or not there are any successors, the succession property shall constitute a juridical person.

Article 7-7 (Public notice and peremptory notice to creditors, etc.)
1 In case where the existence of successor(s) has not been ascertained, within two months following the public notice prescribed in Article 7-2, Paragraph 2, the administrator shall without delay give public notice to all succession creditors and testamentary donees to present their claims within a specified period, which shall not be less than two months.
2 The terms of Article 6-4-2, Paragraph 2 and Articles 6-4-3 or 6-4-9 shall apply *mutatis mutandis* to cases under the preceding Paragraph; provided that the administrator cannot become the purchaser in an auction or sale under Article 6-4-7 as applied *mutatis mutandis.*

Article 7-8 (Public notice of search for successor)
1 If even after the expiration of the period prescribed in Paragraph 1 of Article 7-7 the existence of successor(s) still cannot be ascertained, the court, upon application of the administrator or of a public prosecutor, shall give public notice calling upon successors, if any, to declare his claim within a specified period which shall not be less than six months.
2 If there is no prospect of a surplus arising from the succession property, the administrator and public prosecutor shall not be required to make application under the preceding Paragraph.

Article 7-10 (Distribution of succession property to person having special connection with decedent)
1 If the court deems it appropriate under Article 7-9, upon application by a person who has shared his livelihood with or devoted himself to the medical treatment and nursing of the decedent, or has otherwise had a special connection with the decedent, the court may confer upon such person the whole or a part of the succession property remaining after liquidation; provided that the total amount of property conferred in this way shall not exceed one-half of the remaining succession property.
2 An application under Paragraph 1 shall be made within three months after the expiration of the period prescribed in Article 7-8, and shall include a clarification of the grounds for claiming a special connection with the decedent.
3 In making a distribution of succession property under Paragraph 1, the court shall hear the opinion of the head of the commune.

Article 7-11 (Devolution of succession property to the state)
Succession property that has not been disposed of under Article 7-10 shall devolve to the state. In such a case, the administrator shall prepare, without delay, an account of administration and submit same to the court.
8. Demand for recovery of succession

Article 8-1 (Objective of demand for recovery of succession)
A successor may demand recovery of succession in order to recover the whole or a part of the succession property of which he has been deprived of the right to inherit.

Article 8-2 (Substance of demand for recovery of succession)
1 A successor may demand that a person who has acquired succession property through a succession right that does not actually belong to such person return the thing obtained to the successor.
2 Property that the other party to the demand for recovery of succession has obtained by a juristic act, using the succession property of the successor, shall be deemed to be succession property obtained by such other party.

Article 8-3 (Substance of obligation to return)
1 The other party to the demand for recovery shall return the succession property to the successor who has demanded same. If the other party acquired the succession property in good faith, he shall be entitled to retain the fruits and interests already received on the property, to demand reimbursement of outlays for the benefit of the property, and also to demand reimbursement of succession debts discharged.
2 If the other party acquired in bad faith, he shall be obliged to return fruits and interests already received on the succession property, and shall not only have no right to demand reimbursement of succession debts discharged, but shall also have no right to demand reimbursement of outlays for the benefit of the property.

Article 8-4 (Extinguishment by prescription of right to demand recovery of succession)
The period of prescription of a right to demand recovery of succession shall be five years if the succession property has been transferred to the other party to such demand in accordance with a will or partition of the succession property, and five years from the date of death of the decedent in the case of a single will [i.e. a will with only one successor].

Roles of the Court and Parties in Civil Actions

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1. Fundamental principles of civil procedure

In order to speak to you on "the roles of the court and parties in civil actions", I must first talk about the principle of disposition rights.

(1) System of civil procedure and principle of disposition rights

The system of civil procedure is a state system that offers an ultimate means of remedy when parties in the midst of a dispute can no longer take necessary actions toward settlement. In this case, a civil dispute is compulsorily settled by the enforcement of the state's jurisdiction. Although it is a state system, the wishes of the parties are frequently reflected in the proceedings. This can be first seen at the commencement stage. For example, in order to activate the system of civil procedure in terms of commencing the procedure for a specific case, the procedure begins only when, figuratively speaking, one of the parties pushes a button and enters the necessary information. This is what is normally called institution of suit. In reality, it refers to the act of submitting a document called bill of complaint to the court (Article 75). In other words, no civil action can be obtained without an appeal based on a party's wishes. Incidentally, the party being sued, or the defendant, is placed in a position of being obligated to answer to the procedure. This is called the defendant's burden of defense or responsibility to defend. Also, when instituting a suit, the plaintiff must clarify the details of the judgment desired from the court. Article 182 (judgment matters) paragraph 1 stipulates that "the court shall adjudicate all claims raised by the parties" and paragraph 2 further provides that "the court shall not adjudicate matters that were not raised by the parties", thereby preventing judgment from exceeding the scope of the plaintiff's complaints. In other words, hearings are conducted and judgments are made only within the scope of the plaintiff's complaints. Furthermore, a party can decide to abate an action during the process at his own free will (dismissal of appeal, litigious settlement, abandonment of claim, cognovit). The acknowledgment of these provisions as fundamental principles is called principle of disposition rights. The principle of disposition rights is precisely the reflection of parties' wishes on the foundation of civil procedures.

Then why are the wishes of parties reflected in the procedure? It is because personal disputes taken up by civil procedures are actually those covered under private law to which the principle of private autonomy is applied, or more simply, civil procedure concerns disputes over rights and legal matters that can be disposed by a private person at his free will.

(2) Principle of argument

The objective of hearings conducted by the court and materials required for that hearing are also determined according to the wishes of parties. In other words, important facts that are not asserted by the parties may not form the foundation of a judgment. Similarly, the examination of evidence by the court should only be made of facts that are disputed by parties, and assertions of especially important facts that are not disputed by parties should not be examined by the court but must be included in the foundation of the judgment. Even when a dispute exists, the examination of evidence should, in principle be conducted only for matters submitted by the parties as evidence. The reflection of parties' wishes on assertions and submission of evidence is referred to as the principle of argument.

Of course, even under the code of civil procedure, there is no room for the application of the principle of argument for suits concerning rights and legal matters that are not allowed to be freely disposed by the parties. For example, in an appeal for a divorce or affiliation, the court must establish facts by evidence even if the facts are not disputed between the parties. In some cases, the court may conduct an ex-officio examination of evidence without waiting for the submission of evidence from the parties. This is referred to as the principle of ex-officio detection.

But, in a normal civil procedure, the principle of argument is fundamental. In other words, assertions and submission of evidence in civil procedure are basically the power and responsibility of the parties, although, as a matter of course, when the assertions of a party are obscure, it is necessary for the court to enforce its "authority to request explanation" (Article 89).

(3) Principle of progression by authority

The progression of civil procedure is managed on the initiative of the court. This is called the principle of progression by authority. For example, as seen in Article 80 (designation of the date of initial preparatory proceedings for oral argument) paragraph 1 which states, "When a complaint is filed, the court shall promptly set a date for preparatory proceedings for oral argument and summon the parties to appear", designation of the date is an official responsibility of the court. Yet, this in no way means that the convenience of the parties in regard to the date can be ignored. Basically, a decision made in compliance with the wishes of the parties will support the smooth progression of subsequent civil procedure. Here, the judge's sense of balance is important. This also applies to a presiding judge's capacity to conduct proceedings (Article 88).

In any event, which of the powers to be prioritized, power of parties or that of the court, is decided in accordance with each of the problematic situations described earlier, and this is expressed in the fundamental principles as a party-oriented policy or authority-oriented policy. Incidentally, powers of a party acknowledged by law are to be exercised by an attorney when said attorney is selected as the agent ad litem by commission

of the party. The role and responsibility of the attorney in this case need to be clarified in relation to the party who made the request and to the court. In the former relation, I would like to emphasize that the attorney is under the duty to provide sufficient explanations to the party. Although comprehension of civil procedure requires a high degree of professionalism, for crucial situations in particular, it is necessary to provide explanations comprehensible to the party and obtain the party's agreement. Regarding the latter relation to the court, the attorney has, for example, the duty to implement the suit in good faith. It is forbidden for an attorney to unduly delay a hearing, as a means of gaining an advantage for his client.

This concludes my presentation. Thank you for your kind attention.

Issue Formation at Pretrial Proceeding

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I. Necessity for issue formation

In a civil procedure, the court is expected to administer proper justice that accords with the real truth. However, this does not mean that an indefinite amount of time can be spent in order to elucidate the truth. Rather, a quick and efficient hearing is sought. In other words, the court should not only aim to conduct a thorough hearing, but it must strive to conduct an efficient one.

In order to conduct a thorough yet efficient hearing, it is necessary to discover at an early stage the real point of issue between the parties involved, and to conduct a hearing with a focus on that issue. Otherwise, the matter presented for the hearing would become too broad, and even insignificant details would be subject to examination as evidence, which may then lead to a delay of the suit. A case may have not only one but several issues, but they would normally be narrowed down to one or two, or perhaps about three at the most, in an average civil case.

This procedure in which issues are formed and limited before an extensive examination of evidences is conducted, is one that the major countries of the world are commonly pursuing. For instance, in the United States, it is said that the parties concerned commonly exchange information and limit issues on their own initiative through a system of pleadings and discoveries, and involve the court only when establishing a schedule and settling conflicts concerning discoveries. In Japan, parties are not given such means that accompany powerful sanctions as this system of discovery used in the United States, but instead, a system is in place whereby the judge effectively participates in the case on the date of the preparatory proceedings for oral argument, and the judge and parties cooperatively form issues based on the pleadings and other briefs, etc. submitted by the parties and the judge's right of elucidation.

The Draft Code of Civil Procedure of Cambodia essentially adopts the Japanese style. This means that the judge invariably participates in discovering the real issue between the parties at an early stage, and conducts an extensive examination focusing on the limited issues (Draft Code of Civil Procedure, Article 127; hereinafter cited by article number only).

II. Procedure for issue formation

Cambodia's new Code of Civil Procedure sets forth that, when a suit is instituted, the court must, upon investigating the complaint, promptly designate the date for the preparatory proceedings for oral argument and summon both parties to appear (Article 80 paragraph 1). Unlike an oral argument, preparatory proceedings for oral argument is not required to be held in an open court (Article 105 paragraph 2), but can be carried out in an ordinary room indicated as a preparatory room. However, in light of the right to petition a hearing and the principles of "la contradiction" (Article 3), both parties must be guaranteed the opportunity to attend the preparatory proceedings. (Article 105 paragraph 1).

In a preparatory proceeding, the court must arrange the allegations of the parties, clarify the issues of the case, and organize the evidences related to the issues so that an intensive hearing can be conducted through an oral proceeding (Article 103). This is the purpose of the preparatory proceedings for oral argument.

In order to fully understand the allegations of the parties, normally the court must call on them to submit their preparatory documents (Article 101 paragraph 1). Specifically, the court requires the submission of a bill of complaint (Article 75 paragraphs 3 and 4), the defense, which is the defendant's first pleading (Article 101 paragraph 3), and when necessary, the pleadings of the plaintiff in regard to that defense. In a preparatory proceeding for oral argument, the allegations of both parties are arranged, and the clarification of any ambiguities, if exist, is requested based on these briefs (Article 90). Upon doing so, the facts asserted by the parties are either accepted by the other party (admission) or denied. Facts that are admitted by the other party are not subject to the examination of evidences (Article 123 paragraph 2). For example, in a suit claiming the payment of a loan, if the defendant does not contest the fact that he borrowed the money, and pleads an extinctive prescription of the claim, but in turn the plaintiff asserts the interruption of prescription (Draft Civil Code, Book on Obligations Article 8-0-10 Item 3 "Approval by other methods") as an argument asserting that "the defendant had previously requested an extension of the payment before the expiration of the prescription period," which the defendant denies, the issue of the case is only whether this fact asserted by the plaintiff is true or false.

Furthermore, as to the fact that is contested, items to be submitted by the parties as evidence concerning the fact are ascertained. Documents can be examined as evidence in preparatory proceedings for oral argument (Article 106), so even if a defendant denies the fact, for example, it is considered appropriate for the court to urge the defendant to make an admission and to limit the issues if the defendant's denial contradicts with the contents of credible document evidence. Naturally, unlike the procedure for an "investigative trial," an examination of witnesses cannot be made in the preparatory proceedings for oral argument. The examination of witnesses must be conducted in an open court on the date of the oral argument.

When completing the preparatory proceedings for oral argument, the court makes a final confirmation with the parties on the "facts to be proved" by the examination of evidence thereafter (Article 107).

Upon completing the formation of issues and arrangement of evidence in the preparatory proceedings, an oral argument commences. In an oral argument, the parties first explain the results, or overview, of the preparatory proceedings for oral argument. Then, witnesses are examined with a limited focus on the "facts to be proved" (Article 116). Facts and evidence that were not presented by the parties in the preparatory proceedings for oral argument may not, as a rule, be submitted in the oral argument (= forfeiture and invalidation). However, in the case where the parties have no reason to be held responsible for the failure of submission, their submission is allowed as an exception (Article 108).

III. Recommendation for compromise at preparatory proceedings for oral argument

The court, regardless of the stage of a suit, can recommend a compromise (Article 97), but particularly at preparatory proceedings for oral argument, the Code provides that the court, as a rule, must attempt a compromise (Article 104). With respect to the nature of Cambodia to place importance on conciliatory settlements, this provision incurs upon the court the responsibility to make an effort to arrange a compromise as much as possible. Whether before, in the midst, or after the formation of issues, it is ideal for the court to carry out the procedure considering an opportunity for the parties to reach a compromise, and as a general rule, it should recommend a compromise at least once.

Demand Procedure

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From birth, all human beings are entitled to the right to life and the capacity to enjoy living in society. When they are minors, they do not have sufficient capacity for establishing legal relationships. Therefore, legal relationships created by them must necessarily be governed by certain statutes such as provisions requiring consent of their parents, etc.

After that, persons usually start to acquire property and manage such property in accordance with their intentions. When entering into a contract, one assumes an obligation stated in the contract and is entitled to the right to demand performance of obligation by the other party because the contract creates legal effects.

Most people get married and establish their own families with respective properties and manage such properties for the family interests.

When they die, some people leave property, which is subject to succession. Actually, such property is divided among successors in accordance with the decedent's will or with the law.

The above-stated events are governed by the civil law that is closely related to the life of persons.

However, no life develops regularly without any obstacles. Some people are born without any paternal recognition, while the legal rights of others have been violated. In addition, some have suffered physical or financial damages because of others' actions, and so on.

In view of protecting their legal rights and interests, especially their civil rights, citizens may file a complaint before a civil court, asking the court to resolve their civil disputes in accordance with the law.

Once a complaint is submitted to the court, procedures relating to the resolution of civil disputes are applied in accordance with the provisions of the Civil Procedure Code.

It is true that the court has to make efforts to ensure that civil actions are conducted fairly and speedily. However, each resolution of the court shall be conducted step by step in accordance with the provisions of the law.

After receiving a complaint, the court processes its resolution through the preparatory proceeding for oral argument, oral argument, decisions and pronouncement of judgment. When any party considers the judgment unsatisfactory, he/she is entitled to file an appeal against such decision via Uttor appeal or Satuk appeal.

Normally, civil cases require that both court and parties conduct many activities before the issuance of judgment. On the other hand, some civil cases do not require such a complex

procedure and may be resolved in a short period of time. The latter cases are those pursued in accordance with the provisions on "Demand Procedure" of the Code of Civil Procedure.

What is a demand procedure?

Demand procedure is a procedure that decides a civil case in a brief manner regarding a claim for the payment of money. The procedure has been applied in countries that practice German Law; the Japanese Code of Civil Procedure also adopts this system. In a society where credit (such as credit cards) is widely used, people often use the demand procedure to deal with debts arising from the use of credit cards. Demand procedure requires a simple manner for obligee to claim payment for such a debt arising from a sale or loan regardless of its amount. When the demand procedure is used, the obligee usually expects the obligor to agree with the demand procedure. If the obligee had no such expectation, he would not use the procedure. He should rather file a suit to a court.

Requirements for demand ruling

The court may, upon motion of the obligee, issue a demand ruling only where:

1. a claim is for payment of money; and
2. a demand ruling can be served in a manner other than service by publication.

A motion seeking issuance of demand ruling may be made to the court on a claim for the payment of money such as debt arising from a sale or money loan. The court may order the obligor to pay the exact amount of the debt. A demand ruling shall be served in a manner other than service by publication. It means the service of the demand ruling should be sent to obligor who has a permanent residence or a definite domicile. In the case the obligor does not have either residence or domicile, the demand procedure is not available.

The court having jurisdiction over demand procedure

The court can issue a demand ruling upon motion of the obligee. Provisions regarding a suit shall be applied *mutatis mutandis* to a motion seeking issuance of a demand ruling except where such provisions are inconsistent with the nature thereof. A written motion must be submitted to the court (court of first instance), which has jurisdiction over the defendant's domicile. The jurisdiction is be exclusive.

Dismissal of motion

In case a motion seeking issuance of a demand ruling does not seek a monetary purpose for payment, or a motion has been submitted to a court having no jurisdiction over the motion, or there are no clear grounds for the claim, the court dismisses the motion by ruling. No appeal may be made against the ruling, but the obligee may make a motion to the court to issue a new

demand ruling. If any part of a motion seeking issuance of a demand ruling does not meet the requirements for such issuance, (e.g. in case the motion includes some portions unrelated to monetary payment), the above provisions shall apply to those irrelevant parts.

Method of issuance of demand ruling

One of the special characteristics of the demand procedure is that the court does not need to examine substantive rights. This means that the court may issue a demand ruling without hearing the obligor, unlike the litigation procedure. To ensure the interest of the obligor, who may make an objection to the demand ruling, the law allows the obligor to transfer the demand procedure to litigation procedure. The obligor's objection to issuance of a demand ruling can be made whether prior to or after declaration of provisional execution.

Where a valid objection against the issuance of a demand ruling is made prior to the declaration of provisional execution, the demand ruling shall lose its effect and the demand procedure converts itself to a litigation procedure. This means that the legal objection to demand ruling is deemed as a motion for formal trial. In case only a part of an objection to a demand ruling is valid, the demand procedure shall be converted to the litigation procedure to the extent of its validity.

When a valid objection against the issuance of a demand ruling is brought after the declaration of provisional execution, the demand procedure will be converted into the litigation procedure.

If an objection to issuance of a demand procedure brought either prior to or after the declaration of provisional execution is unlawful (e.g. an objection was made after the period for objection provided in the law), the objection shall be dismissed by ruling. *Chomtoach* appeal may be brought against the above ruling.

Service of demand ruling

The court shall notify the obligee of a demand ruling and serve the demand ruling on the obligor. The demand ruling shall take effect when service thereof is made on the obligor. A demand ruling shall be served in a manner other than service by publication. Therefore, when a demand ruling cannot be served, because of the nonexistence of obligor's domicile, residence, place of business or office at the location as reported by the obligee, the court must notify the obligee of this fact. In this case, if the obligee fails to provide an alternative location at which service can be made within two months after the obligee receives such notification, the motion seeking issuance of a demand ruling shall be deemed to be withdrawn. The previously-mentioned period may not be extended for any reason.

Objection period of demand ruling

The obligor is entitled to raise an objection against the issuance of a demand ruling within a period of two weeks from the date of receipt of service thereof. In case the obligor does not file an objection within the said period, the court shall declare the provisional execution, including the amount of costs incurred in connection with the demand procedure on its own authority. Declaration of provisional execution shall be included in the written demand ruling and served upon the party in a manner other than service by publication. The obligor may, within two weeks of the date that service thereof, make an objection to the demand ruling as to which declaration of provisional execution has already been made. An objection against the issuance of demand ruling after the declaration of provisional execution shall have legal power to prevent the demand ruling accompanied by the declaration of provisional execution from becoming final.

Effect of demand ruling

If no objection is made in regard to a demand ruling that includes a declaration of provisional execution, the demand ruling shall have the same effect as a judgment. If an objection to issuance of a demand ruling that includes a declaration of provisional execution is dismissed and the dismissal becomes final and binding, the demand ruling shall have the same effect as a final judgment. A demand ruling that has the same legal effect as final judgment may be enforced through a compulsory execution procedure in accordance with the law.

Evidence

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(1) Evidence-oriented trial policy

In order to form the groundwork of a trial with facts submitted by parties, the court must, in principle, recognize those facts based on evidence (Draft Code of the Civil Procedure of Cambodia Article 123 paragraph 1 sentence 1. According to sentence 2 of the same, however, the court may take into account other factors that became evident in an oral argument.) This is called evidence-oriented trial policy. There are exceptional cases in which facts do not need to be proven by evidence, since undisputed facts between parties, facts confessed by the parties in court, and facts obvious to the court do not need to be found upon by evidence (Article 123 paragraph 2). Facts obvious to the court refer to such generally well-known facts as a large earthquake, or facts officially made known to the court, such as the fact that one of the parties was declared insolvent, for example.

(2) Procedure for examination of evidence

The finding of facts based on evidence requires a procedure for the examination of evidence. In a suit, the facts that are to comprise the issue of a case are narrowed down through a preparatory proceedings for oral argument (Article 103 and on) mentioned earlier in this seminar, and evidences related to those facts are arranged. Evidence that requires examination is examined by the court during the oral argument following the preparatory proceedings for oral argument. Based on the information obtained from the examination of evidence such as objects and people, the court determines whether the facts in dispute do exist or not.

Normally, the procedure for examination of evidence is carried out on evidence offered by either party (Article 124 paragraph 1). Exceptionally, when facts cannot be clarified by the evidence offered by the parties, or when otherwise deemed necessary by the court, the court may conduct an examination of evidence on its own authority (Article 124 paragraph 2). This in fact acknowledges the expletive examination of evidence by authority, and is an exception to the general principle that it is the parties who have the power and responsibility to submit facts and evidence. Normally, however, evidence is produced by the parties, and the court, in response, examines the produced evidence, unless they are irrelevant to the fact to be proven by evidence (Article 126). The court must ensure that the examination of evidence is conducted promptly on the date of the first oral argument after the arrangement of issues and evidence is completed (Article 127 paragraph 1), and must conduct the

examination as intensively as possible (refer to Article 127 paragraph 2). Whether or not the hearing of a suit can be expedited depends on whether or not an intensive examination of evidence can be conducted.

(3) Various types of examination of evidence

Five types of procedures are provided for the examination of evidence. They include examination of witnesses, examination of parties, expert witness, documentary evidence, and inspection, and for these, there are examination procedures respectively. In the Code of Civil Procedure of Cambodia, procedures for each examination of evidence are prescribed in detail from Article 132 and on.

Among these procedures for the examination of evidence, the examination of witnesses adopts a method whereby a witness is examined first by the presiding judge, then by each party. Anglo-American and Japanese laws adopt a cross-examination method in which both parties first examine a witness, but the Draft Code of Civil Procedure of Cambodia introduces the method adopted by the codes of civil procedure in European countries, based in consideration that it would be more practical for a judge to take the initiative in examining witnesses in view of the present state of Cambodia (Article 138 paragraph 5).

In the case of expert witness, the expert is both evidence and an accessory to the court. He is selected by the court, and is required to be impartial (Article 144 paragraph 3, Article 145). In this respect, expert witness differs from "expert witness" in American law.

For documentary evidence, if the person going to prove is in possession of a document, he offers documentary evidence by producing the document, but if the other party or a third person is in possession of the document, the person going to prove makes a motion for order from the court requiring the holder of a document to produce the document (Article 148 paragraph 1). In this case, the holder of the document may not, in principle, refuse the production thereof, as long as the document is required as evidence (Article 150 paragraph 1). In other words, the holder of a document is generally under the duty to produce the document. However, the holder of a document may refuse the production of a document in exceptional cases where the document includes matters that may be used to prosecute or convict the holder of the document or his close relative, matters concerning official secrets of a government official, or knowledge obtained in a professional capacity by a doctor, lawyer, etc. or matters concerning their technological or professional secret (Article 150 paragraph 2). If a party ordered to produce a document fails to comply with the order, the court may admit the truth of the assertion of the other party relating to the statement of the document, or in some cases, the court may admit the truth of the fact that the other party tries to prove through the document (Article 153 paragraphs 1 and 3). If a third person fails to produce the document whose production was ordered, he will be fined (Article 154). In these ways, by broadly applying the duty to produce documents, even parties without sufficient evidence can

establish facts and realize their rights.

(4) Preservation of evidence

Examination of evidence is conducted after pending a suit, but as an exception, it may be allowed before the institution of a claim in some cases. That is, when there are circumstances that make the use of evidence difficult unless the examination of evidence is conducted beforehand, the examination of evidence is allowed to be conducted even before the institution of the suit (Article 163 and on). This is referred to as the procedure for preservation of evidence. A typical example would be a medical malpractice case, where a patient's medical record is examined before the patient institutes a claim against the doctor or medical institution when it is feared that the doctor, etc. may falsify the medical record.

Appeal

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1. Definition of appeal

As expert of the law, judges make every effort to conduct a fair trial, but as they are human beings, after all, there is always the possibility that they will make errors. Therefore, it is necessary for parties concerned to be given the opportunity for a new trial by a different judge and efforts to be made to protect their rights, while at the same time citizens' trust in the legal system must be secured. The system of appeals is acknowledged precisely for that purpose. In other words, "appeals" refer to the filing of an appeal to an upper court before a decision is finalized. In the Draft Code of Civil Procedure of Cambodia, approximately 50 articles from Article 59 to 306 are provisions regarding appeals. Incidentally, Articles 307 to 318 provide for re-trials, but since a re-trial is an appeal that is exceptionally allowed as an emergency measure only when there is a gross problem in the final and binding decision, it is not the same as a normal appeal that can be filed against a decision before it becomes final and binding.

Article 259 paragraph 1 placed at the very beginning of the provisions concerning appeals clarify the three types of appeals. The first type is the "*uttor* appeal", or "intermediate appeal", which seeks a re-trial in an appellate court against a judgment rendered by the court of the first instance. The second type is "*sutuk* appeal", or "final appeal", and seeks a review by the Supreme Court against a judgment rendered by the appellate court. The third is an appeal filed against a type of decision called ruling, and is called "*chomtoah* appeal", or "interlocutory appeal". In other words, an *uttor* appeal is the appeal first made against a judgment, and a *sutuk* appeal is the second appeal against a judgment, while a *chomtoah* appeal is an appeal made not against a judgment but against a type of decision called ruling. Unlike those against a judgment, there is no distinction between first and second appeals in a *chomtoah* appeal. This is because, as prescribed in Article 259 paragraph 3, a *chomtoah* appeal is not allowed to be made more than once.

2. *Uttor* appeal

The main purpose of the system of appeals is to offer remedy to parties that have received an unjust decision through a retrial. The *uttor* appeal, or the first appeal made against a judgment, is designed with an emphasis on this particular objective. For instance, in cases where an *uttor* appeal may be filed, hardly any special requirements are needed, unlike the filing of a *sutuk* appeal. In other words, a party, in principle, can make an *uttor* appeal simply

for the reason that the judgment of the court of the first instance is unsatisfactory. Furthermore, an *uttor* appeal hearing, like the court of the first instance, can both determine facts and pass a legal judgment. This point greatly differs from the litigation system of the United States and the United Kingdom, where the determination of facts can in principle only be made in the first instance, and the legal judgment is passed in the appeal hearing based on the facts determined in the first instance. Contrarily in the Draft Code of Civil Procedure of Cambodia, the determination of facts can be conducted in an *uttor* appeal hearing, as is the case in Japan and Germany and is extremely generous in offering remedy to parties.

However, an *uttor* appeal cannot be filed against all judgments. The guarantee of the right to a re-trial through an *uttor* appeal hearing is important, but it entails a reasonable cost. Therefore, the balance between the value of the dispute to be settled and the expenses of the government and the labor of relevant parties in settling that dispute must be considered. Indeed, for litigations of small claims, the three-instance system adopted by those of large claims may not always be appropriate. Therefore, Article 260 paragraph 1 item 2 restricts cases that can be appealed to litigations claiming an amount exceeding 5 million Riels. Article 35 of the draft of the Law on Organization of the Courts also prescribes the restriction of *uttor* appeals by the amount claimed in a litigation, but according to this, it seems that *uttor* appeals cannot be made for cases exceeding 500 thousand Riels. The amount of 5 million Riels specified in the Draft Code of Civil Procedure was prescribed in consideration of the opinions of the Cambodian group, but as it differs from the amount mentioned as the restriction for appeals in the draft of the Law on Organization of the Courts, adjustment on this point must ultimately be made.

3. *Sutuk* appeal

A *sutuk* appeal is the second appeal made against a judgment, and is also the last. Some people may think that in order to offer remedy to parties that have received unjust decisions, they should be allowed as many retrials as necessary until they are satisfied. However, the repetition of trials does not necessarily ensure the improvement of resultant decision. There is a limit to everything. Also, reaching a quick conclusion is an important objective of trials, and the burdens on the other party as well as the government upholding the litigation system must be considered as well. For this reason, in most countries, appeals can only be made up to a maximum of twice. The Draft Code of Civil Procedure of Cambodia, as previously mentioned, also restricts the number of appeals against a judgment to twice, an *uttor* appeal and a *sutuk* appeal. In other words, including the court of the first instance, judgments can be rendered up to three times. This is referred to as the “three-instance system”.

The system of appeals, in addition to the purpose of offering remedy to parties that have received unjust decisions, has another objective of standardizing the interpretations and applications of laws and ordinances. The *sutuk* appeal has been more or less designed with

emphasis on this objective, and this can be seen specifically in the following points. First of all, unlike *uttor* appeals, a *sutuk* appeal can only be made when special requirements have been met. That is, besides cases where there is a gross procedural violation prescribed in Article 285, they include only cases where there is a violation of the Constitution or other laws and ordinances that may influence the judgment, as prescribed in Article 284. In other words, even if there was an error in the finding of facts in the judgment of the *uttor* appeal, a *sutuk* appeal cannot be made on that premise. Also, in accordance with this rule, a *sutuk* appeal can only conduct a trial for legal issues. In regard to the findings of facts, as prescribed in Article 296 paragraph 1, a *sutuk* appeal is constrained by the findings of the *uttor* appeal court. Therefore, *sutuk* appeals, by reviewing only legal issues, serve to standardize the interpretation and applications of all the laws of Cambodia.

4. *Chomtoah* appeal

This last section describes *chomtoah* appeals. Appeals are originally made against decisions of the court, but there are two types of decisions: “judgment” and “ruling”. Article 179 prescribes the distinction between the two, but basically, judgment is the original decision rendered in a civil litigation, and ruling is a decision concerning other concomitant matters. Let me take, for example, an institution of a suit appealing for the reimbursement of 1 million Riels that a person had lent. A decision ordering the defendant to pay 1 million Riels, or a decision to dismiss the plaintiff’s claim, is a judgment. If the plaintiff had mistakenly instituted the suit at Phnom Penh Court that has no jurisdiction over the case instead of at the Siem Reap Court where he should have, the Phnom Penh Court transfers the suit to the Siem Reap Court. This transfer is a ruling.

A *chomtoah* appeal is an independent appeal against such ruling. An *uttor* appeal or *sutuk* appeal can, in principle, always be made against a judgment, but a *chomtoah* appeal can be made against a ruling only if it is stipulated by a separate law. Article 259 paragraph 2 prescribes this matter. When a *chomtoah* appeal is not acknowledged by law, an appeal against a ruling is judged in an upper court together with an *uttor* appeal or *sutuk* appeal made against a judgment. Since rulings are originally decisions concerning concomitant procedural matters, independent appeals are not accepted as a rule. Yet, even for concomitant matters, their early resolution is some times desired, and therefore certain matters of importance are allowed to be filed as a *chomtoah* appeal. By the way, a *chomtoah* appeal is allowed to be filed against the ruling of transfer in the above-mentioned example, under Article 21.

Overview of Compulsory Execution and Provisional Remedy

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1. Introduction

Professor Uehara and I will report on compulsory execution and provisional remedy. Excluding some parts that have not yet been reviewed in the workshop with the Cambodian group, the draft of the stipulations regarding compulsory execution and provisional remedy has been largely completed. I will speak first about the outline of the specific procedures of compulsory execution and provisional remedy, and Professor Uehara will next explain the fundamental principle and mechanism of enforcement proceedings.

2. Compulsory execution

(1) Overview

Compulsory execution refers to the procedure for compulsorily realizing a civil right. Procedures differ according to the type of rights to be realized and targeted properties. The largest distinction lies in whether or not money is the objective of a claim to be satisfied by execution. Compulsory execution of claims aiming to achieve monetary payment can be classified into execution against movable assets, execution against claims and other property rights, execution against immovable assets, and execution against marine vessels, depending on the type of property to be seized from among the debtor’s properties and converted into money. The compulsory execution is also provided with special rules for satisfying a secured claim through foreclosure of a security interest.

Compulsory execution of claims not aiming to achieve monetary payment, such as the delivery of objects or abandonment of a building or land, include direct enforcement, substitute performance, and indirect enforcement. Substitute performance is a procedure in which a person other than the debtor discharges the obligation and later collects the incurred cost from the debtor; indirect enforcement is a procedure for urging a debtor to perform his obligation by ordering him to make a monetary payment, when he fails to do so.

Documents such as final judgments, final payment orders, judgments accompanied by declaration of provisional execution and deeds of execution, all of which prove the existence and substance of specific claims, and upon which compulsory execution is permissible, are collectively called “title of execution”. The statement that publicly certifies the existence and scope of the power of the holder of such title is called an execution writ. Compulsory execution, as a rule, commences upon the title of execution with an execution writ attached thereto.

(2) General theory for compulsory execution against claims aiming to achieve monetary payment

The compulsory execution against claims aiming to achieve monetary payment is composed of three stages, regardless of what the target object may be. The first stage is the attachment prohibiting the disposal of an object by the debtor, the second is the conversion of the target object into money, and the third is the satisfaction by allocating the money gained from the conversion of the object to the execution creditor and others. In regard to the attachment of objects in the first stage, the attachment of certain properties, such as movable assets required to make a living or a portion of earnings, is prohibited in order to guarantee the execution debtors minimum standard of living. With respect to satisfaction in the third stage, the court distributes the money obtained from the conversion of an object into money in accordance with the ranking stipulated by law, except for execution of movable assets for which the bailiff decides the distribution.

(3) Execution against a movable asset—in brief

The petition for the execution against a movable asset is filed with the bailiff. The bailiff goes to the location specified in the petition and seizes attachable property. [In so doing, however, the amount seized by the baliff may not exceed the amount equal to the execution creditor's claim or the amount required to pay the cost of execution.] He then sells the attached movable asset by means of an auction or other means, and distributes the money obtained to the execution creditor and other creditors who demanded an allotment before allocation of the proceeds.

(4) Execution against immovable assets and marine vessels

The petition for the execution against an immovable asset is filed with the court. When the court acknowledges that there is a good reason for the petition, it makes a decision of commencement, and entrusts the register of attachment in the registry of the targeted immovable. The court selects an appraiser, and orders him to investigate and appraise the present state of the immovable. Burdens of security interests, usufructuary rights and leaseholds on the targeted immovable property, which enjoy priority over the attachment by the execution creditor, or in the event of a foreclosure of a security interest, over the security interest which such foreclosure is based upon, do not extinguish by the sale of the targeted property in the course of execution, but are assumed by the buyer, while burdens of other rights and interests become null and void by such sale. This principle is called "principle of assumption". The court, in view of the burden of rights assumed, establishes a minimum selling price based on the evaluation of the appraiser. The court must also prepare an itemized specification that lists the rights that will not prevail even after the sale, to be kept in the court along with the evaluation statement of the appraiser for public access.

The compulsory sale of an immovable asset is made in principle by bid tender or

auction. A person who wishes to buy the immovable upon reading the itemized specification and the evaluation statement of the appraiser makes a deposit of an amount equal to one-tenth the minimum selling price and makes a petition for its purchase. When the person who made a petition for the purchase at the highest price is determined as a result of the bid tender or auction, the court makes a decision to approve the sale. The buyer must then pay the price by the prescribed date. When the price is paid, the buyer acquires ownership of the immovable, and as an after-sales service, the court entrusts its registration to the registration office. In the case where the execution debtor or others continue to occupy the immovable, the court can order the transfer of the immovable to the buyer through a simple procedure called transfer order.

The payment from the sale is allotted to the execution creditor, as well as to creditors who demanded an allotment and creditors who separately made a petition for a compulsory sale.

The outline of an execution against an immovable has been described above. The procedure for compulsory execution against a marine vessel largely follows a similar procedure.

(5) Execution targeting claims

Compulsory execution targeting a monetary claim possessed by execution debtor is called "claim execution", and the debtor of a claim subject to attachment is called "third debtor". Here are a few typical examples. If an execution debtor is an employee of a company, the debtor's claim for salary may be seized making the company a third debtor, or if an execution debtor has a savings account at a bank, that bank account may be seized making the bank a third debtor.

A petition for claim execution must be filed with the court. When the petition is deemed lawful, the court makes a decision for attachment, and serves the decision to the debtor and the third debtor. Under the attachment decision, the collection of claims from the execution debtor and other such actions are prohibited, as is the payment, etc. by the third debtor to the execution debtor. A week after the decision of attachment is served to the execution debtor, the execution creditor is allowed to collect his claim from the third creditor. However, the third debtor can choose to bail the amount of his obligation and escape from enforcement proceedings. In this case, the court distributes the bail, and the execution creditor may not collect the claim by himself.

Claim execution, in addition to compulsory execution targeting monetary claims, is also applied to compulsory execution against claims for the delivery of a movable asset, and compulsory execution targeting such property rights as patent rights.

3. Provisional remedy

Compulsory execution is carried out according to the title of execution against a

conclusive judgment or other such judgments. Therefore, a waiting period is an unavoidable part of the process of acquiring a judgment after the institution of a civil suit. However, it is certainly possible for the execution debtor to conceal or assign his property during the time it takes for the creditor to acquire a judgment, and thereby cause the subsequent compulsory execution to become unfeasible or substantially difficult, or cause serious damage or imminent danger to the position of a party due to a dispute between the parties over matters related to rights. In such cases, a person who wishes to protect his interest can make a petition for the preservation of his interest or legal state through provisional remedy.

There are two types of provisional remedy, namely provisional attachment and provisional disposition. The latter can be further divided into provisional disposition concerning disputed property and provisional disposition ensuring temporary status.

Provisional attachment is a type of disposition that restricts the disposition of the debtor's property in order to preserve the compulsory execution against a claim that aims to achieve monetary payment.

Provisional ruling regarding disputed property is a disposition that maintains the current state of the disputed property when due to a change in the actual state of the disputed property there is a possibility that a creditor may no longer be able to realize his interest, or substantial difficulty may arise and prevent the creditor from realizing his interest. One example of this is the provisional disposition preventing transfer of possession (and furthermore, custody by a bailiff) for the purpose of preserving a delivery claim for a specific movable.

A provisional disposition ensuring temporary status is a disposition that ensures the temporary status of a judgment until it becomes final when it is necessary to avoid substantial damage or imminent danger to a creditor in relation to a dispute of legal matters. An example of this would be the provisional disposition for the preservation of a person's status as a worker, or the provisional disposition for the temporary payment of salary when the validity of a worker's dismissal is being disputed. The latter is called satisfactory provisional disposition, because it is a provisional remedy that provides temporary satisfaction of a preserved right.

I apologize for the haste, but this ends my presentation on the overview of the procedures for compulsory execution and provisional remedy.

Fundamental Framework of Enforcement Proceedings

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Following upon Professor Matsushita's introduction of the specific procedures for execution and preservation, I will report on the fundamental principle and mechanism of the enforcement proceedings and their difference from judgment proceedings, as the last presenter of the Japanese members.

1. Fundamental principle of enforcement proceedings

1-1. Emphasis on the interest of execution creditor, separation of execution organs and procedural formalization

The objective of the enforcement proceedings is the ultimate realization of a private individual's right (right to claim). Therefore, it must give foremost consideration to the protection of an execution creditor's interest, and be conducted as simply and expeditiously as possible. This point is reflected in the fundamental framework of enforcement proceedings.

Firstly, the fundamental framework of enforcement proceedings calls for separation and specialization of execution organs. In a judgment proceeding, it is considered important for two conflicting parties to be guaranteed the opportunity to plead and prove and for the court to make a careful judgment. However, in an execution proceeding, a state organ is required to quickly and efficiently enforce direct legal force in order to promptly and efficiently realize the claim, rather than to make a discreet judgment. Therefore, it would be appropriate for state organs in charge of enforcement proceedings (execution organs) to be formed separately from organs in charge of judgment proceedings (separation of execution organs). Also, since actions expected of such state organs differ from those of other organs, there is no need nor would be appropriate for a judge to take charge of the entire proceeding as in judgment proceedings. Accordingly, for acts with few legal factors and many factual factors, and acts that are enforced outside the court in regard to debtors, a suitable specialist, or in other words a bailiff, is to be posted to take charge of the proceeding. Thus, the court as a whole, is required to make an efficient placement of human resources (specialization of execution organs).

Secondly, on the premise of separation and differentiation of execution organs from a rights adjudicating organ, the formalization of proceedings is underway in response to a call for expeditious enforcement proceedings. In regard to claims that are to be realized by execution, an execution organ does not make a judgment upon directly receiving assertions

and substantiations of the parties. Rather, as long as the documents that could provide a key to making a judgment are prescribed by law, and an execution creditor produces such a document, the execution organ commences an execution proceeding without making further examination on the legitimacy of the content of the document. The system involving title of execution and execution writ is provided precisely for this purpose. Moreover, under normal conditions, properties that can be subject to execution are limited to those belonging to the properties of the debtor, but the framework allows enforcement proceedings to be conducted, based on the external facts such as registration for immovable assets and occupation for movable assets as clues.

As a result, although an adversary structure between an execution creditor and execution debtor also exists in enforcement proceedings, the plaintiff and defendant are not treated equally as they are in judgment proceedings. The execution creditor plays the major role, and the proceeding is carried out according to his petition and production of materials. The execution debtor is placed in a passive position, and is frequently only provided with the opportunity to file an objection against a disposition already made or procedures already begun.

1-2. Protection of the interest of debtors and third parties

Yet on the other hand, enforcement proceedings must also take into account the interests of debtor and other such people. Firstly, this is because no matter how important the realization of the right to claim may be for a creditor, if the debtor is a natural person, the method of realization cannot be something that can violate the dignity of the debtor as a personality or a human being. This is why the law strictly prescribes methods of execution. Also, an execution should never deprive a debtor of his living as an independent human being. For this reason, among the property of a debtor, movable assets and claims (such as salary) that are absolutely necessary for his livelihood are excluded from the targets of execution as properties prohibited to be seized.

Secondly, enforcement proceedings must be valid in terms of substantive law. Yet, when considering the promptness required for enforcement proceedings, they cannot be made to commence only upon full confirmation of its validity in regard to substantive law. When an execution proceeding is conducted based on a definitive judgment that has become conclusive, the judgment is res adjudicata, so the right to claim no longer becomes disputable. However, even in this case, it is possible that the right had expired after a base period (period of litigation when the factual hearing and oral argument have been concluded). Moreover, when an execution proceeding is conducted based on a document other than the conclusive judgment, the right to claim that is to be realized by execution cannot even be established. Furthermore, property that can be subject to execution must belong to the property of the debtor, but regarding this point, it is conceivable that the execution is conducted on property belonging to a third party, since the framework of enforcement proceedings is such that the

attribution of property is determined by external standards. Thus, on the premise that an execution proceeding lacking validity in relation to substantive law may be begun, the law must, in response to a request made by the execution debtor or third party, provide procedures for confirming the validity of an execution proceeding. This system is what is referred to as an execution-related litigation.

Thirdly, the protection of a creditor's interest must accord with the interest of the society as a whole and of all citizens. For instance, an execution that completely deprives a debtor of his property and means of earning a living is not to be allowed, as the burden is eventually placed on the entire society in the form of social welfare for those debtors. Also, the method and value of the sale of property subject to execution must not disrupt the general order of distribution. In this consideration as well as for the purpose of raising a creditor's level of satisfaction, sales procedure of immovable assets is regulated in detail and aims for a sale at a suitable price by broadly soliciting buyers from the public.

2. Guarantee system for substantive validity of enforcement proceedings (title of execution and execution writ, execution-related litigation)

2-1. Substantive requirements of enforcement proceedings (title of execution and execution writ)

The system of enforcement proceedings exists for the realization of the right to claim under substantive law. Therefore, in order for the enforcement proceedings to be acknowledged as substantively valid, under normal circumstances, it requires the existence of a claim under substantive law to be realized, an immediate appeal for provision to be ready, a creditor to be able to enforce this claim, and a debtor to be in a position to take responsibility of fulfilling this obligation. However, for the purpose of improving the efficiency of enforcement proceedings, it is not appropriate for the execution organ separated from the rights adjudicating organ in order to directly judge these requirements. Therefore, execution organs are to confirm the requirements indirectly and formally, based on the existence of documents. Documents that serve as the means for confirmation are the title of execution and execution writ. An execution organ begins enforcement proceedings upon receiving the authenticated copy of the title of execution with the execution writ affixed at the end of it.

A title of execution is a document that describes the existence and details of a claim, and includes a conclusive judgment for performance, a judgment with declaration of provisional execution, a demand ruling, a certificate prepared by a notary for monetary payment, and a protocol recording a compromise reached in a suit. An execution writ clarifies the existence and scope of the executive power given to the title of execution. For example, the fact that a judgment has been concluded is revealed by the appendage of an execution writ and in this way made known to the execution organ. Furthermore, when a person other than the party indicated in the title of execution becomes the execution creditor or execution debtor,

or when it is necessary to confirm the fulfillment of conditions mentioned in a claim, the execution writ serves to correct the content of the title of execution. As a matter of course, according to the type of title of execution, an execution writ may be deemed unnecessary in order to simplify the proceeding.

2-2. Execution-related litigation

As mentioned earlier, execution-related litigation is a system indispensable for securing the substantive validity of formalized enforcement proceedings that tend toward the protection of an execution creditor's interest in response to pursuing promptness. In this aspect as well, the framework is such that execution organs are kept from directly making a judgment in regard to a substantive right, the execution debtor or a third party is to institute a suit outside of the execution proceeding, and the existence of substantive requirements of enforcement proceedings is to be established by means of standard civil procedures, and the result of a hearing is to be reflected in the execution proceeding. This litigation is referred to as execution-related litigation, and is comprised of three types of appeals: objection to a claim, objection regarding affixed execution writ, and third-party objection.

Objection to a claim is a litigation instituted by an execution debtor for clarifying the fact that when a title of execution does not correctly reflect the existence of the claim under substantive law and monetary amount thereof at the present stage, compulsory execution based on that title of execution is not permissible. This applies, for example, when the content of a title of execution is unmodified even when the claim has extinguished due to payment or other reasons after the establishment of the title of execution. Objection regarding an affixed execution writ is instituted when, for example, an execution writ was affixed for the reason that a person accepted the obligation of a debtor indicated in the title of execution, but that person wishes to dispute the fact. A third-party objection is an appeal made, for example, to request the withdrawal of attachment (compulsory execution) by the real owner (third party) of a movable seized by a bailiff who determined the movable as property owned by an execution debtor because the debtor had been occupying it.

In light of the necessity for an execution proceeding to be expeditious, even when these execution-related litigations are instituted, enforcement proceedings that had already begun are naturally continued. However, if an execution proceeding that is not substantively valid is carried on, execution-related litigations will not function. Therefore, a system is also provided under certain requirements to temporarily halt an execution proceeding until the litigation reaches a conclusion.

3. Conclusion

Civil disputes are not necessarily settled through judgment proceedings only. They can be settled only when enforcement proceedings have been developed and state organs that

are to implement the proceedings are prepared to do so. As the fruit of the intensive tasks undertaken by our Civil Procedure Code Drafting Group and the people of Cambodia over a span of three and a half years, the Draft Code of Civil Procedure has been completed for the most part as the definitive draft. However, many issues still remain, for example, to promptly constitute the Code of Civil Procedure based on the draft, to enable the people of Cambodia to further their understanding of the Code of Civil Procedure and autonomously put it into effect, and to not only improve the court system but to install notaries, bailiffs, and other peripheral components concerning the legal system. As Professor Takeshita mentioned in yesterday's keynote speech, I look forward to further efforts by the relevant parties of Cambodia, and at the same time, we, the Civil Procedure Code Drafting Group, wish to extend our full cooperation so that a civil procedure system that can stand up to international evaluations takes root in Cambodia and functions as a principal foundation for the development of the country.

Thank you very much.

Closing Speech[1]

H.E. MIKAZUKI Akira
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Former Minister of Justice, Japan

It is a great pleasure for me to have the opportunity to make final remarks at the closing ceremony of this significant and historic seminar, in the presence of your excellency Samdech Heng Samrin.

I would like to make some observations here, not on the individual issues covered in this seminar, but from a broader standpoint. To begin, please allow me, a retired academic, to express my nostalgia for the academic world.

More than 20 years ago, I put an end to my academic career and the academic activities to which I had devoted myself for a long time. Since then, I have been involved in various activities in the legal field, such as acting in court, lawmaking, being responsible for legal administration and international cooperation within the legal field, etc. By attending this seminar in an academic atmosphere today and yesterday, for the first time in more than 20 years, I have strongly felt as if I had returned to my academic life.

It was immediately after the end of the war that I started my academic career. Back then, gatherings such as an academic conference did not exist, and I had to find my way in the dark more than once, having few opportunities to interact with other scholars of law or other disciplines. I feel, therefore, as a person who was in such a difficult situation and who wanted to revisit academia for the first time in twenty-plus years, that this seminar represents the latest experimental and pioneering task in the history of law in the world, though I am not sure if all of you recognize it clearly. This is my belief because it should be considered noteworthy in the history of law that the legal system of one country has been constructed through collaboration between young legal professionals who will bear the future of the said country and young academics of another country in mutual friendship, without concern for political considerations. I, as a retired academic, sincerely feel envious of those young legal professionals from different countries, who have been able to share such a wonderful and historic experience. It is not only that the project itself is unique, from a historical point of view, but it is also unprecedented for the work to be celebrated mutually by both countries in the form of ceremony.

This seminar was held simultaneously in three different languages, Khmer, Japanese and English. It should receive high praise due to the fact that the seminar was organized

[1] This speech was originally presented in Japanese, and then translated into English for this publication.

successfully although it has been extremely difficult to administer it using trilingual terminologies. Also, we should not forget by any means the efforts made by the people engaged in translation and interpretation.

When legal professionals from different countries with different legal histories engage in a joint project with a common objective, it could be assumed that one is a developing country and the other a developed country. However, this thinking will not see through the nature of things. Certainly there will be such an issue, if any, but in reality, a different perspective is necessary for this kind of task.

The law itself shall change its form continuously in accordance with the development of society. It is the fate of the law. In the realm of law, the distinction between developing country and developed country does not exist in rerum natura, and the law should be reformed at all times. In this sense, any country is always a developing country. When this understanding is applied to the relationship between the Kingdom of Cambodia and Japan, the two countries differ slightly in the timing of their original importation of Western Law. Japan is also a developing country, in a different form and manner. This is my conviction. One good example is that Professor Takeshita, who is the head of the working group for the Draft Code of Civil Procedure, has been addressing Judicial Reform, as the acting chairperson of the Judicial Reform Council, and this reform is currently being fully implemented now in Japan. The reform of the legal system of Japan, which is still in its initial phase, is actually a revolution comparable to the legislation of the Kingdom of Cambodia. In that sense, there is no difference between Japan and Cambodia, since both of them are in the midst of growing pains, except for the fact that Japan met Western Law somewhat earlier than Cambodia.

By the way, with respect to the reform referred to as the Reform of Law, that should be implemented on a regular basis in any country. In Japan, I always say that there are three issues to consider.

Firstly, the legislation should be re-evaluated in conformity with a new era, when it no longer fits the trend of the times. Secondly, the mechanism and procedures to actuate legislation, which shall be re-evaluated on a regular basis, will also have to be re-shaped accordingly. The last, but the most difficult, is how to develop human resources to play the main role in dealing with the two above-mentioned issues, in accordance with the times. In addressing the reform of law, a professional has to constantly challenge himself/herself, while addressing these three tasks simultaneously. From my experience, I would say that the first issue is the easiest, while the third one is the most difficult challenge.

Making public the results up to date in this seminar precisely corresponds to the reform in the codification, which is referred to as the first challenge in my above description, the easiest one to undertake and to bear fruit. However, it is evident that accomplishments

gained in the first stage will have a big impact on the reform in the second and third phases and will certainly assist in their implementation. That is how the reform of law should be, I suppose. The joint work of the two countries has just taken off, and there still remain a lot of areas for cooperation even in the first task, such as the constitution of the commercial code, the law of intellectual property rights, and the like. Regarding the second issue to be handled in Japan, how to operate the procedures in family courts, ADR and procedures of bankruptcy law constitute the problems to be overcome. In Cambodia as well, these issues will have to be approached, together with the legislation of other legal fields, making use of the prior experience to date. With regard to the third challenge, that is, fostering legal leadership, it is the most difficult task, as mentioned earlier, and the augmentation of juristic education both in quantity and quality is becoming the toughest issue even in Japan.

Be that as it may, the codification project has admirably been finalized here and it will be truly wonderful not only for Cambodia and Japan, but for the whole of Asia, if the joint project of the two countries proceeds from the first stage to the second and to the third phase.

Lastly, I would like to get back to the issue proposed at the beginning of my speech, that is, why this project "has been an experiment full of new legal ambitions". I, as one who has long devoted his energy to reforming the legal system in Japan, would like to make sure this point, at this very moment of the project beginning to sprout, that the jurists who bear the future of the two countries, have been proceeding without political or personal consideration, only linked in friendship. In this manner, the fact that the Prime Minister Hun Sen has mentioned that he would make efforts toward the earliest possible enactment of the draft codes, has greatly impressed me.

There is a dream that a new and courageous experiment, never before seen on a global scale, will spread to the world, not from the Western World, but from Asia in the vanguard. If this dream comes true, I have a strong feeling that, it will be a turning point for the establishment of the field of Asian Law, not Continental Law nor Common Law.

I would like to conclude my closing speech, wishing this seminar to be a turning point for Asian Law.

ICD & ADB Training Course

for

the Philippines Judiciary

YAMASHITA Terutoshi
Senior Attorney
International Cooperation Department
Research and Training Institute
Ministry of Justice, Japan

It is a great pleasure for us to share the outcome of the training course on "Court and Case Flow Management for the Philippines Judges and Court Personnel" organized by the Asian Development Bank ("ADB") and the International Cooperation Department ("ICD") of the Research and Training Institute of the Ministry of Justice, Japan.

The ICD has been conducting international training courses since 1994 as one of the methods of Japan's legal assistance. Japanese legal assistance is normally provided through the Official Development Assistance ("ODA"), part of which is operated by Japan International Cooperation Department ("JICA"). Thus, a great majority of training courses implemented by the ICD are funded by JICA. On the other hand, the ICD has conducted international training courses once or twice per year in cooperation with the International Civil and Commercial Law Centre Foundation or the ADB.

As for trainings in cooperation with the ADB, a multi-national training course on the "Technical Assistance for Organization and Management of Governmental Legal Services" was organized in 2000. Twelve (12) overseas participants, representing 6 countries, and 3 Japanese participants joined the course. Based on this experience, the ICD decided to organize a course for the Philippines in 2001, which was conducted in 2002. Prior to the course, Ms. TANAKA Kazuko, faculty member of the ICD from April 2001 to March 2003, attended an ADB conference held in Manila, Philippines in July 2001. Taking advantage of her visit to the ADB and Manila city, an initial discussion for the course was made with some staff members of the Philippine Judicial Academy ("PHILJA"), which was responsible for the implementation of the project funded by the ADB. Subsequently, the ICD had close contact with the ADB and PHILJA to effectively and efficiently implement the course.

Considering the keen interest of PHILJA in the ways and means of reducing case backlog, the course focused on the recent movement for legal reform in Japan, the increased efficiency of case management after the reform of the Code of Civil Procedure, and the actual application of family courts and the mediation system. This course was unique because one Japanese judge, court clerk and public prosecutor also participated. The Filipino judges and court clerks were able to exchange views and experience not only with Japanese lecturers but also with Japanese participants even after class.

During the course, the ICCLC and ICD jointly organized a one-day seminar introducing the legal and judicial system of the Philippines to the Japanese audience, most of which were legal professionals and people from the legal departments of private companies. The presentation papers made by Filipino justices and judges are included in this issue. Their titles are as follows:

1. Judicial System and Direction for Reforms (Supreme Court and Court of Appeals)
   Mr. Buenaventura J. Guerrero
   Justice, Chairman, 2nd Division, Court of Appeals, Manila
2. Sandiganbayan (Special Court for Criminal and Civil Case Against Government Officials)
   Mr. Francis E. Garchitorena
   Presiding Justice, Sandiganbayan
3. Regional Trial Courts
   Mr. Presbitero J. Velasco Jr.
   Justice, Court Administrator, Supreme Court of the Philippines
4. Philippine First Level Courts and Directions for Reforms
   Ms. Zenaida N. Elpano
   Justice, Senior Deputy Court Administrator, Supreme Court of the Philippines
5. Barangay Justice System and Other Alternative Dispute Resolution Mechanics (Mediation) in the Philippines
   Mr. Bernardo T. Ponferrada
   Head, Judicial Reform Office, Philippine Judicial Academy, Supreme Court of the Philippines

Moreover, the Philippine participants submitted the "Delegation Report on the Training Course on Court Management" to the ADB and ICD. The report contains all of the names of the participants and the ICD members involved in this course, their understanding of the Japanese legal and judicial system acquired from the course as well as recommendations which may be useful to their legal reform after learning from the Japanese system and its practices. I must acknowledge their tremendous efforts and

dedication to the Report because its draft was almost completed by the end of the course as a result of a series of discussions and drafting, which took place after class and on weekends.

I am convinced that this course has enriched the knowledge and experience of legal professionals of both the Philippines and Japan, and has enhanced further the mutual understanding and good relations between the two countries.

The Philippine Judicial Academy (PHILJA)[1]

The Philippine Judicial Academy (PHILJA), a training school for justices, judges, court personnel, lawyers and aspirants to judicial post in the Philippine, was originally created by the Supreme Court under the Administrative Order No. 35-96 on March 16, 1996 and finally mandated by R.A. 8557 on February 26, 1998.

The Philippine Judicial Academy is a component of the Supreme Court as one of the important features of judicial education in the Philippines. The programs of the Academy enjoy the patronage and support of the Court. Participation of the judges is also guaranteed. In fact, no appointee to the Bench may commence the discharge of his adjudicative functions without completing the prescribed course of the Academy. The Judicial and Bar Council, constitutionally tasked with recommending appointments to the judiciary and promotions, is also directed by law to consider the participation of judges in the programs of the Academy.

For operational purposes, PHILJA is currently organized into the following three main offices;

1. Academic Office: It drafts curricula and plans the academic undertakings of PHILJA
2. The Research and Publications Office: As Academy's Charter obliges it to publish a Judges' Journal at least annually, the Research and Publications Office produces and sends all judges nationwide the *PHILJA Judicial Journal and PHILJA Bulletin* which provides thumb-nail information on new doctrines of the Supreme Court, reproduces important administrative issuances, and announces PHILJA activities.
3. Judicial Reforms Committee: It is composed of the Research Group and the Consultant's Group that submit proposals for judicial reforms to the Supreme Court. With the collaboration of CD Asia, the Judicial Reforms Committee produces PHILJA Updates which consist of Supreme Court decisions, legislative enactments, PHILJA lectures and articles in electronic or digital format.

PHILJA's Administrative and Financial Management Office supervises over personnel and human resource affairs as well as budget and financing.

THE ACADEMIC PROGRAM

PHILJA's curricula, teaching and training programs are the responsibility of the core professors. There are twelve academic departments: Departments of Constitutional Law, Civil Law, Remedial Law, Criminal Law, Ethics and Judicial Conduct, Court Management,

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[1] Excerpt from "An Introduction to the Philippine Judicial Academy (PHILJA)" by the Republic of the Philippines Supreme Court

Commercial Law, International Law and Human Rights, Jurisprudence and Legal Philosophy, Legal Method and Research, Special areas of Concern, and Court Technology.

The Chairpersons of the departments are recognized authorities in the various areas of law and judicial managements.

There are also special programs for Shari's court judges and Shari's court personnel. PHILJA conducts training on particular themes, such as gender sensitivity, women's and children's rights, and on new laws that require particular attention. For Justices of the Court of Appeals, conference and discussion sessions have been conducted. Seminar-workshops for court personnel, such as legal researchers, clerks of court, and sheriffs are also provided.

Recently, PHILJA has played an active role in the management study of the Philippine Judiciary, a component project of the Supreme Court-United National Development Program (SC-UNDP) on Technical Assistance to the Philippine Judiciary on Justice and Development. Indeed, projects done in collaboration with international development agencies such as the UNDP and the World Bank stress the direct relationship between development and a credible, competent judiciary, and the immediate and pressing concern for judicial education in most jurisdictions.

The Academy conducts its educational activities mainly at the Ridge Convention Center, a 3.7 hectare facility located in Tagaytay City. Due to its limited space, another building adjacent to the present Convention Center will be constructed. PHILJA also conducts seminars in other places nationwide.

PHILOSOPHY

PHILJA adheres to the following philosophy:

1. The people are best served when the Judiciary is independent and its members are men and women of proven competence, integrity, probity, and independence.
2. The mission of the Philippine Judicial Academy is to serve the Judiciary; to make available the opportunity for the development of judicial competence, formation of constructive attitude and the cultivation of sound values for members;
3. Judicial education is an indispensable tool for ensuring an effective, independent and credible Judiciary.

OBJECTIVES

The objectives of the Academy are stated in terms that allow assessment of fulfillment of non-fulfillment. PHILJA shall pursue the following objectives:

1. To foster sound values and attitudes, expertise in substantive and procedural law, and develop management competence through courses, seminars and symposia for members of the Judiciary and quasi-judicial bodies:
2. To contribute, to avail legal literature of scholarly and practical significance to

members of the Judiciary, through the publication of a Judicial Journal and Bulletin;

3. To integrate the Academy's philosophy, principles and objectives and instructional programs in conventions, seminars, and programs of the association of judges and of court personnel;
4. To conduct research to advance the frontiers of juridical science and court technology;
5. To develop and strengthen networking and partnership with other institutions for the development and implementation of programs for continuing judicial education.

POLICIES

The policies of the Academy are:

1. Only participants who have completed the programs prescribed by the Academy and have satisfactorily complied with all the requirements incident thereto may be appointed or promoted to any vacant judicial position;
2. Every three years the Academy shall review its curricula and programs in consultation with relevant sectors of society;
3. The Academy shall maintain a database of the records of all the participants in its programs, the records of their performance. Provided, however, that the record of their performance shall be accessible only to the Justices of the Supreme Court, the Board of Trustees, the Executive Officials of the Academy, the Court Administrator and members of the Judicial and bar council through its Chairman.

Training Course on Court and Case Flow Management for the Philippine Judges and Court Personnel
Hosted by ADB and MOJ Japan

March 16, 2002
International Cooperation Department
Research and Training Institute
Ministry of Justice

1. Course Title
   Training Course on Court and Case Flow Management for the Philippine Judges and Court Personnel

2. Duration
   June 3 (Mon) ~ 24 (Mon), 2002

3. Subject
   Effective management of judicial system

4. Objective

   Asian Development Bank (hereinafter, "ADB") implements Law Development Activities (corresponding to the "legal assistance" of Japan), which aims to enforce the rule of law in Asian nations, through improvement of governmental legal services and their efficiency and expansion of jurists' roles in various governmental activities.

   The Judicial Reform Project of the Philippines, which constitutes a part of the above-mentioned activities of ADB (ADB Project No.: AOTA: PHI3408-01), holds "Effective Management of the Judicial System" as one of its objectives. To this end, the Philippines is planning to offer training courses for judges through the Philippine Judicial Academy (hereinafter "PHIJIA"), a judicial training institute, pertaining to the Supreme Court of the said country, and corresponding to the Legal Research and Training Institute of Japan.

   Moreover, the Ministry of Justice of Japan (MOJ) has been implementing the legal assistance in the field of civil and commercial laws since 1994. As part of its programs, the MOJ has already established a cooperative relationship with ADB and has held various training courses for legal professionals in Asia, jointly with ADB. This time, the MOJ has decided to collaborate with the Philippine's Judicial Reform Project and hold training courses for its judiciary.

   At present, the Philippines faces a lot of challenges, such as the operation of family courts, which have just recently been established, and the introduction of the nascent

Alternative Dispute Resolution program (ADR). In criminal cases as well, the law is not applied as expected and issues such as judicial ethics must be resolved.

The Philippines was greatly influenced by Continental Law under the Spanish regime and by American Law during the U.S. occupation. Thus, Japan and the Philippines have many similarities in their legal systems and historical development. Given these factors, in order to formulate an effective proposition for the improvement of Filipino court management, PHIJIA wishes to gain an understanding of the current state of the Japanese legal system, such as the recent movement for judicial reform, especially systematic reform and the increased efficiency of case management after the reform of the code of civil procedure, the actual application of family courts and arbitration systems, which have long been established in Japan, and its trustworthy justice system, which receives no political nor any other interventions.

In response to this, the MOJ believes that learning more about the reality of the justice and judges of the Philippines and giving aid for the improvement of her court management will contribute, not only to the development of the country, but also to the mutual collaboration between the two countries in the legal field.

5. Organizing Institution

Research and Training Institute (RTI), Ministry of Justice
Address: 1-1-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8977

Contact details:

International Cooperation Department (ICD)
Research and Training Institute, Ministry of Justice
Address : 1-1-60, Fukushima, Fukushima-ku, Osaka 553-0003
Phone : 06-4796-2153
Fax : 06-4796-2157

6. Training Institution

(1) Osaka Session: June 3 (Mon) – 13 (Thu), 2002
International Cooperation Department
Research and Training Institute, Ministry of Justice
Address: 1-1-60, Fukushima, Fukushima-ku, Osaka 553-0003
Phone : 06-4796-2153
Fax : 06-4796-2157

(2) Tokyo Session: June 14 (Fri) – 24 (Mon), 2002
Research and Training Institute, Ministry of Justice
Address : 1-1-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8977
Phone : 03-3580-4111
Fax : 03-5511-7213

7. Requirement for Application

(1) Domestic trainee

Domestic trainees shall consist of one (1) judge or associate judge, one (1) court clerk and one (1) public prosecutor.

Applicants who possess the following qualifications should be nominated from concerned departments upon request of the president of the RTI.

a) Be in a senior position or expecting promotion for a senior position.
b) Be under forty five (45) years of age
c) Be sufficiently proficient in spoken and written English to participate in discussion and presentation

(2) Philippine trainee

Philippine trainees shall be of 15 members, composed of judges, teachers of PHIJIA and court officials who fulfill the following requirements:

a) Be in a position of decision-making as to the operation of courts, training for judges and court personnel and office work of courts
b) Be sufficiently proficient in spoken and written English to participate in discussion and presentation

(3) Special trainee

In addition to the above-mentioned trainees, those who are qualified by the president of the RTI, will be able to participate in this training course.

8. Curriculum and Procedure

The following eight (8) subjects have been selected, based on the request from the Philippine, under the main topic, "Study of the Efficient Management of the Judicial System".

a) Court management (efficient judicial disposition)
b) Judicial ethics
c) ADR (Alternative Dispute Resolution)
d) Judicial reform
e) Juvenile delinquency and women's issues
f) State-of-the-art Technology (teleconference, etc.)
g) Efficient disposition of large-scale cases (on the subject of environmental case)
h) Judicial training method improvement for court officials, including judges

Accordingly, the below-mentioned curriculum is scheduled, in such a manner as to search for an improvement in court management, operation and training in the Philippines, by offering trainees the opportunity to learn from the current Japanese court management system and the experience of various recently implemented legal reforms.

(1) Lecture

Lecture on the outline of the Japanese judicial system and observation visits, corresponding to each subject, are scheduled.

However, it is necessary to introduce the system of Japan, upon reaching an understanding of the current reality of the Philippines. Therefore, with regard to the general legal system, a focus will be put on interactive lectures presented by the teachers of the RTI, who have been involved in the legal assistance of Japan and observation visits. Thus, lectures will be given in such a manner as to enable trainees to understand practical applications of the Japanese legal system as visible as possible, through the use of public information videos, etc.

Lectures on court will be given by incumbent and retired judges, so that questions from trainees can be answered properly, in consideration that only judges who have engaged in court operation are familiarized with the current status of court management.

(2) Observation visits and field trips

Observation visit to institutions such as the Ministry of Justice, the Supreme Court, district court, family court, police office, prison, juvenile training school, Juvenile Classification Home, the Legal Training and Research Institute, the Training Institute of Court Clerks, and field trips to Tokyo, etc., are scheduled.

(3) Workshops by trainees

Trainees will hold workshops in order to formulate proposals on the improvement of court management and training for court personnel in the Philippines, based on the lectures and field trips, and will be requested to submit reports on the improvement measures.

The training will be given principally in English, but Japanese-English interpreters will be arranged upon request of lecturers.

9. Other

Participants are encouraged to reserve presentation equipment, such as projectors of OHP and PowerPoint, as needed. Such request will be granted as to the extent possible.

Schedule of Training Course on Court/Case Flow Management

As of 2002/5/15

Date	Day	10:00 – 12:30	14:00 – 17:00	17:10	Others
6/3	M		15:10 Leave Manila via PR422 20:00 Arrive in Osaka, Japan		
6/4	T	Orientation on Life in Japan and Contents of Training / Courtesy call to Chief Prosecutor ICD Attorney TANAKA, Kazuko (English)	Lec. on Organization of Japanese Government and MOJ ICD Director OZAKI, Michiak (English)	logistical announce ment for next day	Welcome Party hosted by the ICD Director
6/5	W	Lec. on Outline of Criminal Procedure (Investigation) ICD Attorney MARUYAMA, Tsuyoshi (English)	Lec. on the Judicial System in Japan Attorney TANAKA, Kazuko (English)	logistical announce ment for next day	
6/6	T	Lec. on Outline of Criminal Procedure (Court procedure) ICD Attorney TANAKA, Kazuko (English)	Visit to Osaka District Public Prosecutors Office Attorney TANAKA, Kazuko (English)	logistical announce ment for next day	
6/7	F	Lec. on Court organization and management Retired Judge Mr. KASAI, Tatsuya (With interpreter)	Visit to Osaka District Court with Court Hearing Observation Retired Judge Mr. KASAI, Tatsuya (With interpreter)	logistical announce ment for next day	
6/8	S	Workshop			
6/9	S	Holiday			
6/10	M	Video Presentation on Civil Procedure at the first instance ICD Attorney TANAKA, Kazuko (English)	Lec. on the case flow management in the practice of civil procedure Retired Judge Mr. ISEKI, Masahiro (With interpreter)	logistical announce ment for next day	
6/11	T	Video Presentation on Summary Procedure for Small Claim ICD Attorney TANAKA, Kazuko (English)	Lec. on the Independence of the Judiciary (With interpreter)	logistical announce ment for next day	
6/12	W	Lec: Judicial Reform in the Intellectual Property Right Cases Professor Ph.D.. Eguchi (With interpreter)	Visit to Osaka Probation Officers Office Discussion with Volunteer Probation Officer on Juvenile Treatment (With interpreter)	logistical announce ment for next day	
6/13	T	Video Presentation on Family Court System (10:00-11:00. Then move to Kyoto.) Attorney TANAKA, Kazuko (English)	Visit to Kyoto Family Court Discussion with Conciliators (With interpreter)	logistical announce ment for next day	
6/14	F	Move to Tokyo	Courtesy call to the Vice Minister Courtesy call to the President of the Institute Visit to MOJ Museum (With interpreter)	logistical announce ment for next day	Reception hosted by the President of the Institute
6/15	S	WS			
6/16	S	Holiday			

		10:00 12:30	14:00 17:00	17:10	Others
6／17	M	Visit to Tokyo Summary Court with Briefing Judge (With interpreter)	Visit to the Legal Training and Research Institute with briefing Lecturer (Judge) (With interpreter)	logistical announcement for next day	
6／18	T	Lec. on Court Management in Administration Cases: Taking Samples from Environmental Cases ICD (introduction) Attorney TANAKA, Kazuko (English)	Tokyo District Court (Lecture and Q&A) Judge ICHIMURA, Yousuke (With interpreter)	logistical announcement for next day	
6／19	W	Lec. On the Role and Function, and the Training of Court Clerk Supreme Court (With interpreter) Chief of the Efficiency Division and the Equity Division MORI, Masanobu	Lec. on the role and function of Secretariat of the Supreme Court Judge (With interpreter)	logistical announcement for next day	
6／20	T	Lec. On the role and function of "Law Clerk" in the Supreme Court Retired judge (former "law clerk") Attorney-at-law TANAKA, Yutaka (With interpreter)	Presentation of the Philippine Judicial System Open Lecture Meeting for Japanese Lawyers and Businessmen Philippine Justice	logistical announcement for next day	Farewell Party hosted by ICCLC
6／21	F	Visit to Fuchu Prison and UNAFEI (English)	Lec. On Corruption Control UNAFEI Professor TACHI Yuichiro (English) (English)	Closing Ceremony RTI	
6／22	S	WS	Evaluation meeting on this training course Attorney TANAKA, Kazuko (English)		
6／23	S	Holiday			
6／24	M	Leave Japan from Tokyo to Manila via PR431 9:30 Narita	13:15 Manila		

LIST OF TRAINEES

(Sponsored by the Ministry of Justice, Japan and Asian Development Bank, 2002)

	[PHILIPPINE]	POSITION
1	**Mr. Buenaventura J. Guerrero**	Justice, Chairman, 2nd Division, Court of Appeals, Manila
2	**Mr. Francis E. Garchitorena**	Presiding Justice, SANDIGANBAYAN
3	**Mr. Presbitero J. Velasco Jr.**	Justice, Court Administrator, Supreme Court of the Philippines
4	**Mr. Bernardo T. Ponferrada**	Justice, Philippine Judicial Academy (PHILJA)
5	**Ms. Zenaida N. Elepano**	Justice, Deputy Court Administrator, OCA
6	**Mr. Lucas P. Bersamin**	Judge, RTC-Quezon City, Branch 96
7	**Mr. Pampio A. Abarintos**	Judge, Regional Trial Court (RTC)-Cebu City, Branch 22 (Family Court)
8	**Mr. Mario V. Lopez**	Judge, RTC-Batangas City, Branch 2 (Intellectual Property)
9	**Ms. Nelia Y. Fernandez**	Judge, RTC-Puerto Princesa City, Palawan
10	**Ms. Adoracion P. Cruz-Avisado**	Judge, RTC-Davao City, Branch 9
11	**Mr. Valerio M. Salazar**	Judge, RTC-Iligan City, Branch 6
12	**Ms. Iluminada C. Cortes**	Judge, Metropolitan Trial Court (MeTC) - Baguio City
13	**Mr. Conrad S. Tolentino**	Attorney, Deputy Program Director, Program Management Office, the Supreme Court
14	**Ms. Jesusa P. Maningas**	Attorney, Clerk of Court (COC), RTC-Manila
15	**Ms. Lelu P. Contreras**	Attorney, COC< RTC-Iriga City, Albay
	[JAPAN]	
16	**Ms. ICHIKAWA Tamiko**	Assistant Judge, Kumamoto District Court
17	**Mr. TOMINAGA Yoshifumi**	Liaison Officer, Secretary Division, General Secretariat, Supreme Court of Japan
18	**Mr. IMAMURA Tomohito**	Public Prosecutor, Osaka District Public Prosecutors Office, Sakai Branch

Judicial System and Direction for Reforms
(Supreme Court and Court of Appeals)

Mr. Buenaventura J. Guerrero
Justice, Chairman, 2nd Division
Court of Appeals, Manila

Prefatory Statement

The Philippine Judiciary is a confluence of the traditional concepts in the judicial systems of Western democratic and republic states and Philippine inputs from national experience.

A. Judicial Power:

1. Vested in one Supreme Court and such lower courts created by law
2. It includes –
   a) Traditional jurisdiction (to settle actual controversies)
   b) Extraordinary or Expanded Jurisdiction – to determine whether grave abuse of discretion attended the exercise of governmental powers (Section 1, Article VIII, Constitution), a novelty introduced by the present Constitution

B. The Philippines' Four-Level Integrated Court System:

1st level: Metropolitan Trial Courts (METC), Municipal Trial Court (MTC) and Municipal Circuit Trial Court (MCTC)

2nd level: Regional Trial Court (RTC). The Philippines is divided into 13 regions with one RTC in each region consisting of several branches.
In some provinces of the Muslim region in Mindanao, there are Shari'a Circuit Courts (SCC) equivalent to the 1st level courts and Shari'a District Court (SDC) of the level of the RTC. These courts interpret and apply the Muslim Code on personal laws.

3rd level: The Court of Appeals (CA). An appellate and review court of decisions of RTC as well as quasi-judicial agencies. Decisions of Court of Tax Appeal (CTA) are appealable to the CA. In the same level is the Shari'a
Appellate Court (SAC) to decide decisions from SDC.

4th level: The Supreme Court (SC) – the Court of last resort.
There are two specialized courts, the Sandiganbayan (the graft Court and the Court of Tax Appeals handling appealed decisions from the Bureau of Internal Revenue and Bureau of Customs.

1. Supreme Court

1.a Only constitutionally created court

1.b Membership: 1 Chief Justice and 14 Associate Justices who hold office during good behavior until 70 years of age or become incapacitated to discharge the duty of their office [Sec. 4 (1) (11), Article VIII Constitution]

1.c Qualification of SC Justices:

1. Natural born citizen of the Philippines
2. 40 years old or over
3. At least 15 years or more a judge or in the practice of law in the Philippines
4. A person of proven competence, integrity, probity, and independence (Sec.7)

1.d The Court may sit *en banc* or in divisions. Presently, there are three divisions of five justices each. The three most senior justices are the chairmen.

1.e The decision of a division is the decision of the Court, hence it may not be elevated *en banc* unless it modified or reversed a doctrine or principle of law laid down by the full Court or another division making it necessary for the *en banc* to resolve the conflict (SC Circular No. 2-89).

1.f Judicial power consists of:

(a) **Constitutional powers** – those provided in Section 4 (4). Section 5 (1&2), Article VIII.

(b) **Statutory** – those provided by Acts or laws passed by Congress

1.g Other important powers/duties

1.g.1 Administrative supervision over all courts and the personnel thereof (Sec.6, Art. VIII)

1.g.1-a- Office of Court Administrator was created by law headed by a Court Administrator and 3 deputy Court Administrators

1.g.1-b- This power includes the duty to investigate and dismiss justices, judges and other court personnel from the service.

1.g.2 Administrative supervision over the Philippine Judicial Academy established by RA 8557 (a law), a training school for justices, judges, court personnel, and lawyer-aspirants to the bench.

1.g.3 Administrative supervision of the Judicial and Bar Council – a constitutionally created office composed of the Chief Justice as *ex-officio* Chairman, the Secretary of Justice, and a representative of the Congress as *ex-officio* members, a representative of the Integrated Bar, a professor of law, a retired member of the Supreme Court, and a representative of the private sector. It prepares a list of nominees to the bench for the President’s consideration and appointment with at least 3 nominees for each vacancy (Sec. 8, Art. VIII)

1.g.4 Rule making for the admission to the Bar and disciplinary power over lawyers. May disbar or suspend them or impose such penalty as it may deem proper, for violation of the Code for Professional Responsibility (Rule 139, Rules of Court)

1.g.5 Protects the Judiciary from reorganization “(W)hen it undermines the security of tenure of its members” (Sec. 2, par.2, Article VIII).

2. Court of Appeals

The Court was created by Commonwealth Act No.3 in 1935 with an initial membership of one presiding judge and ten judges. It has exclusive appellate jurisdiction of all cases not falling under the original and exclusive appellate jurisdiction of the Supreme Court. Its decisions in those appealed cases are final except upon a petition for review on certiorari under Rule 45, Rules of Court when the Supreme Court in the exercise of its discretion entertains the appeal elevated on a pure question of law.

The Court’s membership increased in the years until its present number of one Presiding Justice and fifty (50) Associate Justices. Under R.A. No. 8246 which became a law on December 30, 1996 but has not yet been implemented, six (6) more divisions were added, three (3) for Visayas with station in Cebu and another three (3) for Mindanao with station at Cagayan de Oro City.

Jurisdiction:

(1) Review all appeals from decisions of the RTC in the exercise of its original and appellate jurisdictions, the first by ordinary appeal and the second by petition for review which is a discretionary power

(2) Review which is discretionary, cite awards, judgments, final orders or resolutions of about 21 agencies exercising quasi-judicial functions

(3) Because of *Fabian vs. Desierto* (295 SCRA 470), review decisions of the Ombudsman in administrative cases

(4) Pursuant to the *St. Martin Funeral Home vs. National Labor Relations Commission* (295 SCRA 494), review decisions, resolutions and awards of the National Labor Relations Commission elevated under Rule 65, Rules of Court.

Under the present internal rules of the Court, justices under a division of 3 composed of the Chairman, the senior member and the junior member – on the basis of their seniority in Court. A unanimity of 3 is required for a division’s decision or resolution. In case of a dissent, two other members are chosen by raffle to make a division of five. Three votes will prevail for a decision or resolution.

The Court does not sit *en banc* except for ceremonial purposes. The

Presiding Justice is the Administrative Head of the Court. Like any government office, the Court is supported by administrative offices headed by the Clerk of Court.

C. Direction for Reforms:

The judiciary has had many reform programs to strengthen its delivery system of justice and its independence.

The technical Assistance to the Philippine Judiciary on Justice and Development Project produced the "Blueprint of Action for the Judiciary". This "blueprint" in turn is based on several previous studies made such as Assessment of Past Judicial Reform Efforts, Formulation of Administrative Reforms, Review of the Criminal Justice System, to mention a few.

The current Action Program for Judicial Reform (2001-2006) is the apex of all these studies. It is all embracing touching on institutions development, human resources development and reform support system.

Meanwhile that these studies and system are yet to be fully validated, the Supreme Court and the Court of Appeals have both adopted the "Zero Backlog Project" to expedite the early termination of old cases. More notable is the Davide Watch Program which extends to the entire judiciary.

Conceived by the incumbent Chief Justice, Hilario G. Davide, Jr., it is premised on the principle that the Judiciary, as the constitutionally designated arbiter of all legal disputes, must at all times, maintain its independence and remain immune from undue influences. It is essential that the members of the Judiciary must be of utmost competence and unassailable integrity. The Davide Watch enjoins that the system of justice must be fair, impartial and swift. The case value of the rule of law, equal justice, judicial independence, and the pursuit of excellence must be preserved and always predominate, says the author.

RESPECTFULLY SUBMITTED.

BUENAVENTURA J. GUERRERO

Sandiganbayan

Mr. Francis E. Garchitorena
Presiding Justice, Sandiganbayan

The existence of the Sandiganbayan is mandated by the Constitution. It is of the same level as the Court of Appeals. It was established to try and decide criminal and civil cases against government officials and employees accused of graft and corruption and other "office related" offenses. The term is a *Tagalog* word meaning "pillar of the nation." It is a special court, as distinguished from the regular courts, because it exercises limited jurisdiction over particular individuals and specialized categories of cases.

The Sandiganbayan's mission is to give life and meaning to the constitutional precept that a public office is a public trust, to impress upon public officers and employees their duty to serve with the highest degree of responsibility, integrity, loyalty and efficiency and to remain at all times accountable to the people. It carries out this objective by conducting trials of criminal and civil cases involving offenses committed by public officers and employees, including those employed in government-owned or controlled corporations.

Its History –

The creation of the Sandiganbayan was originally provided for by Article XIII of the 1973 Constitution:

> *"SEC. 5. The National Assembly shall create a special court, to be known as Sandiganbayan, which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law."*

Further to that, the late President Ferdinand E. Marcos, exercising the legislative power granted him under Amendment No. 6 of the 1976 Amendments to the 1973 Constitution, issued on June 11, 1978, Presidential Decree No. 1486 creating the Sandiganbayan and putting it on the same level of what were then known as the Courts of First Instance, now the Regional Trial Courts. This would be the equivalent of the District Courts. Shortly thereafter, however, the Sandiganbayan was elevated to the level of the Court of Appeals by virtue of Presidential Decree No. 1606 issued on December 10, 1978, the equivalent level of a Japanese High Court, one level below the Supreme Court.

The Court started operations on February 12, 1979 with one Division composed of three (3) justices and a staff of 15 personnel. In 1981, a second division was activated and the third division was fully constituted on August 4, 1982.

The structure of the Court remained unchanged until 1997 when by an amendment of the law, two divisions were added. Thus today, the Sandiganbayan is composed of fifteen Justices sitting in five divisions composed of three permanent members each and a total staff of about 300 persons. This number includes drivers and janitors, as well as clerks of court, and the judicial and non-judicial support staff.

Of greater interest is its jurisdiction: previously it covered all government officials of all levels – from village officials to the highest levels who committed office-related offenses. "Office Related offenses" is a technical phrase whose meaning will be taken up later.

Private individuals are also covered if they conspire with the public official in the commission of office-related offenses.

Within the first ten years of its existence, the coverage of the Sandiganbayan was changed so that its jurisdiction was only over government officials who committed office-related offenses for which the law imposed a penalty of more than six years imprisonment, or a fine of more than P6,000. In 1997, the jurisdiction was further modified to cover government-related offenses committed by government officials of Salary Grade 27 or higher, military rank of colonel or equivalent positions in the navy and in the police force -- with certain exceptions -- regardless of the penalty provided by law.

Additionally, the court was required to go to the geographical region where the offense was committed to save expenses for the accused and his witnesses.

The reason for this change was our Revised Penal Code, which was enacted in 1930 and was made effective in 1932. Malversation of public funds or property is an offense whose penalty is related to the value of the property involved. The value of money from 1930 to 1949 was reduced by forty percent (40%), but the penalties for many related offenses were not changed to adjust to these values. This resulted in many low-level employees from different parts of the country who had to come to Manila for cases involving relatively small amounts.

Now for some clarifications:

“Office-related offenses” are those which are committed by government officials where the public office is an essential element or where the offense is deeply connected with their public office.

Thus, under our Revised Penal Code there is a classification of offenses committed by public officers such as malversation of public funds or property, failure to deliver a person in custody to the proper judicial officer within the proper periods, infidelity in the custody of prisoners.

We also have an anti-graft law which has a specific list of offenses for which a public officer can be held liable. For example:

1. asking for or receiving a gift or a share or a percentage of a contract or transaction where the public officer officially intervened or for whom the public officer obtained a permit or a license.

   - neglecting or refusing to act without sufficient justification on a matter before him for the purpose of obtaining benefit, whether monetary or otherwise, or for favoring or discriminating against another party.

2. Even if there is no benefit to the public officer,

   - if by deliberate acts or by gross neglect a public officer grants unjustified benefits or preference to a person or causes undue injury to any one including the government while performing his administrative or judicial function

   - by intervening into a contract in behalf of the government that is grossly disadvantageous to the government,

   - by giving a license, or permit or privilege to any person not qualified,

   - by divulging confidential information he obtained by reason of his office.

Common crimes such as theft or homicide are generally not covered by jurisdiction of the Sandiganbayan -- unless the offense is committed by the use of a person's public office. For example:

- murder or physical injuries committed by a police officer while the victim was in his custody;

- for a government finance officer to issue government checks that are not funded so that the check is dishonored.

In these, the offenses were committed in a manner where the public office was involved as an integral part in the commission of the offense.

All offenses heard by the Sandiganbayan have to be filed and prosecuted only by the Ombudsman. Complaints for investigation against public officials for office-related offenses can be filed only with the Ombudsman.

The biggest load of cases of the Sandiganbayan is cases of what we call "accountable officers." These are public officials who have money or property in their custody or possession as part of their duties. Here we are talking of treasurers or cashiers and officers who have supervision or control over cash or property. Municipal treasurers are primary examples. These offenses are usually discovered by government auditors who periodically examine the accounts and records of these public officials. If the money is not there, or if the records do not balance, these are easily discovered. Thus, these officials sometimes hide the shortages by making false entries in the books of accounts or make false documents to hide the missing items. In this way, two offenses are often committed -- what we call "malversation" and falsification.

In fact, these are the most common charges.

Problems:

1. In many instances of corruption, the public official and the private person both benefit from the illegal act -- the one who gave the bribe received his benefit. More than that, the private person who gave the bribe may have more transactions with the same office or official so he will not report the offense. There you see that even if there are reports linking the award of many contracts, very few are charged for bribery.

2. Many areas of public suspicion are at
   - the Bureau of Internal Revenue, in charge of collection of taxes;
   - the Bureau of Customs in charge of the taxes on importations;
   - the licensing offices;
   - the Department of Public Works and Highways, where according to public perception, 40% of the funds of public works projects are lost in various forms of bribery.

The newspapers are full of these stories. We can see bad roads, foreign goods in strange places, rich taxpayers who pay little taxes, and generally poor services. But we are unable to bring in enough evidence against them to stand up in court.

Thus, the cases that reach the Sandiganbayan are primarily those where somebody was seriously prejudiced, who suffered a serious disadvantage, or who is the political adversary or opponent of the public official. These are the ones who will complain to the Ombudsman. The Office of the Ombudsman investigates the cases and, if the Ombudsman believes there is a case, then an indictment -- we call it Information -- is filed.

3. The country is almost two thousand (2,000) kilometers from one end to the other, and about a thousand kilometers across, composed of many islands with poor communications. Because of this, private offended parties have a difficult time in making their complaints and pursuing their case.

   The Sandiganbayan is required by law to go to the geographical region where the offense was committed. That is some help but the problem of transportation is still difficult.

   For a complaint then to be started by private individuals is quite difficult and in the end quite costly in time and money to pursue.

4. Those who are charged are quite often accountable public officers whose accounts do not tally and who are not able to explain the shortage. While we do not want to diminish the need to punish those who put public money into their private pockets, this is not the primary complaint of impropriety against public officials.

5. A good portion of the offenses come from the heavily populated areas:

   -- Metro Manila (NCR) and its adjoining provinces,

   -- Region VII, the Central Visayas, where the province and the City of Cebu are located, also a very active commercial area in the country.

6. The catalogue of the cases filed is very revealing

   There have been 27,515 cases filed with the Sandiganbayan since its creation until April 30, 2002. Of these, only 305 cases, or 1.11 percent, were for bribery -- what is popularly considered a very common form of graft.

About 68.5 percent of all the cases filed were for those generally discovered by government auditors for low-level employees. All other cases comprise only about 10.5 percent. (Please see Annex A)

For the last 23 years, 17,139 accused were involved in cases where trials were terminated.

- Of these, 6.61 percent pleaded guilty, usually on plea-bargaining;
- 27.22 percent went to trial and of these, 16.68 percent were acquitted while 10.54 percent were found guilty;
- 20.63 percent of the accused could not be located by the police so that their cases were archived.

This accounts for almost 55 percent of the accused who were charged. (Please see Annex B)

For the other 45 percent of the accused, the Court had to dismiss the case against them even without trial, or the cases were withdrawn by the prosecutor, or sent to other courts which had proper jurisdiction over them.

In sum, the anti-graft drive in the Philippines is facing many difficulties in many fronts – in law enforcement, in evidence-gathering, in prosecution, and even with us in the Sandiganbayan where we are unable to dispose of the cases faster than they are filed. In the last ten years, the undisposed cases have been increasing as can be shown by the attached schedule. (Please see Annex C)

We have to study your methods very seriously and see how we can adopt them in this area for us in the Sandiganbayan against office-related offenses.

Annex A

BREAKDOWN OF CASES FILED FROM FEBRUARY OF 1979 TO APRIL 30, 2002

NATURE OF OFFENSE	TOTAL	%
Falsification	5364	19.49
Malversation	9096	33.06
Estafa (Swindling)	4306	15.65
Violation of R. A. 3019	5560	20.21
Bribery	**305**	**1.11**
Others	2284	10.48
TOTAL	27515	100

Annex B

DISTRIBUTION OF ACCUSED WHOSE CASES WERE TERMINATED (PERCENTAGES)

	TOTAL	%
Number of accused whose cases were dismissed without trial	3361	19.61
Number of accused convicted on a plea of guilt	1133	6.61
Number of accused convicted after trial on the merits	1806	10.54
Number of accused acquitted after trial on the merits	2910	16.98
Number of accused who turned state witness	27	0.15
Number of accused whose cases were archived*	3535	20.63
Others	4367	25.48
TOTAL	17139	100

* because they could not be located

Annex C

A N N U A L   S U M M A R Y

YEAR	NEW CASES	TOTAL CASELOAD	DISPOSED	PENDING
1979	760	760	217	543
1980	1559	2102	579	1523
1981	2693	4216	1246	2970
1982	2320	5291	2230	3061
1983	1656	4717	2055	2662
1984	1368	4030	1305	2725
1985	1285	4010	1272	2738
1986	1101	3836	1227	2609
1987	733	3342	764	2578
1988	644	3222	754	2468
1989	970	3438	795	2643
1990	2400	5043	1950	3093
1991	1076	4169	1256	2913
1992	1124	4037	875	3162
1993	1984	5144	1461	3683
1994	1868	5549	1931	3618
1995	1574	5192	2652	2540
1996	471	3011	388	2623
1997	926	3539	430	3109
1998	799	3908	636	3272
1999	802	4074	561	3513
2000	809	4322	966	3356
2001	507	3963	767	3196
2002	346	3542	213	3329

REPUBLIC ACT NO. 3019

ANTI-GRAFT AND CORRUPT PRACTICES ACT

Sec. 3. Corrupt practices of public officers. - In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

(a) Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.

(b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law.

(c) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act.

(d) Accepting or having any member of his family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination.

(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

(f) Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, or for the purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party.

(g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

(h) Director or indirectly having financing or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

(i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group.

Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transaction or acts by the board, panel or group to which they belong.

(j) Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled.

(k) Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

The person giving the gift, present, share, percentage or benefit referred to in subparagraphs (b) and (c); or offering or giving to the public officer the employment mentioned in subparagraph (d); or urging the divulging or untimely release of the confidential information referred to in subparagraph (k) of this section shall, together with the offending public officer, be punished under Section nine of this Act and shall be permanently or temporarily disqualified in the discretion of the Court, from transacting business in any form with the Government.

Regional Trial Courts

Mr. Presbitero J. Velasco Jr.
Justice, Court Administrator
Supreme Court of the Philippines

In the Philippine Judiciary, there is a hierarchy of courts, from the level of the Municipal Trial Courts, Metropolitan Trial Courts, Municipal Circuit Trial Courts, and Municipal Trial Courts in Cities, to the level of the Regional Trial Courts, to the level of the Court of Appeals, and finally, reaching the level of the Supreme Court. We will focus on the second level courts, the Regional Trial Courts.

Jurisdiction

There are thirteen (13) Regional Trial Courts (RTC) composed of 950 branches created for all judicial regions corresponding to thirteen (13) administrative regions in the country. The jurisdiction of RTCs in civil, criminal and other cases is defined in the Judiciary Reorganization Act of 1980 or B.P. 129, as amended.

The Regional Trial Courts exercise exclusive original jurisdiction in the following civil cases[1]:

1. Actions in which the subject of litigation is incapable of pecuniary estimation;
2. Actions which involve the title to, or possession of, real property, or any interest therein, where the assessed value of the property involved exceeds twenty thousand pesos (P20,000.00), or for civil actions in Metro Manila, where such value exceeds fifty thousand pesos (P50,000.00), except actions for forcible entry and unlawful detainer;
3. Actions in admiralty and maritime jurisdiction where the demand or claim exceeds two hundred thousand pesos (P200,000.00) or, in Metro Manila, where such demand or claim exceeds four hundred thousand pesos (P400,000.00);
4. Matters of probate, both testate and intestate, where the gross value of the estate exceeds two hundred thousand pesos (P200,000.00) or, in probate matters in Metro Manila, where such gross value exceeds four hundred thousand pesos (P400,000.00);
5. Actions involving the contract of marriage and marital relations (now under the jurisdiction of the Family Court);
6. Cases not within the exclusive jurisdiction of any court, tribunal, person or body exercising judicial or quasi-judicial functions;
7. Civil actions and special proceedings falling within the exclusive original jurisdiction of the Juvenile and Domestic Relations Court (now Family Court) and the Court of Agrarian Relations as now provided by law; and

[1] Sec. 19 of Batas Blg. 129, otherwise known as the Judiciary Act of 1980, as amended by Rep. Act No. 7691.

8. Other cases in which the demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs, or the value of the property in controversy exceeds two hundred thousand pesos (P200,000.00) or, in such other cases in Metro Manila, where the demand, exclusive of the abovementioned items, exceeds four hundred thousand pesos (P400,000.00).

However, in cases where the claim for damages is the main cause of action, or one of the causes of action the amount of such claim shall be considered in determining the jurisdiction of the Court.[2]

The Regional Trial Courts exercise exclusive original jurisdiction in criminal cases not within the exclusive jurisdiction of any court, tribunal or body.[3] These include:

1. Offenses punishable by imprisonment exceeding six (6) years irrespective of the fine[4], except those falling within the exclusive original jurisdiction of the Sandiganbayan where the accused are occupying positions corresponding to salary grade "27" or higher;[5]
2. Criminal cases where the only penalty provided by law is a fine exceeding four thousand pesos (P4,000.00)[6], except offenses involving damage to property through negligence which are under the exclusive jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts irrespective of the amount of the imposable fine;[7]
3. Violations of the Dangerous Drugs Act of 1992, as amended;[8]
4. Intellectual property rights violations;[9]
5. Violations of the Omnibus Election Code, except those relating to the offense of failure to register or failure to vote;[10]
6. Libel cases;[11]
7. Cases of money laundering committed by private persons, except those in conspiracy with public officers which fall under the jurisdiction of the Sandiganbayan.[12]

The Regional Trial Courts have original concurrent jurisdiction with the Supreme Court and the Court of Appeals in the following cases:

1. Petitions for issuance of writs of certiorari, prohibition and mandamus against lower courts or bodies.[13]

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[2] Adm. Circular No. 09-94, June 14, 1994.
[3] Batas Blg. 129, Sec. 20.
[4] Rep. Act No. 7691.
[5] Pres. Decree No. 1606, as amended by Rep. Act No. 7975 and Rep. Act No. 8246.
[6] Adm. Circular No. 09-94, June 14, 1994.
[7] Batas Blg. 129, Sec. 32 (2), as amended by Sec. 2, Rep. Act No. 7691, Sec. 2.
[8] Rep. Act No. 6425, Sec. 39, as amended.
[9] Adm. Circular No. 113-95; Rep. Act No. 8293.
[10] Omnibus Election Code, Sec. 268.
[11] Adm. Circular No. 104-96, Oct. 21, 1996; Rev. Penal Code, Art. 360.
[12] Rep. Act No. 9160, Sec. 5.
[13] Batas Blg. 129, Sec.21.

2. Petitions for *quo warranto* and *habeas corpus*.[14]

The Regional Trial Courts exercise appellate jurisdiction over all cases decided by Metropolitan Trial Courts, Municipal Trial Courts, Municipal Trial Courts in Cities and Municipal Circuit Trial Courts, in their respective territorial jurisdictions.[15]

Special Courts

In the interest of a speedy and efficient administration of justice, the Supreme Court under section 23 of the Judiciary Reorganization Act of 1980 has designated certain branches of the Regional Trial Courts to handle exclusively criminal cases such as heinous crimes and drugs cases. There are also branches designated to try and decide cases formerly cognizable by the Securities and Exchange Commission, such as intra-corporate disputes. RTC branches have also been designated as special courts for intellectual property rights. Certain branches have also been designated as family courts. There are also special courts handling cases under the Comprehensive Agrarian Reform Law.

Heinous Crimes Cases

Under Adm. Order No. 104-96, as amended by Circular No. 31-97, some branches of the Regional Trial Courts are designated exclusively to try and decide cases of kidnapping, robbery in band, robbery committed against a banking or financial institution, violation of Anti-Carnapping Act of 1972, as amended , and other heinous crimes committed within their respective territorial jurisdictions.

Intellectual Property Rights Violations

Pursuant to Adm. Order No. 104-96, violations of intellectual property rights such as, but not limited to, violation of Art. 188 of the Revised Penal Code (substituting and altering trademarks, trade names, or service marks), Art. 189 of the Revised Penal Code (unfair competitions, fraudulent registration of trademarks, trade names, or service marks, fraudulent designation of origin and false description), Pres. Decree No. 49 (protection of intellectual property rights), Pres. Decree No. 87 An Act Creating the Videogram Regulatory Board), Rep. Act No. 165, as amended (The Trademark Law) shall be tried by the Regional Trial Courts in accordance with the established raffle scheme.

Administrative Order No. 104-96 provides for the procedure governing heinous crimes cases and intellectual property rights violations. These cases shall undergo mandatory continuous trial and shall be terminated within sixty days from commencement of the trial. Judgment thereon shall be rendered within thirty days from submission unless a shorter period is provided by law or otherwise directed by the Supreme Court. The Executive Judges of the RTCs concerned shall exclude these designated Special Courts from the raffle of other cases, criminal or civil, whenever in their judgment the caseload of these courts shall prevent them

[14] *Ibid.*
[15] 1987 Constitution, Art. VIII, Sec. 21. Batas Blg,. 129, Sec. 22.

from conducting daily trial of the special cases herein specified. No postponement or continuance shall be allowed except for clearly meritorious reasons. Pleadings or motions found to have been filed for dilatory purposes shall constitute direct contempt and shall be punished accordingly.

Dangerous Drugs Cases

Under A.M. No. 00-8-01-SC, certain branches of the Regional Trial Courts were designated as Special Courts to hear and decide all criminal cases in their respective jurisdictions involving violations of the Dangerous Drugs Act of 1972 (R.A. No. 6425), as amended, regardless of the quantity of drugs involved.

As to procedure, under A.M. No. 00-8-01-SC, the drugs cases referred to herein shall undergo mandatory continuous trial and shall be terminated within sixty days from commencement of the trial. Judgment thereon shall be rendered within thirty days from submission for decision unless a shorter period is provided by law or otherwise directed by the Supreme Court.[16] No postponements or continuance shall be allowed except for meritorious reasons, and pleadings or motions found to have been filed for dilatory purposes shall constitute direct contempt and shall be punished accordingly.[17] Furthermore, these designated special courts shall be excluded from the raffle of other cases subsequent to the assignment or transfer to them of drug cases.[18]

Family Court Cases

Republic Act No. 8369, otherwise known as the Family Courts Act of 1997, provides that the Family Courts shall have original jurisdiction to hear and decide the following cases, regardless of the penalty imposable by law:

1. Criminal cases where one or more of the accused is below eighteen (18) years of age but not less than nine (9) years of age, or one or more of the victims is a minor at the time of the commission of the offense;
2. Petitions for guardianship, custody of children, habeas corpus in relation to the latter;
3. Petitions for adoption of children and the revocation thereof;
4. Complaints for annulment of marriage, declaration of nullity of marriage and those relating to marital status and property relations of husband and wife or those living together under different status and agreements, and petitions for dissolution of conjugal partnership of gains;
5. Petition for support and/or acknowledgement;

[16] A.M. No. 00-8-01-SC, (5).
[17] *Ibid.* (6).
[18] *Ibid.* (7).

6. Summary judicial proceedings brought under the provisions of Executive Order N. 209, otherwise known as the "Family Code of the Philippines";
7. Petitions for declaration of status of children as abandoned, dependent or neglected children, petitions for voluntary or involuntary commitment of children; the suspension, termination, or restoration of parental authority and other cases cognizable under Pres. Decree No. 603, Executive Order No. 56 (series of 1986) and other related laws;
8. Petitions for the constitution of the family home;
9. Cases against minors cognizable under the Dangerous Drugs Act, as amended;
10. Violations of Republic Act No. 7610, otherwise known as the 'Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act,' as amended by Republic Act No. 7658."; and
11. Cases of domestic violence against women and children.

The law establishing the Family Courts provides that, "The Supreme Court shall promulgate special rules of procedure for the transfer of cases to the new courts during the transition period and for the disposition of family cases with the best interests of the child and the protection of the family as primary consideration taking into account the United Nations Convention on the Rights of the Child.[19]

SEC-related Cases

In A.M. No. 00-11-13-SC, the Supreme Court issued *En Banc* Resolution dated November 21, 2000 designating certain branches of the Regional Trial Courts to try and decide cases formerly cognizable by the Securities and Exchange Commission enumerated in Sec. 5 of Pres. Decree No. 902-A arising within their territorial jurisdictions with respect to the National Capital Judicial Region in the First to Twelfth Judicial Regions. Section 5.2 of the Securities Regulation Code (Republic Act No. 8799) transfers to the appropriate Regional Trial Court the original jurisdiction over the following cases such as controversies in

1. Devices or schemes employed by, or any act of, the board of directors, business associates, officers or partners, amounting to fraud or misrepresentation which may be detrimental to the interest of the public and/or of the stockholders, partners, or members of any corporation, partnership, or association;
2. Controversies arising out of intra-corporate, partnership, or association relations, between and among stockholders, members, or associates; and between, any or all of them and the corporation, partnership, or association of which they are stockholders, members, or associates, respectively;
3. Derivative suits; and
4. Inspection of corporate books.

[19] Rep. Act No. 8369, Sec. 13.

These cases shall be commenced and tried in the Regional Trial Court which has jurisdiction over the principal office of the corporation, partnership, or association concerned. Where the principal office of the corporation, partnership or association is registered in the Securities and Exchange Commission as Metro Manila, the action must be filed in the city or municipality where the head office is located.

Also, pursuant to R.A. 8799 or the Securities Regulation Code, cases for rehabilitation are transferred from the Securities and Exchange Commission to the Regional Trial Courts.

Agrarian Cases

Adm. Order No. 80A-90, amending Adm. Order No. 80, dated July 18, 1989, designated certain branches of the Regional Trial Courts as Special Agrarian Courts which shall have original and exclusive jurisdiction over all petitions for the determination of just compensation to land-owners and prosecution of all criminal offenses under the Comprehensive Agrarian Reform Program or R.A. 6657.

Procedure

In order to get a better understanding of the Philippine judicial process, here now is a simplified breakdown of the basic procedure for civil and criminal actions:

A civil action is commenced by the filing of the original complaint in court.[20]

The complaint is the pleading alleging the plaintiff's cause of action.[21] An answer is a pleading in which a defending party sets forth his defenses.[22] However, within the time for but before filing the answer to the complaint or pleading asserting a claim, the defendant may file a motion to dismiss.[23]

After the last pleading has been served and filed, it shall be the duty of the plaintiff to promptly move *ex-parte* that the case be set for pre-trial.[24]

The pre-trial is mandatory, it is where the court shall consider:

1. the possibility of an amicable settlement or of a submission to alternative modes of dispute resolution;
2. the simplification of the issues;
3. the necessity or desirability of amendments to the pleadings;
4. the possibility of obtaining stipulations or admissions of facts of documents to avoid unnecessary proof;
5. the limitation of the number of witnesses;

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[20] Rule 1, Sec. 5, 1997 Rules of Civil Procedure.
[21] Rule 6, Sec. 3, 1997 Rules of Civil Procedure.
[22] Rule 6, Sec. 4, 1997 Rules of Civil Procedure.
[23] Rule 16, Sec. 1, 1997 Rules of Civil Procedure.
[24] Rule 18, Sec. 1, 1997 Rules of Civil Procedure.

6. the advisability of a preliminary reference of issues to a commissioner;
7. the propriety of rendering judgment on the pleadings, or summary judgment, or of dismissing the action should a valid ground therefore be found to exist;
8. the advisability or necessity of suspending the proceedings; and
9. such other matters as may aid in the prompt disposition of the action.[25]

Should the action proceed to trial, the pre-trial order shall control the subsequent course of the action, unless modified before trial to prevent manifest injustice.[26]

After trial, a judgment or final order shall be issued. A judgment or final order determining the merits of the case shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of court.[27] If no appeal or motion for new trial or reconsideration is filed within the time provided in these Rules, the judgment or final order shall forthwith be entered by the clerk in the book of entries or judgments. The date of finality of the judgment or final order shall be deemed to be the date of its entry.[28]

As for criminal actions, they shall be instituted as follows:

1. For offenses where a preliminary investigation is required pursuant to section 1 of Rule 112, by filing the complaint with the proper officer for the purpose of conducting the requisite preliminary investigation.
2. For all other offenses, by filing the complaint or information directly with the Municipal Trial Courts and Municipal Circuit Trial Courts, or the complaint with the office of the prosecutor. In Manila and other chartered cities, the complaint shall be filed with the office of the prosecutor unless otherwise provided in their charters.[29]

A complaint is a sworn written statement charging a person with an offense, subscribed by the offended party, any peace officer or other public officer charged with the enforcement of the law violated.[30] Information is an accusation in writing charging a person with an offense, subscribed by the prosecutor and filed with the court.[31]

A preliminary investigation is an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well-founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial.[32]

If the case is filed in court, at any time before entering his plea, the accused may move to quash the complaint or information.[33] Otherwise, the accused will be arraigned before the

[25] Rule 18, Sec. 2, 1997 Rules of Civil Procedure.
[26] Rule 18, Sec. 7, 1997 Rules of Civil Procedure.
[27] Rule 36, Sec. 1, 1997 Rules of Civil Procedure.
[28] Rule 36, Sec. 2, 1997 Rules of Civil Procedure.
[29] Rule 110, Sec. 1, Revised Rules of Criminal Procedure.
[30] Rule 110, Sec. 3, Revised Rules of Criminal Procedure.
[31] Rule 110, Sec. 4, Revised Rules of Criminal Procedure.
[32] Rule 112, Sec. 1, Revised Rules of Criminal Procedure.
[33] Rule 117, Sec. 1, Revised Rules of Criminal Procedure.

court where the complaint or information has been filed or assigned for trial. The arraignment shall be made in open court by the judge or clerk by furnishing the accused with a copy of the complaint or information reading the same in the language or dialect known to him, and asking him whether he pleads guilty or not guilty.[34] The accused must be present at the arraignment and must personally enter his plea.[35] After arraignment, the case proceeds to pre-trial where the following shall be considered:

1. plea bargaining;
2. stipulation of facts;
3. marking of identification of evidence of parties;
4. waiver of objections to inadmissibility of evidence; and
5. such other matters as will promote a fair and expeditious trial of the criminal and civil aspects of the case.[36]

After pre-trial, the case proceeds to trial, and after trial, to judgment. Judgment is the adjudication by the court that the accused is guilty or not guilty of the offense charged and the imposition on him of the proper penalty and civil liability, if any. It must be written in the official language, personally and directly prepared by the judge and signed by him and shall contain clearly and distinctly a statement of the facts and the law upon which it is based.[37]

Appeals

The process does not end with the rendering of judgment by the trial court, as there is still the remedy of appeal available, provided the same is made within the time prescribed.

The Regional Trial Courts exercise appellate jurisdiction over all cases decided by Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts.[38] The appeal of a decision of the Regional Trial Court to the Court of Appeals in the exercise of its original jurisdiction shall be taken by filing a notice of appeal which rendered the judgment or final order appealed from and serving a copy thereof upon the adverse party.[39] The appeal to the Court of Appeals in cases decided by the Regional Trial Court in the exercise of its appellate jurisdiction shall be by petition for review in accordance with Rule 42.[40] In all cases where only questions of law are raised or involved, the appeal shall be to the Supreme Court by petition for review on certiorari.[41] In all criminal cases in which the penalty imposed is *reclusion perpetua* or higher, the Supreme Court has the power to review, revise, reverse, modify, or affirm on appeal or *certiorari*, final judgments and orders of lower courts.[42]

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[34] Rule 116, Sec. 1 (a), Revised Rules of Criminal Procedure.
[35] Rule 116, Sec. 1 (b), Revised Rules of Criminal Procedure.
[36] Rule 118, Sec. 1, Revised Rules of Criminal Procedure.
[37] Rule 120, Sec. 1, Revised Rules of Criminal Procedure.
[38] Batas Blg. 129, Sec. 22.
[39] Rule 41, Sec. 2(a), 1997 Rules of Civil Procedure.
[40] Rule 41, Sec. 2(b), 1997 Rules of Civil Procedure.
[41] Rule 41, Sec. 2(c), 1997 Rules of Civil Procedure.
[42] 1987 Constitutions, Art. VIII, Sec. 5 (2)(d).

Measures to expedite dispositions of cases

The second level courts in the Philippines, the Regional Trial Courts, are the workhorses of the Judiciary, considering the scope of their jurisdiction and the caseload they must handle. As of last year, the pending cases at the Regional Trial Court level numbered 280,232, outnumbering the cases being handled by the other courts.

Despite the seemingly overwhelming number of pending cases, several measures and steps have been taken to reduce this number and to expedite their resolution.

Modes of Discovery

In order to speed up trial, there are modes of discovery in the Rules of Court which the lawyers can avail of to facilitate case trial and expedite the disposition of cases. The modes of discovery are:

1. Depositions pending action;[43]
2. Depositions before action or pending appeal;[44]
3. Interrogatories to parties;[45]
4. Admission by Adverse Party;[46]
5. Production and Inspection of Documents or Things;[47] and
6. Physical and Mental Examination of Persons.[48]

The Rules of Court also provide for sanctions in case of failure or refusal to comply with the modes of discovery, compelling litigants to resort to these modes or else lose the chance to present certain evidence. Resort to these modes of discovery will reduce the time spent in trial adducing evidence, and clarifying matters as well.

Court Referred Mediation

Mediation is a process of resolving disputes with the aid of a neutral person who helps parties identify issues and develop proposals to resolve their disputes. It is a process where the parties to a pending case are directed by the court to submit their dispute to a neutral third party (the Mediator) who works with them to reach a settlement of their controversy. The Mediator acts as a facilitator for the parties to arrive at a mutually acceptable arrangement, which will be the basis for the court to render judgment based on a compromise.

The Supreme Court designated the Philippine Judicial Academy (PHILJA) as its component unit for court-referred, court-related mediation cases and other forms of Alternative Dispute Resolution mechanisms and established the Philippine Mediation Center.[49] PHILJA directs and manages the Philippine Mediation Center (PMC) which establishes PMCs in courthouses and train mediators, judges and court personnel.

[43] Rule 23, 1997 Rules of Civil Procedure.
[44] Rule 24, 1997 Rules of Civil Procedure.
[45] Rule 25, 1997 Rules of Civil Procedure.
[46] Rule 26, 1997 Rules of Civil Procedure.
[47] Rule 27, 1997 Rules of Civil Procedure.
[48] Rule 28, 1997 Rules of Civil Procedure.
[49] Adm. Matter No. 01-10-5-SC-PHILJA.

The following cases are referable to mediation:

1. All civil cases, settlement of estates, and cases covered by the Rule on Summary Procedure, except those which by law cannot be compromised;
2. Cases cognizable by the Lupong Tagapamayapa under the Katarungang Pambarangay Law;
3. The civil aspect of BP 22 cases; and
4. The civil aspect of quasi-offenses under Title 14 of the Revised Penal Code.[50]

During the pre-trial stage, the trial court, after determining the possibility of an amicable settlement or of a submission to alternative modes of dispute resolution, shall issue an Order referring the case to the Philippine Mediation Center (PMC) unit for mediation and directing the parties to proceed immediately to the PMC Unit.[51] There shall be a PMC Unit in courthouses or near the premises of the trial court for court-referred mediation proceedings.[52]

The Supervisor of the PMC Unit shall assist the parties in selecting a mutually acceptable Mediator from a list of duly accredited Mediators and inform the parties about the fees, if any, and the mode of payment. If the parties cannot agree on a Mediator, then the Supervisor shall assign the Mediator. Lawyers may attend the mediation proceedings and shall cooperate with the Mediator towards the amicable settlement of the dispute.[53]

To encourage the spontaneity that is conducive to effective communication, thereby enhancing the possibility of successful mediation efforts, the mediation proceedings and all incidents thereto shall be kept strictly confidential, unless otherwise specifically provided by law, and all admissions or statements made therein shall be inadmissible for any purpose in any proceeding.[54] The period during which the case is undergoing mediation shall be excluded from the regular and mandatory periods for trial and rendition of judgment in ordinary cases and in cases under summary procedure. The period for mediation shall not exceed thirty days, extendible for another thirty days, in order to allow the parties' sufficient time to reach a compromise agreement and put an end to litigation.[55]

In the pilot project on mediation conducted by PHILJA, 85% of cases referred for mediation reached settlement, showing that many cases need not undergo full-blown trial.

Some advantages of mediation are:

1. Speed - Many cases reached settlement in 1-2 sessions, saving time and effort that would have been expended on litigation.
2. Cost-saving – Unlike rigorous court proceedings, mediation is quicker and thus devoid of many of the expenses of litigation.

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[50] Second Revised Guidelines on Mediation, A.M. No. 01-10-5-SC-PHILJA.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

3. Durable – Surveys conducted after mediation sessions revealed a high level of satisfaction among disputing parties, with a great deal of compliance with the agreements reached in mediation.

Mediation also helps restore relationships as it addresses deep-rooted sources of misunderstanding.

Speedy Trial Act of 1998

On February 12, 1998, Republic Act No. 8493, or "The Speedy Trial Act of 1998" was passed, to expedite the trial of criminal cases. The law made pre-trial mandatory[56], and also provided that all agreements or admissions made or entered into during the pre-trial conference shall be reduced to writing and signed by the accused and counsel, otherwise the same shall not be used in evidence against the accused.[57] After the pre-trial conference, the court shall issue an order reciting the actions taken, the facts stipulated, and evidence marked. Such order shall bind the parties, limit the trial to matters not disposed of and control the course of action during the trial, unless modified by the court to prevent manifest injustice.[58] The law also provides a time limit for the trial, and a time limit as well between the filing of the information and arraignment, and a time limit between arraignment and trial. If an accused is not brought to trial within the time limit as provided by the law, the information shall be dismissed on motion of the accused.[59] Sanctions are also imposed for delay in the trial by counsel for the accused, the public prosecution or public attorney.[60]

Memorandum on Policy Guidelines between OCA and IBP

As it has been shown that the filing of frivolous pleadings causes inordinate delays in the trial and disposition of cases and the congestion of court dockets, the OCA and the Integrated Bar of the Philippines (IBP) entered into a Memorandum on Policy Guidelines as part of an effort to promote the efficient administration of justice, under which the OCA and IBP agreed to endeavor to have the members of bench and the bar assist in the improvement of court proceedings. The IBP agreed that its members would undertake the following:

1. To make use of available Alternative Dispute Resolution (ADR) methods prior to resort to courts.
2. To encourage parties to include in their contracts a stipulation on compulsory resort to arbitration in any dispute arising there from;
3. To make full use of pre-trial and avail of court referred mediation in appropriate cases, in order to obviate prolonged trial;
4. To resort to the modes of discovery under Rules 23 to 29 of the 1997 Rules of Civil Procedure;

[56] Rep. Act No. 8493, Sec.2.
[57] Rep. Act No. 8493, Sec. 3.
[58] Rep. Act No. 8493, Sec. 5.
[59] Rep. Act No. 8493, Sec. 13.
[60] Rep. Act No. 8493, Sec. 14.

5. To agree to the delegation of the reception of evidence to the clerk of court under Section 9, Rule 30 of the 1997 Rules of Civil Procedure;
6. To refer an issue of fact to commissioners in accordance with Rule 32 of the 1997 Rules of Civil Procedure;
7. To agree to the use of affidavits of witnesses in the direct examination in appropriate cases subject to the right of the opposing counsel to object to inadmissible evidence and the right to cross-examination;
8. To utilize Sections 14 and 15 of Rule 119 to ensure the appearance or examination of material witnesses for the prosecution in criminal cases;
9. To observe restraint in filing motions to dismiss but instead allege the grounds thereof in the answer as defenses;
10. To discourage the filing of motions for postponements, extensions of tie to file pleadings, suspensions of proceedings and like motions; and
11. To submit well-prepared memoranda and well-researched memoranda to assist the judge in rendering decisions.[61]

This undertaking by the IBP members would greatly reduce the case congestion in the courts, by preventing cases from reaching trial stage and instead being settled out of court, through ADR methods. There is also the compulsory resort to arbitration that would be another means of avoiding full-blown trial. Many cases would not even go to full-blown trial, if only they could be settled, and settling these cases would greatly reduce the case congestion that plagues the courts. Lawyers would not only encourage their clients to seek settlement without going to court, thus freeing up much of the court's time, but would also seek to prevent delays in the trial of cases, by resorting to the modes of discovery instead of a drawn out trial to adduce evidence, as well as avoiding filing dilatory motions. Lawyers should fulfill their duties as officers of the court, to see to it that there is an efficient administration of justice. These steps taken by lawyers will assist the courts in the clearing of dockets and in the solution of a heavy burden on this pillar of justice.

Court and Case Management

But the responsibility for more effective and efficient administration of justice does not only fall upon the shoulders of lawyers. It is rightly the duty and task of the judiciary itself to see to it that the courts run smoothly and that the dockets are decongested.

The courts are closely monitored by the Office of the Court Administrator, through the Court Management Office (CMO). There is a constant stream of reports on the progress of cases, and the data is collated and analyzed by the Statistics Division of the CMO. But it is not only through reports sent through the mail that tabs are kept on the trial courts. There are also judicial audits conducted to verify the data in the reports.

Judges are also recipients of training and participants in seminars to improve efficiency. One strategy implemented is Total Quality Management (TQM), with the goal of

[61] Memorandum on Policy Guidelines, March 12, 2002.

providing quality service to court users. Total quality management is a management strategy that enlists the participation of all members of an organization in meeting and exceeding the expectations of their clients or customers by integrating quality into every process that is performed, product produced or service delivered by their enterprise.

A court is an organized whole or an assembly of interdependent parts so that a change in one part affects the whole system. Its administrative functions and processes are so closely linked with each other such that the proper discharge of one depends on the proper discharge of others. TQM finds applicability in a court system since processing court cases involves a series of administrative steps performed by various court employees from the commencement of an action to its final disposition.

The three determinants for setting an ideal climate for implementing TQM are communications, participatory decision-making in the management process, and humane treatment of employees. These mean that communication lines between the judge and staff must always be open. Court employees must be allowed to participate in deciding administrative issues since it is they who will implement the action to be taken. Any decision made should be the consensus of all team members. Each member must be treated with respect and should feel as an indispensable part of the team.

With the idea of improving the quality of service, there should be TQM staff meetings on a regular basis to evaluate and assess individual and collective performance, as infusing quality into court services must be a continuing process. Court personnel should be able to assess his/her specific functions as well as how these functions fit into the larger picture, and how the needs of the court users are met by their work assignments. In TQM, it is not only enough to recognize the current state of affairs, but it is also aimed at improving the service, and recognizing what the users of the courts need and expect.

Apart from all this, judges and court personnel should practice and implement effective case management. Case management in trial courts is a process whereby judicial control over the cases is assumed and exercised, with maximum efficiency consistent with justice, from the moment of filing to disposition for purposes of reducing litigation costs and eliminating delay.[62] The objectives of case management are: equal treatment of all litigants by the court; timely disposition of cases; enhancement of the quality of litigation; and promotion and preservation of public confidence in the courts.

Case management is the sole and primary responsibility of a judge and court personnel. Judges must be actively involved early in the proceedings, i.e. from the time the case is filed. Firm judicial control must be maintained throughout the life of each case, not leaving it to the counsels of the parties to use delaying tactics or maneuvers. The vents or stages of a case must be scheduled at the earliest possible time and the time between these events should be as short as reasonably possible. Judges must create expectations that trials and other case events will occur as scheduled, limiting the postponements and delays in the case. Judges must

[62] James G. Apple, Case Management in American Courts, The Litigator (1195, 373-376), Issues of Democracy, USIA Electronic Journal, Vol. 1, No. 18, December, 1996.

establish an adequate information system for each case through an accurate caseload inventory report that shall include, among other data, the age and status of cases, to properly monitor and manage their caseloads. They must maintain an awareness of the cases in their courts, as well as the deadlines of the same, and keep tabs of the cases they handle, not leaving that responsibility to their clerks and court personnel.

There should be a tracking system in place, with a case flow chart that identifies key events in the life of a case, and the maximum time prescribed by law or procedural rule between the events. Attached for reference and to illustrate is a sample chart for a fast track system. It should also be ensured that the time limits are strictly observed, and this too should be coordinated. Also, unnecessary case events which will delay the disposition of the case should be eliminated, while adding events which will hasten the timely disposition of the case.

It falls to the courts to keep control of the cases, and while enlisting the aid and support of the counsel will help ease case congestion, it is ultimately the responsibility of the courts to ensure the effective and efficient administration of justice. In the Philippines, case decongestion is a great concern of the courts, considering not only the number of cases but the lack of judges to handle these cases, but several measures are already being implemented to address this problem. It requires the discipline and dedication of the courts as well as the assistance and understanding of the court users, but the problem is not insurmountable, and can be solved.

Philippine First Level Courts and Directions for Reforms

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INTRODUCTION

First level courts occupy the lowest level in the hierarchical structure of regular courts in the Philippines, but they perform an extremely significant role in the administration and delivery of justice in the country. For they are, in effect, the frontliners of the Philippine judicial system. By the very nature of their jurisdiction, it is with them that a great number of the populace establish their first and perhaps only contact with the judiciary. This is perhaps the reason why the manner by which judges of these courts perform or discharge their official duties is generally the image the public has of the entire Philippine judiciary.

I. STRUCTURE :

The law creating the Philippine first level courts is the Judiciary Act of the Philippines which became effective on 17 June 1948. There were only two (2) categories of courts of this level: the municipal courts and the city courts.

The Judiciary Act was amended in 1980 by Batas Pambansa Blg.129 which reorganized the Philippine judiciary by creating more courts and re-defining their respective jurisdictions.

At present, our first level courts numbering 1,175 consist of the following categories:

1. Metropolitan Trial Courts (METC) of which there are 82, found in the City of Manila and its outlying cities and municipalities described geographically as the National Capital Judicial Region (NCJR);
2. Municipal Trial Courts in Cities (MTCC) of which there are 153, found in cities outside of the NCJR;
3. Municipal Trial Courts (MTC) of which there are 414, organized in municipalities all over the Philippines;
4. Municipal Circuit Trial Courts (MCTC) of which there are 475, found in smaller municipalities (a circuit judge may be assigned to handle two (2) or more municipalities within his circuit); and
5. Shari'a Circuit Courts of which there are 51. These courts implement and hear cases covered by the Moslem Code of Personal Laws.

II. JURISDICTION

On 25 March 1994, Republic Act No. 7691 was approved by the Philippine Congress. Taking effect on 15 April 1994, it redefined the jurisdiction over cases of the first level courts (except that of the Shari'a Circuit Courts the jurisdiction of which is found in the Moslem Code of Personal Laws) as follows:

Criminal Cases:

1. All violations of city or municipal ordinances committed within their respective territorial jurisdiction;
2. All offenses punishable with imprisonment of not exceeding 6 years regardless of the amount of fine;
3. All offenses involving damage to property through criminal negligence.

Civil Cases:

1. Civil actions and probate proceedings if value of personal property does not exceed -
   P-200,000.00 (in Metro Manila, -P-400,000.00);
2. Ejectment cases (Forcible entry and unlawful detainer);
3. Civil actions involving title to or possession of real property the assessed value of which does not exceed –P-20,000 (in Metro Manila, -P-50,000.00);
4. Delegated jurisdiction in cadastral or land cases where there is no controversy or opposition, or involving contested lots valued at not more than –P-100,000.00.

In 1997, the Family Courts Act took effect and modified the jurisdiction of first level courts by effectively transferring the jurisdiction it had over all cases involving offenses (including violations of the Dangerous Drugs Act) committed by minors, i.e., persons below 18 years of age at the time of commission of the offense, or violations of Republic Act No. 7610 (Special Protection of Children against Child Abuse, Exploitation and Discrimination Act) to the second level courts or regional trial courts.

The jurisdiction of Shari'a Circuit Courts on the other hand consists of the following:

1. Offenses punished by the Moslem Code; and
2. Civil actions between Muslims relating to marriage, divorce, betrothal or breach of contract to marry; customary dowry; support, marital rights, and communal property.

Informatively, before a case is filed with a Shari'a court, it has to undergo conciliation by a body called the Agama Council composed of respected members of the Moslem community and headed by the court clerk of the Shari'a Court.

III. DIRECTIONS FOR REFORM

Target areas for reform in first level courts in the Philippines involve the following major problems:

1. Lack of qualified applicants for vacancies in the position of judges, which as of January 2002 numbered 540 (roughly 46% of the total number of first level courts);
2. A heavy caseload which as of January 2002, consisted of a total of 516, 325 pending cases; the METCs had the highest – 200,351;
3. Lack of qualified court personnel and other support persons and agencies;
4. Existing working conditions need to be improved to ensure the efficient, effective and swift delivery of justice;
5. The expanded jurisdiction of first level courts necessitates the creation of more of these courts to cope with the increasing number of cases filed;

Barangay Justice System and Other Alternative Dispute Resolution Mechanics (Mediation) in the Philippines

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I

The Philippine boast itself with having a rich cultural background and tradition which includes the concept of governance and settlement of disputes among the people at the village or barangay level.

The basic unit of Philippine society is the family and a combination of families in a given territory may constitute a village, commonly known as the barangay – the lowest level of the Philippine local government structure.

Prominent in the governance of the barangay is the role of the Barangay Justice system, in involving members of the community in the settlement of disputes through non-judicial modes or processes.

Even before the Barangay Justice System came into being, time-honored traditions advanced by ancient Filipinos and integrated as part of Filipino culture and traditions, based on Kinship, Utang na Loob (debt of GRAITUTE), Padrino (GODFATHER), Pakikisama (COMRADESHIP) and Community Mores, define how justice is to be served. Some Alternative Dispute Resolution (ADR) mechanisms are unwritten based on one's honor and are effective among the cultural minorities.

The Katarungan Pambarangay law (Barangay justice System) has been in place in the Philippine System of local governance since the promulgation of Presidential Decree (PD) No. 1508 in 1978 and subsequently amended and strengthened with the passage of Republic Act Organizing at the village of barangay level all over the country, the Katarungang pambarangay is the only system formally accepted and practiced in about 41,943 villages or barangay in the Philippines.

STRUCTURE OF THE BARANGAY JUSTICE SYSTEM

Heading the system is the "Punong Barangay" (Village Chief or Barangay Chairman). He is an elected official. He also acts as the Chief Executive and Presiding Officer of the Village Legislative Council

In discharging his duties under the Barangay Justice System, the Punong Barangay is assisted by the Lupong Tagapamayapa (Peace Seeking Committee).

The LUPONG TAGAPAMAYAPA

The Lupong Tagapamayapa (Peace Seeking Committee) is composed of 10-20 persons, who are appointed by the Punong Barangay.

The punong Barangay is the Chairman.

It is from the Lupon membership that a conciliators panel (Pangkat Ng Tagapagsunod) composed of 3 members is chosen by agreement of the disputants or, if no such agreement is reached, then to be drawn by lot the Punong Barangay.

QUALIFICATION OF THE MEMBERS OF THE LUPONG TAGAPAMAYAPA

1. Resident of the barangay, or working in the village
2. Known integrity
3. Competence
4. Known for impartiality
5. Independence of mind

A distinct characteristic of the system is its informality, and LAWYERS are banned in the entirety of the process**.**

JURISDICTION OF THE BARANGAY JUSTICE SYSTEM

Under Section 2, Rule VI of the Katarungan Pambarangay Implementing Rules approved on October 10, 1991**, ALL DISPUTES** maybe the subject of proceedings for amicable settlement; Except:

1. Where one party is the government or any subdivisions or instrumentality thereof;
2. Where one party is a public officer of employee and the dispute relates to the performance of his/her duties;
3. Offenses punishable by imprisonment exceeding one (1) year or fine exceeding P5,000.00 or P12,500.00
4. Offenses where there is no private offended party.
5. Where the dispute involves real properties located in different cities or municipalities unless the parties thereto agree to submit their differences to amicable settlement by an appropriate Lupon;
6. Disputes involving parties who actually reside in barangay of different cities or municipalities except where such barangay units adjoin each other and the parties

thereto agree to submit their differences to amicable settlement by an appropriate Lupon.

7. All Agrarian disputes under Republic Act No. 6657, otherwise known as the Comprehensive Agrarian Reform Law.

WHO MAY BE PARTIES

Under Section 1, ule VI of the Implementing Rules, only individuals shall be parties to these proceedings either as **complainant or respondents.**

No complaint by or against corporations, partnership or other judicial entities shall be filed, received or acted upon.

PROCEDURE FOLLOWED UNDER THE BARANGAY JUSTICE SYSTEM

The proceeding under the system is informal.

However, even if the process is characterized by informality and the same is summary, due process and the rudiments of fair play must be observed.

1. Upon the filing of a complaint with the Lupon, the Barangay Chairman immediately calls the parties and the witnesses to a meeting.
2. The Chairman acts as a neutral person who mediates on the conflicting interest of the parties and convinces them to settle.
3. If amicable settlement fails within 15 days from the 1st meeting, the chairman shall constitute a conciliation panel known as **PANGKAT TAGAPAGSUNOD** composed of 3 members chosen by the parties from a list of the members of the Lupon.
4. Then, the Pangkat shall hear the parties and witnesses, simplifying the issues and explore all possibilities of amicable settlement.
5. If the Pangkat fails to effect an amicable settlement within 15 days from the day it convened, then, a certificate is issued by the Lupon or Pangkat Secretary to the effect that no settlement has been reached.
6. Accordingly, a certification to **FILE ACTION** may now be issued by the Lupon.
7. It is only then, and with this certification that the parties may go to court for adjudication.

SANCTIONS FOR FAILURE OF THE PARTIES TO APPEAR

Complainant –

1. If complainant, after due notice, willfully fails or refuses to appear without justifiable reason, on the date set for mediation, conciliation or arbitration, the complaint may dismissed.
2. Such dismissal, after the party is given the opportunity to explain his non-appearance, shall bar, the complainant from seeking judicial recourse for the same cause of action as that dismissed.

Respondent –

1. If respondent, despite notice, fails to appear without proper and, satisfactory explanation having been made for his non-appearance, may counter-claim he may have interposed arising from or necessarily connected with the complaint, maybe dismissed.
2. Such dismissal bars the respondent from filing such counterclaim in court or with any proper government agency or office for adjudication.
3. In all cases where the respondent fails to appear at the mediation proceeding called by the Punong Barangay to constitute the pangkat.

   If the respondent still fails or refuses to appear without any justifiable reason, such failure/refusal to appear is sufficient basis for the issuance of a certification to file action.

4. Or, in addition, if such failure is unjustified, it may subject the recalcitrant party/witness to punishment for contempt of court, upon application with the trial court by, either:

   a. Lupon Chairman
   b. Pangkat Chairman
   c. Any of the contending parties.

HOW EFFECTIVE IS THE BARANGAY JUSTICE SYSTEM?

A Supreme Court – UNDP Issue Paper on Local Autonomy and Administration of Justice conducted by the Ateneo School of Government, indicates that in 1988 alone, a total of **279,115** barangay disputes were recorded nationally. Out of this total, **236,452** cases were settled, or a fantastic 84% solution factor.

The Figure is indicative of a substantial number of potential cases that never reached the court because of the effective intervention of a settlement mechanism under the Barangay Justice System.

In time, the available data clearly shows that when the system is utilized to its maximum potentials, the process of amicable settlement at the barangay level can be empowering for the community members.

This is so-because the system fosters harmony peace and tranquility at the lever of the most basic structure of local government, conducive to the progress of communities.

CHALLENGES TO THE SYSTEM

However, some existing challenges confronting the Barangay Justice System maybe worth looking into for the purpose, perhaps, of policy reforms.

Viewed from another point of view, there are recurring doubts being entertained on the efficiency and effectiveness of the Barangay Justice System.

Such doubts may appear validated when one realizes that even if more than twenty (20) years have passed since the implementation of the Katarungang Pambarangay law (PD No. 1508, as amended by Republic Act No. 7160), our **courts are still congested**.

A survey of such challenges somehow partly reveals the following:

1. There is a need for community members to better familiarize themselves with the operation of the Barangay Justice System.
   More public campaigns on the processes of the system may worth pursuing.

2. There exist lack of sufficient knowledge and information about the guidelines on how the Revised Katarungang Pambarangay shall be implemented

   Reasons given are:
   a. Lack of trust
   b. Inefficient and ineffective local officials to enforce the law
   c. Lack of dissemination on the working of the system

3. Exposed in a book on the Philippine Justice System written recently by Mr. John Willem, a baker, is the decreasing credibility of barangays as a political unit, more especially in urban areas.

   In rural areas, however, the author observes that Barangay Captains still have the respect in the community.

In contrast, in urban areas, even judges and the ordinary people hardly know who their Barangay Captain is.

Mr. Baker thinks that this may have an effect on why the backlog of cases is more serious in urban areas.

4. Inherent weaknesses of the Lupon and Pangkat have been observed.
    a. There is an imperative need to require the Lupon and Pangkat members to undergo a regular Continuing Education program on Mediation, Conciliation and Arbitration.
    b. Value re-orientation and ethical standards among the members of the Lupon and Pangkat must be enhanced to maintain the standards of integrity and impartiality.

OBJECTIVES OF THE BARANGAY JUSTICE SYSTEM

The overriding objective in promulgating and implementing the system is to decongest caseloads of the court by proving disputants an avenue to settle disputes out of court with the aid of mediation, conciliation and arbitration by respected elders of the village.

MEDIATION IN THE PHILIPPINES IN COURT-REFERRED, COURT-RELATED CASES

Apart from the Barangay Justice System just discussed, the Philippines has other Alternative Dispute Resolution (ADR) Mechanisms available.

One of the innovative approaches recently introduced by the Supreme Court is **Mediation** in court-referred mediation cases.

With the trial facing a huge backlog of cases, the Philippine Judicial Academy (PHILJA) in line with the Action program for Judicial Reforms (APJR) proposed MEDIATION as an effective measure to decongest trial courts of pending cases.

CONCEPT OF MEDIATION –

"Mediation is a process of resolving disputes with the aid of neutral person – **the MEDIATOR** – who helps parties identify issues and develop proposals to resolve their disputes ."

Unlike arbitration, the mediator is not empowered to decide disputes.

Inspired by the results of the pilot projects on court-referred, court-related mediation experimented in selected areas in Metro Manila, Cebu and Davao (1999 – 2001), the Supreme

Court promulgated on October 16, 2001 in Administrative Matter No. 01-10-5-SC-PHILJA, various documents and guidelines on mediation, such as:

- ► Administrative Order on Mediation
- ► Second Revised Guidelines on Mediation
- ► Code of Ethical Standardization for Mediators
- ► Procedures for the Accreditation of Mediators

SIGNIFICANT FEATURES CONTAINED IN VARIOUS DOCUMENTS ON MEDIATION

1. The designation of the Philippine Judicial Academy (PHILJA) as the component unit of the Supreme Court for court-referred, court-related mediation cases and other Alternative Dispute Resolution (ADR) Mechanisms.
2. The establishment of the Philippine Mediation Center, mandated in coordination with the office of the Court Administrator (OCA) to establish units of the Philippine Mediation (PMC Units) in courthouses and in such other places as maybe necessary.

The PMC Unit is manned by the Supervisor and mediators and a Clerk-in-charge designated by the Executive judge.

The unit renders mediation services in the area.

RE-PMC UNITS

So far, PHILJA has already established 16 PMC units in Metro Manila, 3 in Cebu and 4 in Davao

1. The institutionalization of mediation in the Philippines.
2. Professionalization of Mediators

   a. Requirements of PHILJA for mediators to undergo rigid training and screening and continuing education and refresher courses, before and after accreditation by the Supreme Court.
   b. Observance and adherence by mediators to the court-approved Code of Ethical Standards for mediators.

CASES COVERED BY THE MEDIATION PROGRAM

As approved by the Supreme Court, the following cases are referable to mediation:

1. All civil cases, settlement of estates and cases covered by the RULE ON SUMMARY PROCEDURE, except those cases which by law may not be compromised. (i.e. Annulment of Marriage, etc.)
2. Cases cognizable covered by the Lupon Tagapamayapa under the Katarungang Pambarangay Law, which has just been mentioned.
3. Civil Aspect of BP 22. (Bouncing Check Law)
4. Civil Aspect of QUASI- offenses under Title 14 of the Revised Penal Code, such as cases involving negligence and imprudence.

PROCEDURE AND SELECTION OF MEDIATORS

1. After determining during the pre-trial that the case falls within the coverage of the program and there is possibility of an amicable settlement or a submission to Alternative Modes of Dispute Resolution, the trial court issues an order referring the case to the PMC unit for mediation.
2. Upon receipt of court order, the supervisor shall assist the parties select a mediator, mutually acceptable to both, from the list of accredited mediators, informing them of the fees, if any, and the mode of payment.

   If parties cannot agree on the mediator, the supervisor assigns and selects a mediator.
   In both instances, the name of the mediator must be submitted to the court for its confirmation/affirmation.
   The affirmation/confirmation by the court of the selection elevates the mediator to the status as an "Officer of the Court."

3. After payment of 50% of the mediation fees, the mediator shall immediately commence the mediation process unless both parties agree to reset mediation within the next five (5) working days.

   Once the mediation proceeding begin, the same shall continue and the mediation process shall not exceed 30 days.

   It may, however, be extended for another 30 days, upon agreement of the parties and with the approval of the court, to give the parties sufficient time to reach a compromise agreement.

4. If mediation succeeds, the trial court shall be informed immediately and given the ---
   a. original copy of the Compromise Agreement to be the basis of a judgment by compromise;

b. a withdrawal of the complaint, or
c. a satisfaction of the claim

5. If mediation fails, the mediator shall issue a Certificate of Failed Mediation and submit it to the court. Accordingly, the case is returned to the court for further proceedings.

   As shown in partial status report on the operations of PMC units in Metro Manila, Cebu and Davao in the month of March, 2002, a percentage rate of 84.16% success of the mediated cases has been accomplished.

   The Philippine Judicial Academy expects improvements in the performance of the PMC Units as increase in the referral of cases from the courts for mediation, is being noticed, since litigants and even lawyers are beginning to be aware of the advantages of the mediation process.

MEDIATION IN THE COURT OF APPEALS

On April 16, 2002, the Supreme Court in Administrative Matter No. 01-2-17-SC, passed a resolution approving the Pilot Testing of Mediation in the Court of Appeals.

Around 60 retired justices, judges, senior lawyers and law professors will undergo Orientation-Training Seminars as prospective mediators for the Pilot project.

Initial plans and organization to implement the pilot program are not on-going and undertaken by PHILJA and the Court of Appeals.

A settlement month is set on September this year for the project.

DELEGATION REPORT ON THE TRAINING COURSE ON COURT MANAGEMENT

INTRODUCTION

From June 3 to June 24, 2002, fifteen (15) representatives from the Philippine Judiciary attended a Training Course on Court Management in Japan consisting of a series of lectures and observation visits on various components of the Japanese judicial system.

The following officials and personnel composed the delegation:

1. Associate Justice Buenaventura J. Guerrero, Court of Appeals (delegation leader)
2. Presiding Justice Francis E. Garchitorena, Sandiganbayan
3. Court Administrator Presbitero J. Velasco, Jr., Supreme Court
4. Senior Deputy Court Administrator Zenaida N. Elepaño, Supreme Court
5. Deputy Court Administrator (ret.) Bernardo T. Ponferada, Philippine Judicial Academy
6. Judge Lucas P. Bersamin, Regional Trial Court (RTC), Quezon City, Branch 96
7. Judge Pampio A. Abarintos, RTC, Cebu City, Branch 22 (Family Court)
8. Judge Mario V. Lopez, RTC, Batangas City, Branch 2 (Intellectual Property)
9. Judge Nelia Y. Fernandez, RTC, Puerto Princesa City, Palawan
10. Judge Adoracion P. Cruz-Avisado, RTC, Davao City, Branch 9
11. Judge Valerio M. Salazar, RTC, Iligan City, Branch 6
12. Judge Iluminada C. Cortes, Metropolitan Trial Court, Baguio City
13. Atty. Conrad S. Tolentino, Public Information Office/Program Management Office, Supreme Court
14. Atty. Jesusa P. Maningas, Clerk of Court, RTC, Manila
15. Atty. Lelu P. Contreras, Clerk of Court, RTC, Iriga City

The following Japanese representatives joined the delegation in all activities:

1. ICHIKAWA Tamiko, Assistant Judge, Kumamoto District
2. TOMINAGA Yoshifumi, Liaison Officer, Secretary Division, General Secretariat, Supreme Court of Japan
3. IMAMURA Tomohito, Public Prosecutor, Osaka District Public Prosecutors Office, Sakai Branch

The Philippine Judicial Academy (PHILJA) identified the following objectives for the course:

1. To increase awareness of the importance of creative management in the inflow and outflow of cases in light of Japanese experience;
2. To increase awareness of the importance of creative management in the inflow and outflow of cases in light of the Japanese experience;
3. To identify and assess the causes of docket congestion;
4. To define obstacles in the efficient, effective and speedy trial and disposition of cases;

5. To familiarize court officials and personnel with performance standards and assessment areas to aid them in empirically evaluating the performance of their courts.

The expectations of this course as envisioned by the foregoing objectives are specified below:

1. To enable Judges and Clerks of Court to devise a tracking system ideal for the swift movement of a case from filing to disposition;
2. To enable them to recognize some of the paramount causes of delay in the disposition of cases;
3. To enable them to formulate coping techniques that will assist them in handling efficiently the causes of delay;
4. To enable them to organize their court personnel into a working team for the efficient disposition of cases.

The course was conducted by the International Cooperation Department of the Research and Training Institute of the Ministry of Justice of Japan, in coordination with PHILJA assisted by the Program Management Office of the Philippine Supreme Court, and with funding support from the Asian Development Bank.

The members of the Philippine delegation, therefore, express their utmost gratitude to the above-mentioned agencies for realizing this very educational course. Moreover, the members of the delegation sincerely thank the persons below who have individually and collectively made the delegates' stay in Japan even more enlightening and edifying. They are a credit to their respective agencies, their government and their country.

1. Ms. TANAKA Kazuko, Government Attorney and Professor at the International Cooperation Department (ICD), Research and Training Institute (RTI), Ministry of Justice (MOJ).
2. Mr. YAMASHITA Terutoshi, Government Attorney, ICD, RTI, MOJ.
3. Mr. TONE Shougo, Senior International Cooperation Training Officer, ICD, RTI, MOJ.
4. Ms. KAMITANI, Tomoko, International Cooperation Training Officer, ICD, RTI, MOJ.
5. Ms. ICHIKAWA Tamiko, Assistant Judge, Kumamoto District.
6. Mr. TOMINAGA Yoshifumi, Liaison Officer, Secretary Division, General Secretariat, Supreme Court of Japan.
7. Mr. IMAMURA Tomohito, Public Prosecutor, Osaka District Public Prosecutors Office, Sakai Branch.

I. OVERVIEW OF JAPANESE GOVERNMENT

Lectures related to the topic were given by Ms. TANAKA Kazuko ("Orientation on Life in Japan"), Government Attorney and Professor at the International Cooperation Department (ICD), Japan Ministry of Justice, and Mr. OZAKI Michiak ("Lecture on Organization of Japanese Government and Ministry of Justice"), ICD Director.

1. General statement

1.1. The enactment and effectivity of the present constitution promulgated on November 3, 1946 and enforced on May 3, 1947 abandoned and superseded the constitutional monarchy with a sovereign emperor who once ruled Japan.

1.2. A constitutional democratic form of government in which sovereignty resides in the people, was established in Japan under the new constitution. The constitution mandates the separation of powers and provides a system of checks and balances among the executive, legislative and judiciary. The head of state is still the emperor, but the position is titular and symbolic.

2. Legislative power
The legislative power is vested in the Diet, a bicameral body consisting of the House of Representatives and House of Councilors.

3. Executive power
The executive power is vested in the Cabinet headed by the Prime Minister who is designated from among the members of the Diet by a resolution of the Diet and in the exercise of this power, the Cabinet is collectively responsible to the Diet.

4. Judicial power
The whole judicial power is vested in the Supreme Court and such inferior courts duly established by law. The courts are the final arbiters or adjudicators of all legal disputes.

5. Checks and balances
5.1. The House of Representatives may cause the Cabinet to resign *en masse* by passing a "non-confidence" resolution or by rejecting a confidence resolution.

5.2. The Cabinet may decide to convoke the Diet and dissolve the House of Representatives. Moreover, the Cabinet has the power to designate the Chief Justice of the Supreme Court and appoint other justices of the Supreme Court as well as judges of inferior courts.

5.3. Meanwhile, courts are endowed with powers to determine the legality or constitutionality of any order, regulation or official act taken by the Cabinet or other subordinate administrative bodies or agencies of the executive hierarchy. Under the same constitutional prerogative, courts have the power to determine the constitutionality of any law enacted by the Diet and invalidate any law for contravening the provisions of the constitution.

5.4. To check on the activities of justices and judges of all the courts, the Diet has the sole authority to set up an impeachment court to try and decide cases against justices and judges against whom removal proceedings have been filed. The people may cause the dismissal of a judge when, at the first general election of members of the House of Representatives following their appointment and ten years thereafter, a majority of the voters favor such dismissal.

II. JUDICIAL SYSTEM

Lectures related to the topic were delivered by Ms. TANAKA ("Judicial System in Japan"); Judge MORI Masanobu ("Role, Function and Training of Court Clerks"); Atty. TANAKA Yutaka ("Role and Function of the Law Clerk"); and Mr. TOMINAGA Yoshifumi ("On Court Clerks"), Liaison Officer, Secretary Division, General Secretariat, Supreme Court of Japan.

1. History

1.1. The Japanese judicial system is the product of several decades of experimentation with various occidental systems. The introduction of new systems began in the Meiji restoration era in 1858 when Japan reopened itself to the West. Japan's desire to promote relations with other States while maintaining its independence led to the evaluation of Western legal models. Foreign law experts, primarily French and German, were engaged to formulate laws of court procedure. The resulting system was an amalgam of Western systems considered most appropriate for the protection and furtherance of Japan's national interests both in the local and international arenas, but nevertheless founded on traditional concepts of cultural pride, honor and virtue. Thus, the first version of the procedural laws eventually had to be revised in light of the peculiarities of Japanese culture. Culture likewise influenced the structure of the judicial system.

1.2. The present judicial system is composed of the following courts:

1. Supreme Court
2. High Courts
3. District Courts
4. Family Courts
5. Summary Courts

2. Supreme Court

2.1. The Supreme Court is the highest court in Japan and is composed of one Chief Justice and fourteen (14) justices. The Chief Justice is appointed by the Emperor upon designation or recommendation by the Cabinet. He has the same rank as the Prime Minister. The fourteen (14) justices are appointed by the Cabinet and their appointments are attested by the Emperor. The justices enjoy a rank equivalent to the ministers of the Cabinet. The compulsory retirement age for Supreme Court justices is seventy (70).

2.2. The Japanese Constitution provides that at least ten (10) justices must be selected from among those who distinguish themselves as judges, public prosecutors, practicing lawyers, professors, and assistant professors in legal science in universities. The rest need not be jurists.

2.3. As the highest court in Japan, the Supreme Court has territorial jurisdiction over the entire country. It has appellate jurisdiction over *jokoku* appeal and *kokoku* appeal as provided in the codes of procedure.

2.3.1. A *jokoku* appeal is allowed in the following cases:

1. An appeal challenging a decision in the first or second instance by a high court;
2. A direct appeal (so-called "*jumping appeal*") directed against a judgment rendered in the first instance by a district court or family court and a summary court in criminal cases;

3. An appeal with the High Court which for, a special reason, is transferred to the Supreme Court;
4. A special appeal against a decision in a civil action rendered by a High Court as a court of third instance; and
5. An extra-ordinary appeal initiated by the Prosecutor-General against a final judgment of a criminal case.

2.3.1.1. In civil and administrative cases, *jokoku* appeal may be had in cases of violation of the constitution and grave violations of certain provisions of procedures of inferior courts considered in the Code of Civil Procedure as grounds for *jokoku* appeals. The Supreme Court may accept a case on appeal when it deems that such case involves an important issue concerning the interpretation of a law and/or ordinance.

2.3.1.2. In criminal cases, *jokoku* appeal may be had in case of violation of the constitution, or where a decision conflicts with Supreme Court precedents, or with precedents of the High Court, in the absence of a Supreme Court precedent.

2.3.2. A *kokoku* appeal may be filed in the Supreme Court in these cases:

1. An appeal against a judgment in a civil case and a family case on the grounds of violation of the constitution;
2. An appeal made with the permission of the High Court given in a case which the High Court deems to involve an important issue pertinent to the interpretation of a law and/or ordinance;
3. A special appeal interposed against a ruling in a criminal case in which no ordinary appeal is allowed by the Code of Criminal Procedure; and
4. An appeal against a ruling of an intermediate appellate court in a juvenile court being violative of the constitution or for being not in conformity with judicial precedents.

2.3.2.1. Hearings and adjudications of the Supreme Court are conducted either by the grand bench (*en banc*) of all fifteen (15) justices sitting together or by one of the three (3) petty benches (divisions) each being composed of five (5) justices. Nine (9) justices constitute a quorum in grand bench while three (3) or more justices are required in the petty bench.

2.3.2.2. The appellate proceedings in the Supreme Court commenced by filing a notice of appeal (written) in the inferior courts, normally, the High Courts. After examination of the documents (appeal briefs, records of the case and decision), when the court finds it devoid of merit on the basis of these documents, the court may dismiss the appeal without oral proceedings. However, if the court finds the petition sustainable, oral arguments may be set and thereafter, a decision may be rendered by the court.

2.4. Every appealed case is initially assigned to a petty bench. If it is shown that the case involves a constitutional question (except when there is already a precedent on the same question), then, the case is referred to the grand bench which decides on the issue.

2.5. In addition to its primary function of exercising judicial powers, the Supreme Court has a vested rule-making power and possesses the highest authority of judicial administration. It has a general secretariat that administers its administrative affairs. With its rule-making power, the Supreme Court may establish

1. the rules of judicial procedure;
2. rules on matters relating to practicing lawyers;
3. internal discipline of the courts; and
4. administration of judicial powers.

2.6. To enhance its rule-making authority, the Supreme Court is assisted by the Advisory Committee on Rule-Making. The Committee is composed of judges, public prosecutors, practicing lawyers, officers from related institutions and scholars. The proposed rules are deliberated upon by the judicial conference composed of the fifteen (15) justices, who approves the proposed rules for adoption formulated on the basis of the report of the Committee. In the conduct of the administrative affairs, the Supreme Court acts upon the resolutions of the judicial conference which is composed of the fifteen (15) justices presided by the Chief Justice.

2.7. The Supreme Court recommends the appointment of judges to the Cabinet, including the Presidents of the High Courts. The assignment of judges to specific courts remains with the Supreme Court. This authority is exercised through resolutions of the judicial conference. The appointment and removal of court officials other than judges are within the exclusive authority of the Supreme Court.

2.8. Upon recommendation of the judicial conference, the court submits its annual budget to the cabinet. It is the General Secretariat which specifies and drafts the annual estimates of revenue and expenditures and submits such estimates to the judicial conference for its consideration before the court acts on it and submits it directly to the cabinet.

3. High Courts

3.1. Components

3.1.1. There are eight (8) High Courts located in eight (8) major cities, namely: Tokyo, Fukuoka, Osaka, Sendai, Nagoya, Sapporo, Hiroshima, and Takamatsu.

3.1.2. There are about 280 judges in the High Court including eight (8) Presidents. Each High Court has a President and other High Court judges. Ordinarily, High Court cases are heard by a collegial body of three (3) judges.

3.1.3. Insurrection cases which fall within the jurisdiction of High Court, as well as disciplinary action cases, are tried by a five-man or five-judge court.

3. 2. Jurisdiction

High Courts have jurisdiction over the following:

3.2.1. appeals filed against decisions of the District Courts in the first instance or family courts;

3.2.2. *kokoku* appeals, except those over which the Supreme Court has jurisdiction as prescribed by the Code of Civil Procedure;

3.2.3. appeals from decisions of the Summary Courts in criminal cases; and
3.2.4. *jokoku* appeals from decisions of the Summary Courts in civil cases which were initially brought to the District Courts.

3.3. High Courts have original jurisdiction over administrative cases on election and insurrection cases. The Tokyo High Court has exclusive jurisdiction over cases to revoke decisions of quasi-judicial agencies as the Fair Trade Commission and the Patent Office.

4. District Courts
4.1. Components
There are fifty (50) District Courts in Japan stationed in the different seats of the prefectural government (except Hokkaido which is divided into four (4) districts). The District Courts have 203 branch offices manned by about 1,600 judges and assistant judges.

4.2. Jurisdiction
4.2.1. District Courts have general jurisdiction over all cases in the first instance, except:

1. criminal and civil cases exclusively cognizable by Summary Courts, i.e., offenses punishable by fines or light penalties, and claims not exceeding ¥900,000;
2. cases exclusively triable by family courts, i.e., juvenile offenses and domestic affairs; and
3. cases of insurrection, which are triable by the High Courts.

4.2.2. District Courts have appellate jurisdiction over the following:

1. appeals from decisions in civil cases of Summary Courts;
2. *Kokoku* appeals against judgments and orders of Summary Courts in civil cases; and
3. cases designated as collegiate court cases by other laws.

4.3. Disposition of cases
As a general rule, cases in District Courts are handled by a single judge. But, a collegiate court of three (3) judges is required in the following:

1. crimes punishable by death or life imprisonment;
2. imprisonment with or without forced labor for a minimum period of less than one (1) year, except:
    a. robbery, quasi-robbery, attempt to commit these crimes;
    b. crimes of habitual robbery and theft under the Law for Prevention and Disposition of robbery, theft.
3. when exercising appellate jurisdiction; and
4. cases designated as collegiate court cases by other laws.

5. Family Courts
5.1. Components
Family Courts and their branch offices are located in the same places as the District Courts and their branches. In addition, local offices are also found in 77 stations of the Summary Courts. There are 350 judges and assistant judges in the Family Court system. As part of the support staff, there are about 1,500 family court probation officers working with the Family Courts.

5.2. Organization

Family Courts were established in Japan on January 1, 1949, intended basically to maintain the welfare of families, and seeking the sound upbringing of juveniles. The court is a specialized one exclusively created to handle comprehensively family affairs cases and juvenile delinquency cases.

5.3. Jurisdiction

5.3.1. A Family Court has exclusive jurisdiction to try or hear all disputes and conflicts within the family, as well as all related domestic affairs problems of significance.

5.3.2. A Family Court conducts conciliation procedures in family affairs cases, such as:

1. adoption of a minor;
2. guardianship for adults;
3. support;
4. designations of a parent to exercise parental authority or revocation thereof;
5. partition of estate of a deceased person;
6. marital disputes; and
7. divorce.

5.3.3. Cases, like divorce, that are subject to family conciliation and can be filed as a suit in a District Court, must first be the subject of a conciliation process in the Family Court. It is only when the conciliation mechanism in the Family Court fails that the suit may be instituted in the District Court.

5.3.4. Family Courts handle cases involving juvenile delinquents under twenty (20) years of age who have committed a crime or prone to commit offenses (14-19 years old); or who have violated penal provisions or are prone to violate them (under 14 years old).

5.3.5. Family Courts have jurisdiction over adults indicted for offenses detrimental to the welfare of the juveniles.

5.3.6. Cases before the Family Courts are handled by a single judge or a collegial body of three (3) judges.

6. Summary Courts

6.1. Components

There are 438 Summary Courts throughout Japan. A summary court is handled by a single judge.

6.2. Jurisdiction

6.2.1. Summary Courts have original jurisdiction over civil cases involving claims not exceeding ¥900,000.

6.2.2. In criminal cases, Summary Courts have jurisdiction over those cases where the imposable penalty is fine or lighter punishment.

6.2.3. As a rule, Summary Courts cannot impose a penalty of imprisonment or graver punishment. However, they can impose imprisonment with labor as a penalty not exceeding three (3) years only in those cases specifically provided by law. If the Summary Court deems it necessary to impose a penalty beyond the limit, it must transfer the case to the District Court.

7. The salaries of judges and justices are as follows:

Judge/Justice	Summary Court	Salary ¥ (₱) [¥ 1 = ₱ 0.42]
Chief Justice		2,300,400 (967,680)
Justices of the Supreme Court		1,682,000 (706,440)
Tokyo High Court Chief Judge		1,610,000 (676,200)
Other High Court Chief Judge		1,492,000 (626,640)
Judge 1		1,346,000 (565,320)
2		1,185,000 (497,700)
3		1,106,000 (464,520)
4	1	937,000 (393,540)
5	2	810,000 (340,200)
6	3	729,000 (306,180)
7	4	658,000 (276,360)
8	5	593,000 (249,060)
Assistant Judge 1	6	475,400 (199,668)
2	7	437,000 (183,540)
3	8	406,600 (170,772)
4	9	380,300 (159,726)
5	10	353,600 (148,512)
6	11	335,000 (140,700)
7	12	313,200 (131,544)
8	13	301,500 (126,630)
9	14	274,100 (115,122)
10	15	264,300 (111,006)
11	16	248,600 (104,412)
12	17	239,300 (100,506)

8. Other Court Officers/Personnel

8.1. Judicial Research Officers

These are specialists in different fields who conduct research on a case under the instruction of Justices or judges in charge of the case. Other than lawyers, experts on industrial property rights or taxes are appointed as Judicial Research Officers and are assigned to courts of large cities such as Tokyo or Osaka where there are a large number of highly specialized cases. In the Supreme Court, Judicial Research Officers are judges with at least ten years' experience. Aside from the usual functions of Judicial Research Officers in lower courts, those in the Supreme Court are also tasked with negotiating settlement for selected cases. Only a small percentage of cases at the Supreme Court actually go through settlement.

8.2. Court Clerks

They are deemed as the "point men" in any court as they do not only prepare the records and other matters necessary and appropriate in trial proceedings but also assist the judges in research work and take active participation in administering litigation in cooperation with judges to realize proper justice. Specifically, court clerks attend hearings, prepare and file records and documents of court proceedings, facilitate the conduct of trial by making the necessary arrangements before and during the actual hearing, and assist judges in conducting research on laws and jurisprudence. They are appointed from court secretaries after they pass an examination for the purpose and receive the required training consisting of lectures and practical exercises, including drafting of court documents and on-the-job training.

8.3. Family Court Probation Officers

FC Probation Officers specialize on various specialties such as psychology, sociology and teaching. These officers investigate facts surrounding the causes or reasons for a family dispute or the probable cause of a child's/youth's behavioral problems. They submit reports to the judge.

8.4. Court Stenographers

Court stenographers in Japan perform a function similar to stenographers in the Philippines. Thus, they are in charge of taking down the notes/records of court proceedings. However, court stenographers are slowly being phased out and tape recorders are taking their place in court. It must be considered, however, that transcripts of proceedings are not often required in Japanese courts. Judges take their own notes, and the transcript may be necessary only if the case is appealed. If a case is appealed, the appellate judge either listens to the proceedings recorded on tape or the tape recording is contracted out for transcription. A transcript of the proceeding is used by most three-judge courts because of the seriousness of the case, but even then the transcription of an audio recording of the proceeding may be out-sourced. An audio-recording of proceedings will, of course, be unable to capture statements expressed through body language.

8.5. Court Secretaries

They assist with work related to handling of cases filed with the courts. Some are appointed/designated as bailiffs who prepare the courts for the session. They also maintain order in the courtroom.

8.6. Marshals

They are similar to the sheriffs in the Philippines as they execute civil judgments and serve documents issued by the court.

9. Observations and Recommendations

9.1. The efficiency of Japanese courts is partly assured by competent support staff. Even before trial is held, considerable preparations in terms of research, queries with the parties, arrangement of case documents and others, are made to facilitate the conduct of trial and allow the judge greater control of the case. Such preparation may be emulated in the Philippines. The Office of the Court Administrator's efforts to implement Trial Court Performance Standards and Total Quality Management can lead court personnel to better appreciate their role in the administration

of justice and thereby better assist their judges in the conduct of court proceedings. It may, however, be necessary to enumerate the specific preparatory acts that court personnel must undertake prior to actual hearings or in relation to a particular case.

9.2. Increasing the salaries of Justices, judges and support personnel to more realistic levels will not only recognize the important function performed by these officers and personnel but will also attract even more highly qualified applicants to the said positions.

III. CRIMINAL PROCEDURE

Lectures related to the topic were given by Mr. MARUYAMA Tsuyoshi ("Outline of Criminal Procedure [Investigation]"), ICD Professor, and by Ms. TANAKA ("Outline of Criminal Procedure [Court Procedure]"). An observation visit to the Osaka District Public Prosecutors Office and the Fuchu Prison was also made.

1.Basis

The Code of Criminal Procedure of Japan was basically modeled on U.S. law. The influence of German law, however, can still be seen in its implementation. This is particularly evident in the process of investigation and in the reliance at trial on written documents and dossiers prepared by the police and public prosecutors.

2. Procedure from Arrest to Trial

2.1. Arrest

2.1.1. No one may be arrested without a warrant issued by a judge. Police officers designated by law, as well as public prosecutors, are authorized to directly ask a judge to issue an arrest warrant. Japan does not recognize the so-called *"cognizable offense"* that permits the arrest of a suspect without warrant. However, the Code of Criminal Procedure provides two exceptions:

1. Flagrant Offense
   Any person may arrest, without a warrant, an offender who is committing or has just committed an offense; or
2. Emergency Arrest
   "When there are sufficient grounds to suspect the commission of an offense punishable by the death penalty or imprisonment for life or a maximum period of three years or more, and if, in addition, because of great urgency, a warrant of arrest cannot be obtained beforehand from a judge, a public prosecutor, assistant officer or a judicial police official may, upon statement of the reasons therefor, apprehend the suspect." In this case, the procedure for obtaining an arrest warrant from a judge shall be taken immediately thereafter. If the warrant is not issued, the suspect must be released at once.

2.1.2. Additionally, a public prosecutor or a police officer may, in cases where there is a reason to believe that a suspect has committed an offense, apply for the issuance of warrant of arrest, for the apprehension of the suspect. (Art. 199, Code of Criminal Procedure)

2.2. After Arrest

2.2.1. When the police arrest a suspect, they must refer the suspect with documents and evidence to a public prosecutor within forty-eight (48) hours, otherwise, they must release him. Unless the public prosecutor releases the suspect or prosecutes him, the public prosecutor must ask a judge for a pre-indictment detention order within twenty-four (24) hours after receiving him. If the public prosecutor deems pre-indictment detention necessary, he must ask a judge for a pre-indictment order within twenty-four (24) hours after receiving the suspect, and within seventy-two (72) hours after the arrest, otherwise, he must release the suspect. If a public prosecutor arrests a suspect, the same procedure must be followed within forty-eight (48) hours after the arrest. The judge asked to provide the detention order reviews all documents and evidence, and interviews the suspect to afford them the opportunity to explain the alleged case. The judge may order the suspect's detention for ten (10) days if there are reasonable grounds to believe that:

1. he committed the offense;
2. he has no fixed dwelling;
3. there are reasonable grounds to believe that he may destroy evidence; or
4. there are reasonable grounds to believe that he may attempt to escape,

Otherwise, the judge may dismiss the application. In practice, it is granted for the most part since the police and the public prosecutors carefully screen suspects to be arrested or detained.

2.2.2. The pre-indictment detention period is ten (10) days. The public prosecutor may ask a judge for an extension of the detention for up to ten (10) days, if necessary. When an extension of detention is requested by a public prosecutor, a judge examines all the documents and evidence without interviewing the suspect. When here is an indispensable necessity, the detention can be extended up to 10 days, including weekends and national holidays. A suspect's maximum term of custody before indictment is twenty-three (23) days. Upon the termination of the detention term, a public prosecutor should decide whether to prosecute or release the suspect.

2.2.3. The public prosecutor must release the suspect upon the termination of the detention period unless prosecution is initiated.

2.3. Collection of Evidence

Evidence in Japan sometimes means not only real evidence but written statements taken by investigators, unless the differences between both are intentionally stressed. Although investigators collect as much real evidence as possible, it is indispensable to collect witnesses' statement (explaining the meaning of such real evidence) to find the truth. Written statements are made in the following way. Investigators interview witnesses or suspects, then they prepare written statements based on the interview. After the investigators read the statement to him, he is requested to sign on the line after the last sentence to guarantee the voluntariness and veracity of the statement.

2.4. Defense Counsel's Communication with the Suspect

The suspect under physical restraint is allowed to see their defense counsel or the person who is to become their defense counsel, and to receive from and/or hand over to such a person any documents or articles without the presence of a guard.

2.5. Bail

During the pre-indictment detention period, no suspect is entitled to bail, but they may be bailable after indictment upon request of the defendant, their relatives, or counsel.

2.6. Initiation of Prosecution

There are two (2) main forms of prosecution: formal and summary. If the case is serious and the suspect deserves a penalty of imprisonment or death, the prosecutor indicts the suspect for formal trial even if he admits his guilt. The prosecutor utilizes summary procedures when the suspect deserves a fine not exceeding Y500,000, admits his guilt and accepts a monetary sentence. In general, minor offenses, such as traffic violations or physical injury through professional negligence, are dealt with through this system. However, where a suspect accused of assault or physical injury admits his guilt and compensates the victim's damage, summary procedure is also utilized. Alternatively, to indict, a public prosecutor must submit a bill of indictment to the court, identifying the defendant (usually by showing the permanent domicile and present address, name and date of birth), showing the offense charged and the facts constituting such offense.

2.7. Monopolization of Prosecution

2.7.1. Public prosecutors have the exclusive power to decide whether to prosecute. The court cannot take cognizance of any crime unless public prosecutors prosecute. This system is called "Monopolization of Prosecution."

2.7.2. The sole exception is called the system of "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution." This system purports to protect the parties injured by crimes involving abuse of authority by public officials. A person, who has made a complaint or accusation and is not satisfied with the public prosecutor's decision not to prosecute, may apply to the court to order the case to be tried. The court, after conducting hearings, must either dismiss the application, or order the case to be tried if well-founded. If the application is granted, then the practicing lawyer is appointed by the court to exercise the functions of the public prosecutor.

2.8. Suspension of Prosecution

2.8.1. One of the most unique characteristics of Japanese criminal procedure is that public prosecutors can drop cases even when there is enough evidence to secure a conviction. This is called "Suspension of Prosecution". This wide discretionary power granted to public prosecutors has a significant role in encouraging suspect's rehabilitation. It contrasts with that of compulsory prosecution. The latter concept requires that prosecution always be instituted if there are some objective grounds for the belief that the crime has been committed by the suspect, and if the prerequisites for prosecution exist. This prevents arbitrary decisions by public prosecutors and vagaries in the administration of criminal justice. On the other hand, the system of discretionary prosecution is advantageous in disposing cases flexibly according to the seriousness of individual offenses and the criminal tendency of each suspect, and in giving them the chance to rehabilitate themselves in the society.

2.8.2. For purposes of suspension, the following factors concerning the suspect and the crime are considered:

1. The offender's character, age, situation, etc. Generally, youths or the aged, having no or insignificant previous criminal records, or having had a difficult childhood may be extenuating circumstances for offenders;
2. The gravity of the offense;
3. The circumstances under which the offense was committed. For example, the motivation of the offense, and whether or not and to what extent the victim had fault in provoking the offense; and
4. Conditions subsequent to the commission of the offense. For example, whether or not and to what extent compensation for damages is made; whether or not the victim's feelings are remedied; settlements between both parties; the influence to the society; and whether or not the offender repents commission of the offense.

2.8.3. For suspension of prosecution, the court considers the accused's compensation of the victim and the alleviation of the victim's trauma or stress. Thus, a suspect's family, employer, the suspect's attorney and other related persons try to compensate, in many cases, as much as possible to avoid indictment.

2.9. Inquest of Prosecution (Prosecution Review Commission)

2.9.1. This system has the purpose of maintaining the proper exercise of the public prosecutors' power by subjecting it to popular review. There is an Inquest Committee in each district court, which consists of eleven (11) members selected from among persons eligible to vote for members of the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecution. The Inquest Committee must conduct an investigation whenever it receives and investigation request from an injured party or a person who made a complaint or accusation. In some instances, the Committee can carry out investigations on its own initiative, and is competent to examine witnesses in the course of the investigation.

2.9.2. The Committee then notifies the Chief Prosecutor of the District Public Prosecutors Office of its conclusion. If the Committee finds that the non-prosecution is improper, the Chief Prosecutor orders a public prosecutor of the office to further investigate the case and to re-examine the original disposition. After the re-investigation and re-examination, the public prosecutor in charge must ask for the approval of the Superintending Prosecutor before making the final disposition. Although the Committee's verdict is not binding upon the prosecutor, it is highly respected in the re-investigation. Since Japan does not have a jury system and private prosecution system, *"inquest of prosecution"* allows the public to participate in criminal justice administration.

2.10. Notification Program to Victims

2.10.1. A public prosecutor should promptly notify the complainant, accuser or claimant of the result of the disposition. In particular, on request of the complainant, accuser or claimant, a public prosecutor should inform the reasons why the cases were not prosecuted, for instance "suspension of prosecution," "insufficiency of evidence," etc.

2.10.2. When the victims, a bereaved family or witnesses, desire the notification, a public prosecutor shall inform in word or writing as follows:

1. the disposition of the case (e.g. prosecution for the formal trial, prosecution for the summary proceedings, non-prosecution or referral to the family court);
2. in prosecuted cases, the name of the court and the date of the trial;
3. the result of the judgment, sentencing, whether to appeal to higher court;
4. the summary of the prosecuted offenses, the heading and the summary of the non-prosecution, whether to detain, bail, etc.

2.11. Preparation for Trial

2.11.1. The Rules of Criminal Procedure impose duties on both the parties and the court in order to ensure the right to a speedy trial. The public prosecutor and the defendant attorneys must:

1. disclose to the opposing party evidence which they will produce at trial at their earliest convenience;
2. examine such evidence and indicate whether they consent to its admissibility at trial;
3. make an effort to have their witnesses present at the trial; and
4. contact each other and clarify the issues of the case and subsequently report to the court the time which should be allocated for the trial.

2.11.2. Respectively, the court should:

1. require when it deems proper, both parties to attend a pre-trial conference to determine trial dates, allocation of time to both parties, etc. However, it is strictly prohibited for the court to discuss matters which may lead it to form an opinion about the case;
2. designate all trial dates necessary for the disposition of a case beforehand, based on a plan made during the pre-trial conference, and shorten the interval between trial dates;
3. encourage the parties to discuss as many problems as possible beforehand, in order to prevent unnecessary disputes at trial; and
4. exclude improper questions and statements by the parties.

2.12. Trial Procedure

2.12.1. Opening Proceedings

The court initially requests the defendant to identify himself. Then the public prosecutor reads aloud the information. After the court advises the defendant of his rights, such as the right to silence, it must afford the defendant and his counsel an opportunity to make any statements concerning the case. Of course, the defendant is not required to say anything if he wishes to remain silent. In 92.3% of trial cases in District Court, the defendant admits committing the offense charged in 1998.

2.12.2. Examination of Evidence

At the beginning of the examination, the public prosecutor reads an opening statement which outlines the detailed facts he expects to prove by evidence. This procedure enables the court to easily preside over the case and notifies the defendant of the detailed case against him. As a result, the trial procedure is intensified. Additionally, the public prosecutor provides lists of documentary and real evidence that he plans to introduce. Thereafter, the court may permit the defendant or defense counsel to produce its evidence to refute the case. Applications for

examination of evidence may be made by the public prosecutor, the defendant or defense counsel. The ruling to grant or to refuse the application depends upon the court's discretion. The court may also examine the evidence on its own initiative, if deemed necessary. With regard to the examination of real evidence, the presiding judge will ask the applicant to display the real evidence in court. If the defense does not consent to the introduction of documentary evidence, the public prosecutor may request the court to examine witnesses and/or the defendant(s) instead. If such request is granted, the court then determines who will be examined. If the court grants the examination request, the witness is first examined by the party who requested the examination. After this, the other party cross-examines, and then the witness is re-examined if necessary. After both parties have finished, the court examines the witness directly.

2.12.3. Questioning of Defendant

The defendant's right to remain silent entitles them to say nothing at trial unless he wants to say something voluntarily. In many cases, including disputed ones, the defendant agrees to answer to questioning. Even after the beginning of questioning, the defendant can refuse to answer anytime. In non-disputed cases, the defendant's testimony enables the court to collect relevant information for sentencing. During the course of the questioning, the court affords the defendant a chance to tell their version.

2.12.4. Closing Arguments

After the examination of evidence, both parties review and analyze the case and make closing arguments to persuade the court of their positions. The public prosecutor makes their closing argument first, and must include an opinion as to the question of fact and the application of law, including sentencing recommendations. Thereafter, the defense receives and opportunity to state its positions on the case.

2.12.5. Sentencing/Decision

Except in some important cases, the decision or sentencing may be done without a written decision which may follow thereafter for a week or so.

2.12.6. Appeal

Both the prosecution and the accused may appeal the judgment of the court.

3. Summary Procedure

Special proceedings may be utilized for summary disposal of minor cases in the Summary Courts. Summary procedure starts when a demand for summary order is made by a public prosecutor at the same time of institution of prosecution. Before the institution, the public prosecutor shall ascertain whether the suspect has no objection to summary proceedings. The Summary Court may impose on the defendant a fine not exceeding \500,000 only by examining documentary and real evidence submitted by the public prosecutor without opening a public hearing. If the parties, who are not content with the decisions summarily imposed, demand a formal trial, the case is handled on ordinary proceedings. More than ninety percent (90%) of total cases are disposed of by summary procedure.

4. Observations/Recommendations

4.1. Arrest and detention

4.1.1. The immediate release of the suspect often leads to the destruction of evidence and the dissuasion of witnesses. If there is a need to gather more evidence, the public prosecutor may request the court in writing for further detention of the suspect for a fixed period for the inquest.

4.1.2. The suspect must not be allowed to communicate with his co-suspects to prevent concealing/destroying or tampering with the evidence.

4.1.3.Close cooperation between the police investigators and the prosecutors who will ensure the gathering of admissible evidence and its preservation. The public prosecutor should also be authorized to conduct further gathering of evidence.

4.1.4. When the offender is a juvenile, the latter shall be delivered immediately to the family court which shall determine whether the offender shall be placed in the rehabilitation center or be prosecuted. This will shorten and avoid unnecessary litigation of juvenile offenders.

4.1.5. The matter of discretionary prosecution or suspension of prosecution with proper safeguards may be worthy of consideration. This will prevent the unnecessary filing of cases as the suspect will already be rehabilitated without undergoing the rigors of trial.

4.1.6. Arrest of a suspect without prior indictment, through a warrant of arrest issued by the court, should be considered so as to prevent his escape and to facilitate the appropriate investigation by the police officer and/or the public prosecutor.

4.2. Trial

4.2.1. Avail exhaustively of the benefits of the preliminary consultation (pre-trial period). The defense counsel shall be furnished all the documentary evidence or written statements (declaration and affidavits) of witnesses for him to examine for admission or stipulation. The Supreme Court may formulate mandatory specific procedures or steps in the conduct of pre-trial, using as basis the pre-trial steps and techniques described by Senior Associate Justice Josue N. Bellosillo in his book, "Effective Pre-Trial Technique," as well as actual proceedings in Japan witnessed by the Philippine delegation.

4.2.2. Opening statements of public prosecutors must be submitted to the court and defense counsel in order that the court may already be apprised of the theory of the prosecution. The clerk of court shall already prepare the index of prosecution evidence as well as the schedule of the trial and case flow chart. Specific time frames must be allotted for the direct examination and cross-examination of witnesses.

4.2.3. The more extensive use of tape recorders to replace stenographers should be considered.

4.2.4. Conference with the prosecution and the accused (pre-trial) where the court must require that all evidence, documentary or otherwise, be presented and accordingly marked to abbreviate the proceedings.

4.2.5. The right of the accused to confront the witnesses against him must be weighed against the possible influence the accused may have on the witness. In the examination of a witness, the accused may be removed from the courtroom when the witness cannot testify due to fear, but the counsel shall remain and the accused will be briefed later of the testimony. The accused may view the proceedings via closed-circuit television.

4.3. Summary procedure
Summary proceedings in the first level courts where the case is decided by mere examination of documents and real evidence without any public hearing should be considered.

IV. CIVIL PROCEDURE

Lectures related to the topic were delivered by Ms. TANAKA (Commentary on videos on civil procedure, summary procedure and family court system); Mr. KASAI Tatsuya ("Court Organization and Management," "Court Management in Administration Cases"), retired Judge; Mr. ISEKI Masahiro ("Caseflow Management in the Practice of Civil Procedure"), retired Judge; Prof. EGUCHI Junichi ("Intellectual Property Rights Cases"); and Judge ICHIMURA Yousuke ("Court Management in Administration Cases"). Video presentations on civil procedure, summary procedure and the family court system were made. Observation visits to the Osaka District Court, the Kyoto Family Court and the Tokyo Summary Court were also held.

1. Introduction
1.1. History
The Japanese Code of Civil Procedure was enacted in 1890 from a draft prepared by Hermann Techow based on the 1877 Code of Civil Procedure of Germany. After it was found to be too precise and cumbersome, the Code was amended in 1929 with the incorporation of some features of the 1895 Austrian civil procedure. After World War II, the Anglo-American influence resulted in the 1950 Law of Civil Procedure adopting the system of cross-examination. Subsequent developments and mounting criticisms of the civil procedure as being too costly and time consuming as a mode of resolving disputes, and too difficult for ordinary people to comprehend, saw the need for a total revision of said procedure for civil actions. In 1955, the Supreme Court of Japan promulgated the Rules of Civil Procedure, which, together with further amendments to the Code of Civil Procedure, had the overall effect of minimizing the burden on appellate courts and rationalizing trial proceedings. In 1996, a new Code of Civil Procedure was enacted which, among others, enhanced pre-trial procedure, improved the presentation and admission of proof, and the created a small claims procedure. Likewise, the Rules of Civil Procedure was revised in 1996. Both the new Code and the Rules of Civil Procedure became effective on January 1, 1998.

1.2. Kinds of Civil Cases
There are four (4) types of civil suits:
1.2.1. The first is the *"common action"* which is a suit pertaining to a dispute between individuals mainly involving property rights. This is governed by the regular procedure under the Code of Civil Procedure.

1.2.2. The second is a "bills and checks action" which is a general action for payment of bills and checks wherein the presentation of documentary evidence and examination of parties are completed on the first date of oral argument. The decision is contained in a judgment paper of litigation of bills or in a protocol (written minutes prepared by the court clerk) called the "bill of judgment."

1.2.3. The third kind is the "personal affairs action" which covers disputes among family members or relatives such as suits for divorce, recognition of paternity and the like. This suit is governed by special rules pursuant to the Law of Civil Procedure and Code of Procedure Concerning Personal Affairs.

1.2.4. The last type is the "administrative action" involving annulment of acts of administrative agencies exercising police power, suits involving non-feasance or inaction of said agencies and special suits on the application of laws for the protection of general public interests, like nullification of election. This suit is governed by the Administrative Case Litigation Law and the Law of Civil Procedure.

1.3. Venue

A civil action is filed with the court which has jurisdiction over the area where the defendant resides. In case of a suit on torts, it shall be filed and tried where the illegal act was committed which an action involving real property shall be instituted in the court which has jurisdiction over the area where the property is situated.

2. District Courts

2.1. Procedure for common civil action

2.1.1. Filing of complaint

2.1.1.2. A complaint shall allege the parties, the gist of the claim (demand for relief based on the claim) and the ground of the claim which are the ultimate facts upon which the claim is based. In addition, it shall aver substantial evidentiary facts and must attach all the material documentary evidence.

2.1.1.3. Upon receipt of the complaint, the court clerk examines and reviews the form and allegations thereof with the use of a checklist. If found to be defective, he will inform the judge about it and after consultation with the latter, shall urge the plaintiff to correct the initiatory pleading. If plaintiff fails to comply with the suggestions, then the complaints may be dismissed.

2.1.2. Service of complaint and summons

The summons to be prepared and issued by the court clerk shall contain a directive for the defendant to attend the first date of oral proceedings and for him to file his answer to the complaint attached to the summons not later than two (2) weeks prior to said first oral hearing. The complaint and summons shall be served personally upon defendant or if defendant's address is unknown, then it may be served by publication.

2.1.3. Answer

In the answer, defendant shall allege the facts he admits and those he denies with the reasons for such denial. It shall also aver his affirmative defenses supported by substantial evidentiary facts. He shall append thereto all material documentary evidence.

2.1.4. First date of oral proceedings

2.1.4.1. This is the preliminary hearing on the complaint and if filed, on the answer, where both verbally present their claim and defenses. Factual allegations and evidence not presented during this oral proceeding cannot be considered in the adjudication of the case.

2.1.4.2. In case none of the parties appear, then the case shall be dismissed. If it is only the defendant who is present, then the complaint is deemed orally presented while the defendant may present his defenses orally. If it is only the plaintiff who attends and no answer was filed, then defendant is considered to have admitted the complaint and a judgment can be rendered on the pleadings.

2.1.4.3. After oral presentation by both parties, if the court finds that there is no genuine issue on the facts as when defendant has admitted or is considered to have admitted the facts in the complaint, then the court may close the oral proceeding and orally render judgment for the plaintiff. The court clerk will record the decision and the written judgment will be rendered later, usually two (2) weeks after said oral hearing. If a genuine issue exists, then the case will be scheduled by the court for a second oral proceeding which may be any or all of the following:

1. Preparatory oral proceedings;
2. Preparatory procedure for oral proceedings; and
3. Preparatory procedure by documents.

2.1.4.4. Each party shall also be required to file their respective briefs before the second oral proceeding which shall contain their allegations in detail and the summary of the proceedings at the first hearing and must also file all other documentary evidence with the court furnishing the adverse party copies thereof. In closing, the court shall issue a confirmation as to the facts admitted arising from the examination of the parties. If new matters not introduced during the first oral proceeding are presented, the adverse party may require the presenting party to explain the introduction of new matters.

2.1.5. Procedures for adjustment (determination of issues and evidence)

The court, after the first oral hearing, may choose any or all of the three (3) procedures hereunder explained:

2.1.5.1. Preparatory oral proceedings

This is usually conducted in a “round table courtroom” (the parties are seated around a round or oval table, with the judge between them) which is not open to the public so that parties can discuss in a casual atmosphere. The court proceeds to an intensive determination of issues and evidence which includes the examination of every kind of evidence.

2.1.5.2. Preparatory procedure for oral proceedings

This procedure is designed to prepare the parties for oral proceedings in the future with the court requiring the parties to clarify the facts to be proven so that examination of witnesses may be conducted orderly. The parties may also move for production of documents and the court rule thereon. However, the court shall not require the examination of persons at this hearing. Telephone conferencing may be utilized if one party has difficulty attending this hearing.

2.1.5.3. Preparatory procedure by documents
No hearing is needed for this procedure as the parties are required only to file and exchange briefs and copies of documentary evidence without their appearance in court. The judge may have oral discussions with the parties utilizing the telephone conference system.

2.1.6. Additional oral proceedings
The court may order two, three or many oral proceedings he deems proper as there is an intensive and exhaustive examination of the issues and evidence before trial. Attempts are always made to settle the case. When a judicial settlement is reached, it may be put into the case record in which case, the record has the same effect as a final judgment.

2.1.7. Conference in the course of oral proceedings
The court may call a conference at any time to clarify the issues, to schedule the hearing or to discuss any matter for the speedy disposition of the case, or it can be done via the telephone conference system. Parties cannot present any allegation or introduce evidence during the conference.

2.1.8. Trial (Examination of parties and witnesses)
Trial begins after the exhaustive determination of issues and evidence. The court strives to finish the examination in one hearing or in successive dates. Written statements of witnesses in lieu of their direct testimonies are submitted subject to the right of cross-examination by the adverse party. The court orders the examination of the most important witnesses under the most important witness rule. TV conference system may be availed of in case the witness lives far from the court. Expert witnesses may also be availed of by the court in complicated cases.

2.1.9. Closing of proceedings
Parties may be required to present their closing arguments and submit respective brief. After considering all the allegations and evidence adduced by the parties and the court finds that the evidence presented are sufficient for the adjudication of the complaint, the court closes the oral proceedings and schedules a date for the rendition of judgment.

2.1.10. Rendition of judgment
The court promulgates its judgment on the case which contains the facts, the reasons for the decision and the reliefs granted to the winning party. If there is no appeal, then the judgment becomes final.

2.1.11. Appeal

2.1.11.1*Koso* appeal

This is an appeal taken from the decision of a District Court to a High Court or from a Summary Court to a District Court. It is perfected by notice of appeal and has to be filed within two (2) weeks from receipt of decision. The appellant must file his brief within fifty (50) days.

2.1.11.2. *Jokoku* appeal

This appeal covers only questions of law, violations of constitution or substantial violations of the Code of Civil Procedure. This is taken from a decision of the High Court to the Supreme Court or from a judgment of the District Court to a High Court.

2.1.11.3. *Kokoku* appeal

Interlocutory orders are not ordinarily appealable but orders or decisions which violate the Constitution or which involves an interpretation of law may, nevertheless, be subject of a *kokoku* appeal from Summary Court to District Court or from District Court to High Court or from High Court to Supreme Court.

2.2. Observations/Recommendations

2.2.1. The complaint should allege not only ultimate facts but also evidentiary facts. It should attach all available documentary evidence, which should be certified by the government agency issuing it.

2.2.2. The clerk of court should examine the complaint if it is sufficient in substance and form with the use of a complaint review sheet (checklist) to be formulated by the Office of the Court Administrator after analyzing a considerable sample of cases. The clerk of court should consult the judge if his/her findings are correct and ask the plaintiff to correct the complaint if necessary. For this purpose, clerks of court should receive appropriate training.

2.2.3. The court should set the case for preliminary hearing, the date and time of which shall be contained in the summons whereby the parties are required to attend said hearing and present their allegations and evidence.

2.2.4. The preliminary hearing shall proceed with or without the answer of the defendant. If there is no genuine issue, then judgment may be rendered. If an answer is filed, then issues and evidence should be examined by the court. At the end of the hearing, the parties should be required to submit their respective briefs that will contain admissions of fact and evidence and other matters taken up during the hearing.

2.2.5. To shorten proceedings, the answer should also contain allegations of substantial evidentiary facts and append all available documentary evidence.

2.2.6. Subsequent oral proceedings which form part of the pre-trial should deal with further examination of issues and evidence and at all times explore the possibility of settlement. Briefs of parties containing matters agreed upon and taken up during these proceedings should be submitted prior to the next hearing. Thus, there should be exhaustive use of pre-trial.

2.2.7. The court should call conferences to clarify issues and evidence. Teleconferencing or videoconferencing may be availed of so as not to inconvenience parties who reside far from the court.

2.2.8. At any and all times, including after the pre-trial stage, the court should endeavor to persuade the parties to reach a settlement.

2.2.9. During the trial stage, the court should determine the most important witnesses who should be examined first (Most Important Witness Rule).

2.2.10. Examination of witness should be terminated in one day (One- day Examination of Witness Rule).

2.2.11. To further shorten proceedings, written statements (affidavits) of witnesses, in lieu of direct examination, should be availed of. Cross-examination may be based on the statements in the affidavit.

2.2.12. A case flow chart consisting of pre-trial/trial dates and expected outcomes should be prepared by the judge to be attached to the case record which should be signed by parties.

2.2.13. Use of tape recorder in recording proceedings should be considered.

2.2.14. Fax and/or e-mail filing of pleadings should be allowed. To this end, the Office of the Court Administrator should identify appropriate measures to ensure the authenticity of the pleadings, especially their source, so that the party concerned would not deny the same later on.

2.2.16. Oral judgment may be allowed where no answer is filed or in case of non-appearance of defendant, which should be entered into the minutes of the hearing to be signed by the clerk of court and the judge. The written judgment will be released to the parties a maximum of two (2) weeks later. The receipt of the written decision is the official date of receipt thereof for purposes of appeal.

3. Intellectual Property (IP) Courts

3.1. Intellectual Property (IP) Courts are Sections of District Courts specially selected to handle only cases involving intellectual property rights (IPR).

3.2.Problems encountered in the trial of IPR cases

IPR cases can be prolonged due to causes such as the following:

3.2.1. Need for special expertise on intellectual property;
3.2.2. Insufficient preparation for the case by the parties;
3.2.3. Difficulty of identifying the IPR violation due to its tangible nature;
3.2.4. Hesitation to discover evidence due to possible violation of trade secrets;
3.2.5. Large amount of evidence;

3.2.6. Unstable nature of IPR (for example, an issued patent may later on be cancelled by the Patent Agency).

3.3. Solutions

A combination of solutions from all three branches of government addresses the above problems.

3.3.1. Legislative

Various laws had been passed, foremost of which are the following:

3.3.1.1. Trade Secret Law which was revised in 1993 to ensure the confidentiality and protection of the victim's technological secret.

3.3.1.2. Unfair Competition Law which is a supportive law to all the basic IPR legislation.

3.3.1.3. Copyright Act.

3.3.2. Administrative

Various agencies were assigned specific duties to address the problem of enforcement.

3.3.2.1. Patent Agency – in charge of registration of trademark and patent utility models.

3.3.2.2. Ministry of Education and Culture – takes charge of the enforcement of the Copyright Law.

3.3.2.3. Ministry of Economic Trade and Industry – in charge of the enforcement of the Copyright Law.

3.3.2.4. Ministry of Agriculture – in charge of protection of biotechnology-related inventions such as new plant varieties.

3.3.2.5. Customs – in charge of the enforcement of the Customs Law. It is under the Ministry of Finance.

3.3.3. Judicial

3.3.3.1. Organization of a special court

Certain Sections of District Courts are designated as IP Courts to exclusively handle IPR cases.

a. The IP Courts are assisted by researchers who are experts in electronics, engineering or chemistry. Recently the Tokyo High Court hired a patent attorney as researcher and increased its IP divisions from three to four, in recognition of the importance of IPR cases.

b. A round table court is allocated to the IP Courts to facilitate the settlement of disputes involving IPR.

c. The court has access to a pool of expert witnesses from which the court or the parties may obtain expert testimony by written interrogatories.

3.3.3.2. Trial schedule model for typical IPR cases

The court has not adopted a specific procedure, although it has devised a track model which is dependent on the nature of the case, subject to the approval of the parties. When the case is filed, the parties are informed through a letter by fax/mail to proceed with the

trial based on a planned schedule furnished the parties for their approval. There are three track models:

a. Standard Fast Track: This is characterized by the parties' submission of briefs to define the point at issue and determination of the necessity of witness examination within defined periods. The trial terminates within six (6) months. The possibility of settlement is taken into consideration.
b. Model I: This is used for cases involving the infringement of patent or utility models. A certain period is established for the parties to research on prior knowledge based on opinions of both parties. Within 200 days the determination of the point at issue will be finalized. The amount of compensation is also discussed.
c. Model II: This is used for cases involving design, trademarks and unfair competition. The issue is whether the infringed property is well-known or whether there are similarities between the allegedly infringing property and the infringed property.

3.4. Observations/Recommendations

3.4.1. Insofar as IPR is concerned, the Philippines has adopted more effective measures to expedite the disposition of cases, both substantive and procedural. The track models presented by the speaker are mere guidelines/proposals which may not be adopted by the parties. In the Philippines, the Supreme Court has issued specific periods for the disposition of IPR cases, both civil and criminal. For purposes of intricate or complicated issues, however, track models may be adopted, the specific periods of which should be fixed based on actual demands on intellectual property courts.

3.4.2. The maintenance of a pool of expert witnesses must be considered, not only for intellectual property courts but also for other special courts. To this end, standards must be set for experts to qualify to the courts' pool, and guidelines for the conduct of the expert witnesses must also be defined. The Office of the Court Administrator and the Philippine Judicial Academy in consultation with members of the Bar and academic and other professional experts may formulate such standards and guidelines.

3.4.3. As with all other types of cases, the pre-trial stage must be taken advantage of to abbreviate actual trial. For instance, the parties can already agree as to the extent of damages before proceeding to trial.

4. Family Courts

4.1. Jurisdiction

Family Courts have jurisdiction over family affairs determinations and conciliations as well as juvenile delinquency cases and adult criminal cases where the welfare of juveniles is affected.

4.2. Procedure in family affairs cases

4.2.1. Determination proceedings

4.2.1.1. Matters covered. Determination proceedings cover the following cases:

a. those which by nature can only be disposed by a court's judgment, such as guardianship for adults, declaration of disappearance or correction of the registers. This will be governed exclusively by determination procedure.

b. those which would be disposed of in accord with agreement of the parties such as divorce. This will be governed by conciliation proceedings.

c. those which would be disposed of either by agreement of the parties or by the court's decision such as share of expenses arising from marriage as partition of a decedent's estate. This will be governed in the first instance by conciliation proceedings and in the event of failure of conciliation, then by determination procedure, as in divorce.

4.2.1.2. Steps to be undertaken

a. Written or oral application. The applicant will undergo family affairs consultation with the family affairs consultant who will hear the problem and advise which governmental agencies might be of help, or what appropriate action could be made by the family court. The court clerk acts as family affairs consultant at the time the applicant makes the application, but his/her assistance is limited to explaining procedures to the applicant.

b. Filing of petition. The family court summons the parties and conducts hearing in the presence of family court councilors.

4.2.2. Conciliation Proceedings

4.2.2.1. Steps to be undertaken

a. Written or oral application. The applicant will undergo family affairs consultation with the family affairs consultant who will hear the problem and advise him/her if he/she could be helped by other government agencies, or of appropriate action to be made by the Family Court explaining the petition proceedings. On the applicant's first visit to the Family Court, the court clerks act as consultants, but their assistance is limited to explaining procedures to the applicant.

b. Filing of petition

b.1. After the filing of the petition, the Family Court summons the parties to a conciliation proceeding to be conducted by a conciliation committee composed of a family court judge and two conciliation commissioners of family affairs.

b.2. The Family Court, as a preliminary measure, refers the case to a family court probation officer either for social investigation or examination, and to a medical officer for diagnosis of the parties.

b.3. Conciliation committee proceedings may result in:

(1) Success of conciliation, whereupon an agreement is entered which has the same force as a judgment or an order of determination (compulsory enforcement).

(2) A determination by the conciliation committee regarding the nullity or annulment of marriage or adoption agreement is reached by the parties and the existence or non-existence of a cause of nullity or annulment is not in dispute. After investigating the necessary facts and hearing the opinion of the conciliation commissioners of family

affairs, the Family Court may render an order of determination corresponding to such agreement as regards nullity or annulment of marriage or adoption (compulsory enforcement).

(3) Failure of conciliation, in which case the Family Court, if it deems proper, may render, upon hearing the opinions of the conciliation committee of family affairs, considering equity for parties, an order of determination of divorce, dissolution of adoption relations or on any other matter necessary for the solution of the case: provided it is not inconsistent with the intent of the application of the parties. The party concerned may institute litigation (as in divorce) and go to the District Court's judicial procedure. The Family Court may also refer the case to determination proceedings.

(4) Withdrawal of the petition or the case.

(5) Refusal of parties to undergo conciliation, in which case the party/petitioner may institute litigation with the District Court or referral of case to undergo determination proceedings.

b.4. The judge may order an investigation by the family court probation officer, seek an examination of the parties by the family court clinic or require the production of evidence.

b.5. Provisional remedies may be availed of by the applicant/petitioner before determination by the family court. Examples of these remedies are:

(1) The Family Court may issue an order of provisional attachment prohibiting defendant/respondent from disposing property until final determination.

(2) The Family Court may issue an order of provisional disposition, forcing the adverse party to pay money temporarily until final determination. Provisional remedy orders of the Family Court are enforceable. If provisional remedy orders are not complied with, an enforcement order will be issued. Failure to comply with enforcement order will result in a non-penal fine. If payment can not be made directly to the applicant/petitioner, then the family court can intervene requiring the obligor to make deposits in court to be turned over to the obligee/petitioner/applicant.

b.6. The determination by the Family Court would be any of the following:

(1) withdrawal of the petition;
(2) dismissal of the case;
(3) grant of remedy; or
(4) submission to conciliation proceedings.

Both the dismissal and the grant of the petition can be appealed. If not appealed, then the decision can be enforced compulsorily by an admonition to perform or a performance order. All proceedings in the family court are confidential and not open to the public/media, and subject to appeal.

4.3. Procedure in Juvenile Delinquency cases

4.3.1. To be cognizable by the Family Court, the offender's age must range from fourteen (14) to nineteen (19) years old at the time of the proceedings.

4.3.2. Juvenile cases are commenced when any of the following persons file a case before the family court:

4.3.2.1.Judicial police officer/public prosecutor

4.3.2.2.Family court probation officer

4.3.2.3.Chief of the Child Guidance Center

4.3.2.4. Other persons such as the person charged with the protection of the juveniles or a school teacher.

4.3.3. Cases filed by judicial police officer (minor offenses and serious offenses)

4.3.3.1. If the offense committed is minor, the Family Court assigns the case to a family court probation officer, giving him direction for his investigation.

a. When the juvenile needs to be taken into protective custody, the Family Court judge may order the juvenile to be detained at the Juvenile Detention and Classification Home for up to four (4) weeks. The detention period may be extended to a maximum of eight weeks when an examination of evidence becomes necessary because the juvenile denies the facts constituting the alleged delinquency or offense.

b. The Family Court, after investigation, may refer the juvenile to a Child Guidance Center.

e. The Family Court may order dismissal without hearing after investigation.

f. The Family Court may order dismissal after hearing.

g. After hearing, the Family Court may also recommend education measures.

4.3.3.2. The Family Court, after determining that the case of the juvenile is serious, may refer the case to public prosecutor for criminal proceeding.

4.3.4. Cases filed by a family court probation officer or Chief of the Child Guidance Center follow the same procedure as the judicial officer/public prosecutor with emphasis that those filed by the Child Guidance Center must undertake the measures under the Child Welfare Law.

4.3.5. The Family Court may refer the juvenile case to a public prosecutor for indictment under the normal criminal procedure generally when the juvenile is over 16 years old and he had killed another person. But the court may place the juvenile under protective control (educative measures), if it deems that it is the most proper disposition for the juvenile considering the result of the investigation into his motivation to commit the crime, the circumstances of the case, the juvenile's condition after the criminal act, the personality, age and behavior of the juvenile, and the juvenile's home environment.

4.4. Procedure for Adult Criminal Cases

This refers to criminal offenses constituting an injury to the welfare of juveniles. The public prosecutor files a case with the Family Court. Then the action follows the same procedure as a criminal case in the District Court. Proceedings in the District Court are open to the public.

4.5. Observations/Recommendations

4.5.1. The Supreme Court, through amendment of rules or through circulars, should delineate which of the cases enumerated in Section 5 of the Family Code could be disposed of:

1. by a court judgment to be governed by the determination procedure;
2. in accordance with the agreement of the parties, which shall be governed exclusively by conciliation proceedings;
3. either by agreement of the parties or by the court's decision, which will be governed in the first instance by conciliation proceedings and in the event of failure of conciliation, by the determination procedure.

4.5.2. The Supreme Court must appoint/designate (if finances warrant) family court councilors and conciliators. The responsibilities of mediators may be expanded accordingly.

4.5.3. The Supreme Court, through circulars, should enhance the duties of family court social workers to play the roles played by the family court probationer officer (Japan family court officer).

4.5.4. The Supreme Court must appoint in every family court medical officers (psychiatrist/psychologist and nurses) with a medical room to be allotted/allocated in each family court.

4.5.5. The Supreme Court must issue guidelines to Family Court staff on how to deal with or treat people with family problems. The Supreme Court must provide the Clerks of Court with checklist forms as to what documentary evidence is needed in every case to be submitted by applicant/petitioner in family courts according to nature of case to be filed. These efforts must be complemented with the corresponding extensive training for the Clerks of Court since they constitute the frontline of the Family Court and can, therefore, assist in facilitating the proceedings.

5. Summary Courts

5.1. The Summary Courts comprise the first level court in the court hierarchy of Japan's judicial system. There are 438 summary courts throughout the country as of August 2000. Cases in the Summary Court are handled by a single summary court judge. There are 810 summary court judges. Almost all Summary Court judges are retired judges or well-trained ex-court clerks or court researchers who passed the internal examination of the court.

5.2. Jurisdiction

5.2.1. Summary Courts have jurisdiction over the following civil cases:.

5.2.1.1. Claims not exceeding ¥900,000;

5.2.2.2. "Small claims" which are monetary claims not exceeding ¥300,000;

5.2.2.Summary Courts have jurisdiction over the following criminal cases:

5.2.2.1. Criminal cases relating to offenses punishable by fines or lighter penalties;

5.2.2.2. Other minor offenses, such as theft or embezzlement.

5.2.3. The Summary Court also handles conciliation proceedings aimed at settling everyday disputes among citizens concerning civil law.

5.3. Judgments

The Summary Court cannot impose imprisonment or graver punishment as a general rule. However, it can impose imprisonment with labor not exceeding three (3) years with respect to cases of offenses specifically provided for by law. When the Summary Court deems it proper to impose punishment exceeding the limit, it must transfer the case to the District Court.

5.4. Civil Cases

5.4.1. Initiating the case

5.4.1.1. The plaintiff fills up a sample form of writ of action for the following types of cases:

a. repayment of loan;
b. payment of sales;
c. payment of contract:
d. payment of deposit for house/room tenant;
e. payment of house/room rent;
f. payment of salary;
g. payment of allowance for dismissal notice;
h. payment of compensation for damage caused by an accident;
i. repayment of deposit of entry fee (for any organization)
j. payment of management cost of an apartment;
k. general claim based on contract;
l. general claim based on other causes.

5.4.1.2. Plaintiff submits a written application under the summary procedure for small claims.

5.4.1.3. Plaintiff fills up a form for conciliation proceedings or may be done orally to the court clerk.

5.4.2. Preparatory steps at the filing of a case

5.4.2.1. The plaintiff gets to talk to a Summary Court clerk at the front desk or reception area of the Summary Court and assigns the plaintiff a number. When his number is called, the court clerk interviews the plaintiff based on a checklist form and examines the documents. The court clerk explains to the plaintiff the possible options to be taken, specifically:

a. demand for payment;
b. small claims action;
c. conciliation action;
d. ordinary action.

5.4.2.2. The court clerk instructs the plaintiff to send copies of each documentary evidence to defendant at least ten (10) days before the first oral hearing schedule. Court clerk further instructs plaintiff to bring his witnesses.

5.4.2.3. The court clerk at the trial section submits the complaint to the judge.

5.4.2.4. The judge allots 60-90 minutes for the case.

5.4.2.5. The defendant submits a written answer by mail by accomplishing a form for the purpose, with copies of documentary evidence, if necessary.

5.4.2.6. The court clerk calls defendant if he will appear on the first oral hearing and if he has any objection against plaintiff's claim; and if he has any evidence available.

5.4.2.7. The defendant submits his written answer and documentary evidence to the court and the plaintiff.

5.4.2.8. The plaintiff may prepare a written brief and send it to the court and the defendant.

5.4.3. First Oral Hearing

5.4.3.1. The judge clarifies the points at issue in a round table conference to facilitate a smooth but frank discussion with the parties and to encourage settlement.

5.4.3.2. After conference with the parties and a settlement is reached, the judge renders judgment. The judgment may grant a grace period or payment by installment with respect to small claims not exceeding ¥ 300,000.

5.4.3.3. If the parties cannot reach an agreement, the judge may ask the conciliation commissioners to assist the parties to reach an agreement. When conciliation is successful, the stipulation of conciliation is entered in an official protocol (minutes or record of the proceedings) and given the same effect as a final judgment.

5.4.3.4. In case there is an objection to the judgment, it should be raised to the court which rendered judgment within two (2) weeks from the day the judgment is served, otherwise the judgment becomes final.

5.4.3.5. Where a legitimate objection has been made, the trial shall be conducted under ordinary procedure. The judgment rendered under the ordinary procedure is final.

5.5. Criminal Cases

In criminal cases, the Summary Court renders judgment by way of documentary review irrespective of the kind of offense.

5.6. Salient Features of the Summary Court System

5.6.1. It caters to ordinary people who are reluctant to hire lawyers, meaning lawyers to assist the parties are not required.

5.6.2. Parties can use “telephone guide/fax guide” provided by summary courts before they visit summary courts which provide basic information on the procedure.

5.6.3. Tape recorded telephone guide is available twenty-four (24) hours a day, and leaflets or other forms can be sent by fax upon request in advance.

5.6.4. Summary court adopts the principle “one day time trial.”

5.6.5. Trial is done in court with round table conference to facilitate frank discussion.

5.6.6. Oral judgment is given immediately.

5.7. Observations/Recommendations

5.7.1. The use of the round table conference between or among the parties without the assistance of counsel with the aim of affording the parties an opportunity to reach an agreement should be considered for Philippine courts.

5.7.2. The assistance of judicial commissioners or conciliators with the objective of terminating cases within one day for certain types of cases should also be considered.

V. PARTICIPATION OF THE PUBLIC IN THE JUDICIARY

Lectures related to the topic were given by Ms. TANAKA and Mr. KASAI. Observation visits to various courts and the Volunteer Probation Office were also conducted.)

Taking advantage of volunteerism, as well as to augment the personnel resources of courts, selected private citizens are engaged by courts to participate in judicial proceedings. Such participation takes the form of the following:

1. Conciliation Committee

Judges and private citizens may become members of conciliation committees. There are approximately 12,000 citizen-members of civil conciliation committees and 12,000 citizen-members of family affairs conciliation committees. About 5,400 private citizens simultaneously serve as members in both types of committees. The citizen-members are selected from members of the general public who are of unquestionable character and deep insight, who have broad knowledge and experience. Typically, the expertise of the selected citizen must match the demand of the cases which he/she will be involved in. For example, an owner of a logging company was engaged as family affairs conciliation committee members in Kyoto where many succession cases involve timberlands. Conciliation is conducted in various disputes on civil and domestic affairs. The experience and knowledge of the committee members help in the drafting of a settlement agreement consistent with the circumstances of the dispute. Due to their

qualifications and stature in the community, they likewise can convince the parties to enter into a settlement agreement.

2. Summary Court/Family Court Councilors

Summary Court Councilors and Family Court Councilors are likewise selected from members of the general public who have broad knowledge and experience. About 5,900 Summary Court Councilors assist the Summary Court judge when the latter recommends settlement. They act as *amicus curiae* as they also attend hearing examinations and give opinions with regard to civil cases in Summary Courts. Around 6,000 Family Court Councilors attend to or give opinions with regard to domestic affairs cases concerning matters such as change of family name and succession.

3. Members of Committees for Inquest of Prosecution

Members of the Committees for Inquest of Prosecution are selected by lot from those who have the right to vote for members of the House of Representatives. There are 201 such committees, tasked with the review of the decision of a prosecutor not to prosecute an accused. The review by the Committee is referred to the chief of the district public prosecutors office, who can reconsider the decision not to prosecute based on such review.

4. Volunteer Probation Officers

Volunteer Probation Officers (VPOs), numbering around 49,000, are selected from the local communities. The officers are referred to as volunteers not because they apply to offer their services but because they are not paid for their services. The selection of a person as a VPO is a form of recognition of that person's stature in the community. The most excellent VPOs have the opportunity to be invited to the Emperor's palace on special occasions. VPOs attend to persons under probation to facilitate their reintegration into society. Since VPOs are familiar with the local residents and the facilities in the community, they can maintain contact with those under probation. After ascertaining the living conditions of the probationer, VPOs can also provide guidance or advice for the probationer's rehabilitation, reintegration into their families and they can also assist in matters concerning education or employment.

5. Recommendation

The Supreme Court should consider enhancing cooperation with civil society so the latter may assist in areas which are non-judicial in character but nevertheless facilitate judicial procedures.

VI. TRAINING OF JUSTICES, JUDGES AND COURT PERSONNEL

Lectures related to the topic were delivered by Judge MORI Masanobu ("Role, Function and Training of Court Clerks"); and Atty. TANAKA Yutaka ("Role and Function of the Law Clerk"). Observation visits to the Legal Training and Research Institute (with briefing) and the United Nations and the Far East Institute for International Crime Prevention (UNAFEI) were also made.

1. Training of Legal Apprentices

1.1. After passing the National Bar Examination of Japan, those who want to enter the legal profession are required to complete practical training at the Legal Training and Research Institute (LTRI) of Japan. The phrase "legal profession" refers to practice as a judge, prosecutor, or

attorney. The LTRI was established in 1947 as an agency under the supervision of the Supreme Court.

1.2. The trainees, who are called legal apprentices, have to undergo an 18-month training period divided into three terms: the initial training term, the field training term and the final training term. Training for legal apprentices is handled by LTRI's Second Division (the First Division handles continuing education for judges). During training, the apprentices receive a monthly stipend. Facilities in the LTRI include a dormitory for the apprentices.

1.3. The initial training term takes three months, during which the trainees are given introductory courses on legal practice and orientation for the field training term. The core courses are civil litigation, criminal litigation, public prosecution, civil advocacy and criminal defense. Courses on special areas of law and ethics are also given. Training consists of lectures and practical exercises, such as drafting of judgments, indictments (informations), pleadings and other legal documents. The initial training is conducted at the Institute by professors who are judges, prosecutors or practicing lawyers. Judges and prosecutors serve as full-time professors, while lawyers teach on a part-time basis. The professors are appointed by the Personnel Bureau of the Supreme Court.

1.4. The field training term is conducted for12 months in 50 different locations – district courts, district public prosecutors' offices, and local Bar associations throughout Japan. The period is divided into three-month rotational assignments to civil trial, criminal trial, public prosecution and private practice of law. Field training also includes "social training" where the apprentices participate in various voluntary work.

1.5. The final training term lasts for three months. It is conducted at the Institute where the apprentices are described as "given some finishing touches."

1.6. After the training, the Supreme Court conducts a final qualifying examination, which is both written and oral. Upon passing the examination, the apprentice may choose to be an assistant judge, a public prosecutor or an attorney. Those who fail the examination may retake the examination, but a second failure effectively disqualifies the apprentice from legal practice.

2. Training of Judges

2.1. The LTRI's First Division handles continuing education and research programs for judges. Professors hired for this purpose are themselves experienced judges with at least 15 years' experience. Experts in specialized fields are also engaged.

2.2. Pre-judicature training is not required for applicants for judgeship because the applicant had already received training for judgeship at the LTRI prior to the second qualifying examination. Thus, only continuing education is provided for judges.

2.2. The training programs are classified according to category of judges and by assignment of judges.

2.2.1. The programs classified by category of judges are Programs for Assistant Judges and Programs for Summary Court Judges. Assistant judges with less than ten years experience receive training in the first year and the third year following their appointment as assistant judge. They receive further training on the year they become eligible to handle cases in a single judge court, and again on the eleventh year following their appointment to full judgeship. Courses cover civil, criminal, family and juvenile affairs. Special courses as determined by a research group are also taught. The special courses are chosen according to recent issues and trends affecting the courts.

2.2.2. Summary Court judges who are not graduates of the LTRI are given similar training as that described in 2.2.1. Note that Summary Court judges need not be lawyers. Court clerks may qualify for a position as Summary Court judge after passing an examination and subsequent training.

2.2.3. Programs classified according to the assignment of judges consist of research conferences on civil, criminal, administrative, family and juvenile law.

2.3. Judges are also made to undergo special research programs wherein they are sent to media companies and private corporations for immersion. The assignment lasts for two weeks, four months or one year and is intended to give the judges a broader outlook and richer social experience.

2.4. Training Abroad/Judicial Research
Selected judges may be sent to other countries for as long as one year to research on the systems of that country which may be applicable in Japan or which may help improve the Japanese judicial system. To qualify for this training/research, judges have to apply to the LTRI and they must pass an examination for the purpose.

3. Training for Other Personnel
3.1.Before they enter into their duties as court personnel, such employees are first given training consisting of practical exercises and on-the-job training.

3.2. Applicants for the position of court clerk who do not have a law degree must undergo a two-year training course. Training methods include lectures, mock trials and practical exercises. Examinations and assignments are regularly given during the course.

3.3. Additionally, as with judges, court clerks (as well as prosecutors) are also typically sent abroad for long periods to study foreign systems. They must report about their learnings through a research paper. The research paper is disseminated by the Supreme Court through law journals.

4. Observations/Recommendations
4.1. The PHILJA may consider holding pre-assumption seminars for court personnel, focusing on the particular work expected from each type of personnel. The seminar may be made a requirement for qualification to the position, similar to the Pre-Judicature course for judges, or the training may be conducted immediately after the personnel are appointed. The latter option

may affect the schedule of appointments, that is, since it is more cost-effective to train batches of personnel than individual employees, it may be necessary to appoint several court employees at once rather than as the need therefor arises.

4.2. In order to effectively gather international best practices, Japan regularly sends selected officers abroad to undertake intensive studies of foreign systems. The resulting research becomes the basis for improvements in the Japanese judicial system. Similarly, the Philippine Judiciary may choose to send selected officers to different jurisdictions to gather best practices which may be applied to the Philippine judicial system. For purposes of continuity and comparison of contexts in order to determine which systems are most appropriate for the Philippines, the Supreme Court may consider sending the same team sent to Japan for this particular course, at least for studies on court and caseflow management.

VII. SUMMARY OF OBSERVATIONS AND RECOMMENDATIONS

1. Observations

1.1. The efficiency of Japanese courts in court and caseflow management is deeply rooted in preparations for trial. These preparations include a thorough analysis of the nature of a particular case. A thorough understanding of the case can lead to a determination of whether the case is appropriate for one or another type of alternative dispute resolution. If it is inevitable that the case must proceed to court, judges exhaust pre-trial to obtain a reasonable settlement of the dispute. By the time the case continues to a full-blown trial, the judges already have a clear understanding of the demands of the parties, and at the same time, arrangements at pre-trial shorten the period of actual trial. These arrangements include admissions and agreements on certain aspects of the case, identification and marking of evidence, submission of witnesses' statements to eliminate the need for the taking of testimony in court, and other activities.

1.2. Also an important part of preparations is the support provided by court personnel. A complement of personnel research on laws and jurisprudence related to a case, while others gather or validate relevant evidence. Pertinent records and other documents are also organized by support staff to facilitate the work of the judges. Private citizens also assist in this regard through their membership in conciliation committees or participation as councilors or volunteer probation officers.

1.3. Training is equally essential for effective court and caseflow management. Judges and personnel have to be trained on specific techniques relevant to their work. The Japanese judiciary thus regularly conducts training for its officers and employees before and during their actual engagement.

1.4. The Japanese judiciary likewise regularly determines trends in other jurisdictions. Based on intensive studies of advanced foreign judiciaries, the Japanese judiciary selects best practices which it then incorporates into the Japanese system.

1.5. Before specific changes are applied system-wide, the Japanese judiciary first pilots these changes in selected courts. The criteria for selection of pilot courts are themselves the product of

long years of experimentation. In any case, implementing changes at this level allows for flexibility of policy and manageability of costs.

2. Recommendations

2.1. Based on the lessons gathered by the delegation, it is recommended that Philippine courts maximize and exhaust the pre-trial stage of proceedings. Measures should be adopted to maximize factual determination during pre-trial. For instance, all documentary evidence which shall be used by the parties should be revealed and marked, with the consequence that evidence not so marked may be made inadmissible unless its inclusion may be justified. Similarly, the names of the witnesses and the nature of their testimony must be revealed at pre-trial. This can elicit admission or stipulation and thereby abbreviate proceedings. The suggested changes may seem a departure from what has been perceived as entirely adversary proceedings, where concealment of evidence and the protraction of proceedings are seen as strategies to wear down the opponent. In truth, however, the suggested changes are more in keeping with the ideals of court proceedings in the Philippines where counsel for the plaintiff and the respondent mutually assist the court in determining a just resolution to the case. The recommendations entail further suggestions for the enhancement of pre-trial techniques, the identification of specific tasks for judges and court personnel in support of pre-trial, and training of judges and personnel. Specific mandatory procedures or steps in the conduct of pre-trial should be defined by the Supreme Court. The studies on caseload decongestion and delay reduction being undertaken by the Office of the Court Administrator should be used to define specific time frames for pre-trial procedures.

2.2. Specific changes in pre-trial practice may be piloted in selected courts and selected cases to determine their effectiveness. The limited implementation of changes can allow the Supreme Court to adjust policies before their impact becomes unmanageable. Reasonable criteria must be formulated for the selection of courts and cases for piloting.

2.3. Pre-assumption training for court personnel and continuing education for judges and personnel must be strongly implemented by the Philippine Judicial Academy. There are current initiatives on continuing education which need only to be fine-tuned according to present and evolving demands on the courts. Even greater attention must be given to pre-assumption training for court personnel Judges have the benefit of Pre-Judicature training which prepares them for the rigors of court work. But there is presently no equivalent training or orientation for court personnel. Court personnel can be of better assistance to judges, and consequently reduce delay in court proceedings, with the requisite training that will help them not only learn the basics of their work but also help them better appreciate their role in the administration of justice.