ICD NEWS

LAW FOR DEVELOPMENT

INTERNATIONAL COOPERATION DEPARTMENT
RESEARCH AND TRAINING INSTITUTE
MINISTRY OF JUSTICE, JAPAN

February 2013

～Features～

GREETINGS

Dear all,

I am a new ICD Director from late June 2012. I would like to cordially request your continued support and advice for the ICD and its activities.

Let me introduce myself briefly: Subsequent to my initial career of domestic prosecution for 10 years, I have been involved in the area of international cooperation in the legal field for more than 16 years. I was engaged in the similar activities as those of the ICD from 1996 to 2000 before its establishment in 2001. It is my great pleasure to meet again many of you who I worked with in those earlier years. I was then seconded to the Asian Development Bank (ADB), Office of the General Counsel in Manila from 2000-2004 and was in charge of program loans and technical assistance grant projects for the legal and judicial sectors of Developing Member Countries. From 2004 to this June, I served as a professor of UNAFEI (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders). I also served the Cambodia Khmer Rouge Trials (the Extraordinary Chambers in the Courts of Cambodia: ECCC) as an international judge of the Supreme Court Chamber from May 2006 to this July. I am advising the Ministry of Foreign Affairs, International Legal Affairs Bureau, on issues related to international criminal justice. I teach this subject at the University of Tokyo, Graduate School of Arts and Sciences as a visiting professor. I am also serving the Trust Fund for Victims of the International Criminal Court as one of the five members of the Board of Directors.

I would do my best as the new Director to further develop the ICD's good practice accumulated since its inception. At the same time, I would seek to review, as necessary, areas and methods of the ICD's activities in the light of changing needs of recipient countries in close consultation with relevant Ministries, Agencies, and various stakeholders. In my view, the legal technical assistance by the ICD must always be strategically located in the overall national policy context, most utilizing limited financial and human resources through prioritization.

It was not possible to foresee the present prosperity of the ICD's activities when I was preparing for its establishment in late 1990's. I know that your continuous support and advice for the ICD and its activities made it possible. Please allow me to conclude this short message by reiterating my sincere thanks for you all. I look forward to working with you.

With my very best regards,

Motoo NOGUCHI (Mr.)
Director, International Cooperation Department
Research and Training Institute
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Contents

I. SPECIAL TOPICS AND ISSUES

MYANMAR – A COUNTRY OF HOPE

Kunihiko SAKAI
Director General
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I will explain later why this paper is titled, "Myanmar - A Country of Hope." Anyway, now

"Myanmar is a hot country!"

I heard that Myanmar offers the last and best business opportunity in this century and the whole world is going crazy about this country. Not only in Asia but also in Western countries the rush to visit Myanmar is intensifying, and it is becoming difficult to make a reservation at major hotels in Yangon. From Japan as well, several missions including those from the Japan Federation of Economic Organizations, the Japan Association of Corporate Executives and the Japan Chamber of Commerce and Industry have visited this country in succession.

All of the above is due to Myanmar's enormous potential. First is its abundant labor force. The country has a population of approximately 60 million people with over a 90% of literacy rate. In addition to the sheer numbers and ability of people, the labor costs are said to be only one-fifth or one-third of those in China or Vietnam, respectively. Secondly, the country offers an attractive market. Different from Japan, which is an aging nation, the working-age population accounts for over 90% of the whole population in Myanmar. The population's consumption style has already been changing, so there is a possibility that the market will expand dramatically driven by an increase in foreign investment in Myanmar.

The country's third appeal is its abundant natural resources, including natural gas, tin, tungsten, etc, with the fourth appeal being its geological location. Myanmar borders six countries, faces the Indian Ocean, and is wedged between the world's most populated countries, China and India. Thus, it is ideally located to develop economic activities. The economically thirsty international community would not leave such a viable region untouched.

Looking back at its recent history, however, after the 1988 demonstrations for democracy and the

birth of the military regime which suppressed them, the United States and other Western countries imposed economic sanctions on Myanmar. These sanctions included the prohibition of direct investment into the country, and the prohibition of importation of goods from Myanmar. In step with this movement, Japan limited aid to the country except for humanitarian support and acceptance of students. As a result, in spite of its enormous economic potential, Myanmar was left behind in the race for global economic growth.

After several decades of military regime, President Thein Sein of Myanmar, who assumed the presidency in March 2011, initiated a shift from military to civilian rule. He furthermore launched a series of democratization policies, including the abolition of press censorship and the release of political "criminals." Witnessing these changes, Western countries began scaling back the economic sanctions against Myanmar, and as a result, the country became a trendy place to visit.

Though it is not yet clear how democratization will advance in Myanmar, the fact that President Thein Sein announced the suspension of the Myitson dam project at the starting point of the large Irawwady River on the grounds of public opposition to the project - because the project had been approved by the military junta for a Chinese company-, gave an impression that he would act differently from the conventional military mindset. Moreover, this incident indicates the government's tendency to avoid the predominance of particular countries.

A series of democratic reforms helped convince the world that the present administration is solidly committed to democracy. These reforms include the direct talks between President and Aung San Suu Kyi; amendment of the law concerning political parties - which made it possible for her and her National League for Democracy to win in the by-election; legalization of labor unions; and the guarantee of press freedom.

To continue to succeed in its quest for democratization, the key for Myanmar will be whether the country can achieve sound economic growth in the years to come, and whether the public will be able to enjoy its benefits in their daily lives.

The president declared in his inaugural speech delivered the day after his assumption of office, that "the pivotal duty of the new government is to create good governance and a corruption-free government." In addition, he emphasized the importance of the rule of law. It is imperative that his government accomplish these tasks to go forward, and if it succeeds-- different from the "Arab Spring," in which, in spite of the word "spring," widespread demonstrations caused many casualties -- Myanmar would be able to realize a calm, peaceful transition to democracy in a unique Southeast Asian way. ASEAN members (as well as Japan) sincerely hope for it.

Needless to say, economic growth may not be realized without official development assistance and investments by other countries. Myanmar, a country with a self-sustaining attitude and an aversion to great outside powers, is expecting assistance and investment from Japan more than from any other nation. Both Japan and Myanmar are Buddhist countries, with an agricultural-based and community-oriented population who have similar appearances. Regarding postwar reparations, Myanmar was the first to agree to hold negotiations on compensation, and has always backed Japanese arguments in international settings, such as the U.N.

On the other hand, Japan had been the largest supporter of Burma until 1988, and Japanese aid accounted for 80% of the world's bilateral assistance to Myanmar. Therefore, it was perfectly the correct decision for the government of Japan to launch a nationwide task force for Myanmar with the goal of hammering out comprehensive assistance measures, including large-scale infrastructure development projects, though it was in fact a slightly late start.

While Myanmar needs a large amount of official development assistance, the core infrastructure supporting the country's development is its judicial system. Legal technical assistance is thus of primary importance. It can be compared to the spines of a human being, and so it is no exaggeration to say that legal development supersedes everything. For example, for the smooth promotion of foreign investment, the development of economic laws is necessary. Such laws include company law, securities exchange law, intellectual property law, and labor law. As these laws are developed on the foundation of civil law and other fundamental laws, which provide basic legal thoughts like "contract", it is essential to develop and understand the basic relevant laws, as well. For example, in undergraduate law courses, students learn special laws based on their knowledge of basic laws. Unless procedural laws and practices to resolve disputes (such as civil procedure code) were not well established, laws to be applied would be mere fantasies. Thus, the development of procedural laws is also critical.

Similarly, if crimes are committed during stock transactions (such as inside trading or stock price manipulation) and market transparency is damaged, investment will be significantly impeded. Therefore, a sound market cannot be established without well-functioning relevant criminal substantive laws and procedural laws. Furthermore, capacity building of legal professionals – judges, prosecutors, lawyers, etc. – who engage in the operation of a legal system, is one of the most required types of assistance for Myanmar, which has long been isolated from the rest of the world.

In addition, in order to ensure development assistance and investments conducive to the improvement of people's lives and further democratization, good governance must be assured

through the prevention of corruption, etc. As President Thein Sein is well aware of this, he made an inaugural speech stating just such matters. The treatment system of offenders must also be improved to conform with relevant international human rights conventions.

All of these are areas of Japanese specialty and Japan has an opulence of experience and achievement in these fields. Thus, we will be able to offer tailor-made assistance through thorough discussions with Myanmar, and with a maximum degree of respect for their ownership. Another important aspect in the development of Myanmar is that, as the country has "belatedly" debuted in the international community and currently foreign investment is surging into it, Myanmar will need to undertake a series of necessary reforms with increased speed and rate. In response to these challenges, legal technical assistance needs to be developed covering multiple areas as a package aid under concurrently advancing schemes.

Now I will explain why I refer to Myanmar as the "country of hope."

Regarding Myanmar and its people, the following has been widely told. Though my impression about Myanmar and its people is based only on my experience from talking with some prominent figures from its legal community visiting Japan, even such brief amounts of time has convinced me that what is said about Myanmar is true.

It is said that people in Myanmar have always had full respect for freedom, equality and human rights since the era of the Kingdom of Pagan in the 11th century. At that time, there did not exist a noble class with a hereditary system. The majority of the people are pious Buddhists, with an utmost life's goal of accumulating good deeds in this world to have a peaceful life in the next. They provide the charity to neighbors in need and do not cling to gained wealth. Priests, teachers and parents are most respected, and its young workers give a third of their income to temples, another third to their parents, and keep for themselves only what remains. As would be expected in such a society, people in Myanmar are polite, kind, shy, patient and calm. Because of these national characteristics, the country is safe, and it is said that only in Japan and Myanmar can women walk safely in the midnight. Beyond that, robbery in this nation is one-eighth that in Japan. All of this may remind you of "good old days" in Japan.

Myanmar and Japan also have more in common. For example, people in Myanmar leave things unsaid if they are on the same wavelength. They hesitate to say "No" because they are afraid of having someone lose face. These characteristics are quite Japanese. It is also said that the grammatical word order of the Myanmar language is the same as that in Japanese. As such, many Japanese people who once find themselves involved in Myanmar fall in love with this country (this

phenomenon is called, “Biru-mero” [a combination of “biruma”, which means Burma, and “mero-mero”, to be madly in love, in Japanese). Conversely, people in Myanmar also like Japanese people in general who they feel share many similarities. Even though Japan once occupied Myanmar, the prevailing anti-Japanese sentiment did not escalate in the country. Moreover, in the Battle of Imphal, many Japanese people were saved by the Myanmar people.

I have mentioned all these merits of the Myanmar people as I wish them to maintain their proud virtues, amidst the expected economic growth. I heard that Yangon is maintaining a beautiful atmosphere, and the people live naturally and appear cheerful. They are good-natured, kind, do not cling to wealth, and helping others gives them great satisfaction. On the other hand, they are proud, self-reliant, and show the spirit of rejecting undue influence from big powers.

Looking back on the history of Japan, in transition from the Edo period to the Meiji period (in the middle of the 19th century), Westerners who visited Japan had similar impressions and left the following words: “I witnessed the richness of this country, heard children laughing happily everywhere, and found nothing miserable in any place” (Henry Conrad Joannes Heusken, Dutch-American interpreter for Townsend Harris, the first United States Consul General to Japan), “Poor people exist, but not poverty,” (Edward S. Morse, an American zoologist who discovered Oomori shell mound in 1879), “All social classes are relatively equal. The rich are not arrogant, and the poor do not belittle themselves, … The real spirit of equality, or a genuine belief that we are all human beings penetrates into every corner of society” (Basil Hall Chamberlain, British Japanologist) (Kyoji WATANABE, *Ikishi Yono Omokage [Remnant of the World Gone]*).

In the modern globalized era, we are living in a world where the behavioral standard is an impersonal “global standard” ignoring the geography, history, civilization, culture and nationality unique to each country. In the market-economy based on such a behavioral standard, the “law of the jungle” prevails. As spiritual richness cannot be measured by a global rule, the materialism tends to proliferate where economic success is prioritized most. In modern society, monstrous globalization dominates and greedily devours people’s minds around the world. There have been serious tragic cases in which girls were sold by their parents to buy new televisions. Japan is not an exception and the above mentioned days when this country attracted visiting foreigners have long since passed.

I believe that Myanmar will be able to retain its spiritual richness and realize an equal society, even in the midst of economic growth. According to “*Letters from Burma*” by Aung San Suu Kyi, when a bishop asked her whether she had come to him because she wanted to get rich, she imagined that he would have been referring to material riches. Therefore, she replied she was not interested in getting rich. Then, he went on to explain the greatest treasure to be gained was that of nirvana (author’s note:

a synonym for enlightenment), and she was ashamed (*"Letters from Burma 1995-1996"* carried in the Mainichi Daily News).

In Asia, people with gentle souls have lived peacefully since early times with the philosophy: Harmony is the greatest of virtues. We have profound and solid ideas and notions on human rights and equality, which are deep-rooted in their histories and cultures, and are not at all inferior to those in the West.

Myanmar will strengthen its presence in the international community, as represented by its ASEAN chairmanship in 2014. We would like to welcome the arrival of newly-born Myanmar, and mutually share our experiences as close friends. It is hoped that Myanmar will be a model which will not lose its most important value – richness in mind – even in the age of globalization.

Therefore, Myanmar is our "country of hope."

Author's note: My impressions and opinions expressed in the article were reinforced through my trip to Myanmar in October 2012.

REPORT ON THE RESULTS OF A FIELD SURVEY IN MYANMAR - THE REALITY OF THE LEGAL COMMUNITY IN MYANMAR-

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International Cooperation Department

I. SURVEY PURPOSE

Myanmar completed its transfer of control from military rule, which had continued since 1988, to civilian rule in March 2011. At this time, all legislative, executive and judicial powers were handed over to the new government. President Thein Sein mentioned in his inaugural speech[1] that the establishment of good governance and a clean government was of primary importance for the country to become a democratized modern country, and held the enforcement of the rule of law as one of the challenges it faced. Since then, the country has steadily been on the road to democracy.

Western countries, including the United States, have evaluated highly the commitment to democratization by Myanmar's new government. The pouring of investment into the country has been further heating up, promoting the government's large-scale economic reform.

In response to such movement in Myanmar and by Western countries, and upon visit of President Thein Sein to Tokyo in April 2012, the Japanese government announced its policy of actively supporting this potential country. The policy aims to support Myanmar in its accelerated reformatory efforts in widespread areas. This would be done while constantly observing their progress in reform, to help its people enjoy benefits from democratization, national reconciliation and dividends from economic reforms. On August 13, the Policy Research Institute of the Ministry of Finance of Japan signed a memorandum with the Central Bank of Myanmar for cooperation in the enactment of the securities exchange law and personnel capacity-building related to this law, for the purpose of developing a capital market in this country. This marked the start of full-scale Japanese legal assistance to Myanmar and Japan is currently seeking to expand its cooperative relationships with a focus on economic areas.

In order to make Japanese assistance useful and practical in a real sense, the development of a

[1] Inaugural speech by President Thein Sein:
http://www.encburma.net/index.php/archives/burma-government/134-new-president-thein-sein-speech-on-31-2011.html

legal system which makes free trade competition possible is imperative. However, the law of Myanmar is based on the "Burma Code", which was formulated by transplanting an Indian code during the British colonial period, and thus has not departed from an outdated legal system. In addition, its Company Law, which was enacted in 1914, has been only partially revised and is not useful for the implementation of a market economy. In case of its Competition Law, no arrangement has been undertaken for its establishment. Thus, for the economic development of Myanmar, the challenge is urgent to establish economic-related and relevant basic legal systems.

It is not an exaggeration to say that almost no study has been done in Japan on Burmese law, partly due to the difficult access to it. Moreover, very little information has been available regarding the actual condition of the legal community in Myanmar which has long been under the military regime. In order for Myanmar to become the democratic nation it desires, it is necessary to establish, not only economic-related, but a broad range of legal systems including public law areas. As a prerequisite for the building of mid-tern and long-term cooperative relationships with Myanmar, we need to understand the situation of its legal system.

It is against the above-mentioned background that we decided to conduct a field survey in Myanmar to collect basic information about its legal system, in an effort to construct a human network conducive to our future assistance.

II. SURVEY SCHEDULE AND OTHER INFORMATION

A. Schedule

Monday, 18 – Saturday, 23 June in Yangon
Sunday, 24 – Tuesday, 26 June in Nay Pyi Taw[2]
Wednesday, 27 – Thursday, 28 June in Yangon

B. Places Visited

See the attached "list of main institutions visited."

C. Officers in Charge of the Survey

- Mr. Hiroki Kunii, Professor and Government Attorney, International Cooperation Department
- Ms. Natsuko Sugawara, Administrative Officer, International Cooperation Department

[2] There are about 200 miles (approximately 321.86 km) between Yangon and Nay Pyi Taw. We traveled from Yangon to Nay Pyi Taw by car, and it took approximately five hours.

III. SURVEY RESULTS

As you can see in the "list of main institutions visited", during our survey we visited several judicial and legal institutions, and were received with wonderful hospitality at each institution. Moreover, they expressed a desire to receive Japanese assistance in a wide variety of fields, which made me realize their high expectations toward Japanese assistance.

I will make a separate report regarding the details of requested assistance by each institution. In this paper, I will focus on the Yangon Bar Association, the existence of which may have not been even known, and the contents of the interview conducted there.

A. Bar Qualification in Myanmar

The legal profession in Myanmar is composed of law officers, who correspond to public prosecutors in Japan, judicial officers, corresponding to judges, and lawyers.

1. Law Officer

The Union Attorney General's Office (UAGO), which exercises jurisdiction over law officers, is an organization equivalent to the combination of the Legal Affairs Bureau, the Public Prosecutors Office and the Cabinet Legislation Bureau in Japan. It is composed of the following four departments.

	Department	Major functions
1	Law Scrutiny and Drafting Department	Drafting and revising laws, translating laws into English, organizing training for prosecutors, etc.
2	Legal Advise Department	Giving legal advise to other ministries and government agencies, etc.
3	Prosecution Department	This corresponds to the Public Prosecutors Office in Japan. However, it has no authority to investigate criminal cases, and is only in charge of prosecution.
4	Administration Department	General administrative matters

Law offices, where law officers work, are organized by the following four levels, having the UAGO at the top of the hierarchy.

	Name	Number
1	Union Attorney General's Office	1
2	State / Regional Law Offices[3]	State 7/ Region 7
3	District Law Offices	65
4	Township Law Offices	325

In order to become a law officer, the applicant must pass the national examination administered by the UAGO. The examination is composed of written tests on law materials (civil law, penal law, civil procedure law, criminal procedure law, evidence law and special law), general knowledge, English, the Burmese language, and an interview. This examination is conducted only when necessary, to fill a vacancy, etc. Successful applicants are hired officially as law officers after going through general training required to public servants, and also another training required to law officers[4].

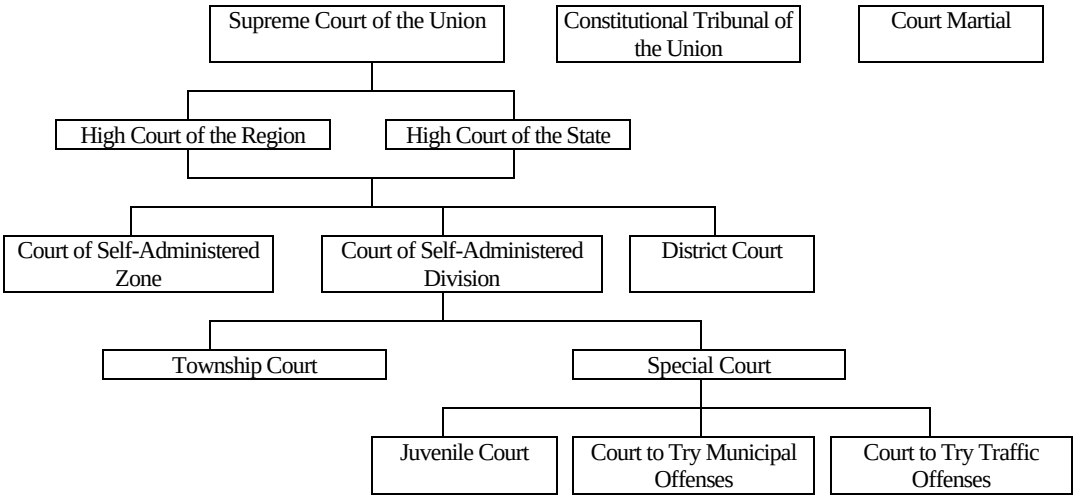
As the eligibility for admission to the examination, applicants are required to have obtained a bachelor degree of law or an equivalent academic degree. Moreover, since a few years ago, there has been an age limit requirement of being not older than 25 years old; provided that, however, this limit is elevated to "not older than 30 years old" in case the applicant has already served as a public officer, such as a court officer, etc.

2. Judicial Officer

The recruitment system of judicial officers is the same as that of law officers, except they are appointed by the Supreme Court.

Under the current Constitution revised in 2008, the judicial system in Myanmar is composed of the following types of courts:

[3] "Law Office" means "Prosecutor's Office" in Myanmar.
[4] Masanori AYUKYO "Ajia-ho Gaido Bukku [Guidebook on Asian Law]" at 298 and onward.



3. Lawyer

Lawyers in Myanmar are divided into two types: advocate and higher grade pleader. While the former is allowed to stand in all types of courts, including the Supreme Court, the latter can stand in the courts except for the Supreme Court[5].

Different from law officers or judicial officers, there is no examination required to become a lawyer. In order to become a higher grade pleader, the applicant must go through a one-year internship after obtaining a bachelor degree in law. During the internship, they must attend trials more than 155 times under the supervision of an advocate with not less than 10-year experience and receive a testimonial from the judge every time they attend a trial. After submitting an application with over 155 testimonials to the Supreme Court, they can finally be certified as higher grade pleaders.

Subsequently, when they have obtained seven testimonials from judges of five town courts, one district court, and one state or regional high court in three years, they are qualified to apply for a promotion to the rank of advocate to the Supreme Court. If the Supreme Court approves their promotion, they are allowed to stand in all types of courts.

The promotion to the rank of advocate cannot be approved immediately after application. In case of the higher grade pleader we interviewed, he had applied for it seven years before but had not been approved yet.

The Supreme Court issues an ID card to each lawyer containing his/her photo, and these cards are numbered in order of the acquisition of qualification. There are approximately 8,000 advocates

[5] As the difference between these two types of lawyers lies in the existence of the right to stand in the Supreme Court, the advocate is occasionally referred to as "Supreme Court Advocate."

and 30,000 higher grade pleaders in Myanmar.

B. Yangon Bar Association

1. Background to its Establishment, Position

The Yangon Bar Association was established in 1944, prior to the independence of Burma, as a private organization at the initiative of lawyers with the aim of protecting the interests and rights of the poor who were unable to afford legal assistance.

Different from lawyers in Japan, it is not mandatory for lawyers in Myanmar to be registered in the bar association, and the Yangon Bar Association accepts registration of lawyers nationwide. They explained that the association was named symbolically only because at the time of its establishment, Yangon was the capital of the country, and was the center of the nation's judicial function. It was in 1947, after the independence of Burma, that the association began its substantive activities.

The Yangon Bar Association was registered as a private organization by the then government and continued its activities until 1988. That year it was unregistered due to its participation in the anti-government movement which was intensifying in Myanmar against the then socialist regime.

However, the association has independently continued its activities and the conventional governments have recognized its de-facto existence. Upon the country's transition to civilian rule in March 2011, the association applied for re-registration to the new government, and it is anticipated to be approved soon.

The association has used an office offered by the then government at the time of its establishment, and has a branch office in Upper Myanmar, which encompasses Mandalay (the second largest city of Myanmar).

2. Activities

As explained above, although it is not mandatory for lawyers to join the Yangon Bar Association, many lawyers including former judicial officers and law officers who agree with the philosophy of its activities are registered. It is administered with the annual membership of 80 Kyat (approximately 8 yen) and donations from member lawyers[6].

The main work of the association is to represent and defend impoverished citizens (legal aid for

[6] I heard that the average monthly salary of civilians in Myanmar is approximately 60,000 Kyat.

the poor) in both civil and criminal cases. Lawyers get paid approximately 2,500 Kyat (approximately 250 yen) per case under legal aid, regardless of its difficulty or seriousness, and all of which is paid by the association. In practice, however, they work on a voluntary basis. In Myanmar, there is a wide gap between the rich and poor, and many citizens apply for legal aid. Therefore, even though cases under legal aid are allocated successively to lawyers registered at the association, applicants are constantly on a waiting list.

Near the Yangon Bar Association

A sign inside the office of the Yangon Bar Association

Inside the office

Interview inside the office

In addition to legal aid activities, the Yangon Bar Association organizes its original training programs for lawyers with less experience, such as allowing them to have free access to books in the office, holding study meetings with experienced lawyers, etc.

The association autonomously organizes an annual general meeting, and administers an election to select its president by member lawyers. Thus, the autonomy and freedom of activities is assured. The current President, Mr. Ohn Maung, is the 5th president since its establishment.

The courts also recognize the importance of the bar association, and notify it of the schedule of court sessions by sending a weekly list of court sessions to the association. The list includes necessary and sufficient information of cases to be heard, including the date of court sessions, types (civil or criminal) and numbers of cases, the names of plaintiffs, plaintiffs' attorneys, defendants and defendants' attorneys, and remarks.

In the criminal justice system in Myanmar, there is a system of court-appointed defense counsels for defendants charged with crimes punishable by the death penalty or life imprisonment, and such defense counsels are selected by the Myanmar Bar Counsel. This counsel deals with affairs in relation to the status of lawyers, including the registration of and taking disciplinary actions against lawyers, but is an entirely different entity from the Yangon Bar Association.

3. Other useful information

On the day of our visit, a board of directors was to be held by coincidence, and fortunately we were able to meet the president and other major directors of the association.

During our interview with the president, I was impressed by his words of expectation for active legal technical assistance from Japan. The outline of his words is as follows:

> Even under the military regime, judicial officers and law officers enjoyed the privilege of studying abroad, including Japan, and acquired international awareness and knowledge. On the other hand, private lawyers had very limited opportunities to study abroad. Therefore, lawyers who were trained during the military regime are not skilled enough from the viewpoint of international standards.
>
> Moreover, the law of Myanmar is based on the Burma Code, which was transplanted from India during the era under the British colonial rule. Although the Code has been amended in a unique manner according to the needs and conditions of Myanmar, various complaints have been raised because it is ill-suited to the actual situation.
>
> Japanese post-war economic growth has greatly depended on its stable legal development. In the midst of its own quest for economic growth, Myanmar may be able to learn much from Japan in the legal field.
>
> It is our sincere hope that Japan organizes capacity-building training for prospective young lawyers, and not ones who are near retirement age.

In response to the President's request for materials on Japanese basic laws, such as the Civil Code, we presented him a CD-R which included English translations of the Civil Code, Code of Civil Procedure, Real Property Registration Act, the electric data of which was downloaded from the website of the Ministry of Justice of Japan.

IV. COMMENTS (AFTER THE FIRST SURVEY)

What is particularly noteworthy is the fact that Myanmar has established its unique judicial system in a situation of national isolation under the military regime, without reference to legal systems of, or assistance from other countries.

It is true that some parts of the traditional Burma Code do not correspond to the reality of Myanmar, and there seems to be inconsistencies between laws due to frequent amendments to the Code. However, the fact that even lawyers in the private sector are aware of these problems and of the necessity of revising laws is the proof of the high level of legal professionalism in Myanmar.

Until we had the chance to observe a trial, I was uncertain whether adjudication is made fairly in this country. In reality, in the open court we observed, the parties actively presented their arguments in front of the judge, and I was convinced of the fundamental strength of the legal community in this nation.

When considering the possibility of providing legal technical assistance to Myanmar, it should be kept in mind that the starting point in Myanmar is different from the case in Cambodia or other countries, and so we should maintain a standpoint of "cooperation" with Myanmar, rather than "assistance."

During this survey, we received requests for cooperation in organizing capacity-building training, personnel exchange, etc., from several institutions including the Union Attorney General's Office, Constitutional Court, Special Investigation Department of the Ministry of Home Affairs, etc., as well as the Yangon Bar Association. Their requests are not limited to the civil and commercial law areas but cover a wide range of areas, such as cooperation in the amendment of the Constitution and training in investigative skills. In order to help them establish the rule of law more firmly, we need to promote cooperative relationships with them.

It cannot be denied that the survey we conducted this time was far from sufficient to become fully acquainted of the actual situation in Myanmar, and we realize the necessity of doing further

surveys in the field. If we undertake certain cooperation programs hastily without giving due consideration, such programs would be superficial and not conducive to legal development in a real sense. Cooperation with Myanmar must be promoted based on trust and human network to be built step-by-step between our two nations. It must be accomplished through maintaining our Japanese unique position and without being carried away by the trend in other countries, all while keeping a certain sense of speed.

Last but not least, my thanks go to Ms. Thit Thit Aung, a lawyer who has studied in Japan and accompanied us all the way during our itinerary, and greatly helped us make appointments with the institutions we visited. Her support was immeasurable as there was very little information available about the situation in Myanmar. I am also grateful to Associate Professor Teilee Kuong and Research Associate Ms. Emi Makino of the Center for Asian Legal Exchange, Nagoya University; Messrs. Takeshi Mukawa and Takeshi Komatsu, Mr. Hidemoto Futami, partners and associate of Mori Hamada & Matsumoto Law Office, who accompanied us partly during our stay, and cooperated with our survey in Myanmar.

The International Cooperation Department (ICD) of the Research and Training Institute has commissioned the above law office to research the legal system and the actual operation in the field of basic laws, including the company law, law of obligations, property law, labor law, etc. in Myanmar. It results are to be published on the website of the ICD.

Main Institutions Visited in Myanmar

	Institutions	Persons interviewed and his/her title
1	Union Attorney General's Office	Mr. Tun Shin, Attorney General Mr. Kyaw San, Director General (Legal Advise Department) Ms. Tin Nyo Nyo Thoung (Commercial Contract Division, Legal Advise Department) One other officer
2	Supreme Court	Mr. Sein Than, Director General Four other officers
3	Constitutional Tribunal	Mr. Thein Soe, Chief Justice Mr. Bo Bo Yin, Director General Three other officers
4	Bureau of Special Investigation, Ministry of Home Affairs	Mr. Bo Maung, Deputy Director of the Special Investigation Department Seven other officers
5	Yangon Regional District Court	Ms. Lwin Lwin Aye Kyaw, Department Director of the Supreme Court in Yangon Ms. Tin New Soe, Judge of the Juvenile Court in Yangon Ms. Thin Thin Oo
6	District Court in West Yangon	Ms. Lwin Lwin Aye Kyaw, Department Director of the Supreme Court in Yangon Eleven other officers
7	Yangon Bar Association	Mr. Ohn Maung, President Mr. Win Sein, Secretary General Mr. Khun Win Hlaing Mr. Ko Ko Mr. Soe Myint Ms. Phyu Phyu Thant
8	Department of Law, University of Yangon	Ms. Than Nwe, Professor (former Dean of the Department of Law) Ms. Khin Mar Yee, Dean of the Department of Law Many others

CONTRIBUTIONS OF FORMER STUDENTS FROM MYANMAR WHO HAVE STUDIED IN JAPAN

Natsuko SUGAWARA
Administrative Officer
International Cooperation Department

It has been more than one year since I joined the International Cooperation Department (ICD). Working in the ICD has many attractions, and one are my "encounters with people."

I was given an opportunity to visit Myanmar for two weeks in June 2012 to conduct a local survey. I will report on the results of the survey on another occasion, and in this paper I would like to focus on the contributions made by the Burmese people who had studied in Japan, as the report on the results of the survey will not refer to them.

What surprised me most was the great hospitality extended to us in Myanmar by those who had studied at Nagoya University, Kobe University, Yokohama National University, Kyushu University and other schools. All are playing important roles in their respective institutions, and extended their welcome to us in Japanese.

During our stay, we visited several institutions including a district court and a high court where we observed trial sessions, the Faculty of Law in Yangon University and the Union Attorney General's Office (the functions of which are similar to those of the Ministry of Justice and the Cabinet Legislation Bureau in Japan).

At each institution we visited, officials who had studied in Japan attended to us with great hospitality, and we were very much impressed by their command of Japanese though they might have been in Japan several years (or more than 10 years) before. Their language ability was enough to convince us the effort they devoted to learn Japanese.

Those who have studied in Japan are playing active roles in various fields. In the legal field, some are working as legal professionals, and others assume executive or important positions in their institutions. It appeared that they would occasionally explain what they had learned in Japan to their colleagues or superiors.

They greatly helped us during our stay in Myanmar, especially in making appointments with the institutions we visited. For example, our visit to the Constitutional Court was not included in our original itinerary, but one official who had studied in Japan, convinced an executive officer of the court to allow our visit. We are most grateful for those people who truly supported us in accomplishing our survey goals.

Recently Myanmar has been attracting worldwide attention. Japan, on the other hand, has conventionally accepted students from Myanmar, and the Union Attorney General expressed his gratitude for it.

For me, accepting students from Myanmar has two important meanings. First, Japan and Myanmar have cultivated relationships of trust through continuation of bilateral relationship. Second, those who have studied in Japan, using their learning and experience in Japan, will lead their country in a better direction. None of these can be achieved overnight.

We also admire university staff and faculty members who have accepted, and still maintain, friendly relationships with students from Myanmar -- even after they have returned to their country.

I was very excited to hear a former student tell me, “Everybody was very kind to me in Japan. It’s my turn to return the favor, so I want to help you in everything.” This trip reminded me of the fact that the “encounter and tie with people” is the basis of legal technical assistance. I realized that such cordial human exchange develops people, creates laws, and mutually supports national development.

We met people in Myanmar who had studied in Japan, and who are now playing active roles in their society. We were destined to meet them. I instantly became fatalist and pledged to cherish future “encounters” with people, while looking out from the train window.

LECTURE PRESENTATION ON THE BUSINESS LAW OF MYANMAR

Hiroki KUNII
Professor and Government Attorney
International Cooperation Department

I. PURPOSES OF LECTURES

In March 2011, Myanmar made a shift to civilian rule from its prior military regime, which had governed the nation since 1988. Through this transition, all legislative, executive and judicial powers were transferred to the new government. In his inaugural address, new President Thein Sein announced the realization of "clean government" and "good governance" as an overriding imperative. Following this movement, a federal legislature was formed in August 2011. Thus, the country is making steady progress in its move towards democracy. Under the new administration's policies on democratization, a large-scale economic reform (including the improvement of infrastructures) is anticipated, and the country is attracting rising attention worldwide, with eyes on taking advantage of this momentum.

Japan had suspended new economic cooperation programs with Myanmar since 2003. However, in light of the current active move towards democracy in Myanmar, the Japanese government decided to re-initiate technical assistance activities with it in November 2011. In order to make such assistance more effective and beneficial for the people, the establishment of a legal system allowing free trade and competition was deemed essential.

The law of Myanmar originated from the "Burma Code," which was formed by transplanting the code in British India during the colonial era. Thus it has not moved away from the old-style legal system. In addition, its Business Law has been only partially amended since its enactment in 1914, and thus is not fully applicable to a market economy. With regard to the competition law, no preparation has been made to date for its establishment. Under these circumstances, for the purpose of the country's economic development, it is urgently required to establish laws in the above field and their underlying legal systems. And in order for Japan to effectively assist efforts in Myanmar for legal reform which will benefit all its people, the knowledge on the basis of its legal system is indispensable.

Against the above background, with the aim of collecting and analyzing basic information on the

legal system in Myanmar, the International Cooperation Department (ICD) commissioned legal research to study groups on the law of Myanmar and law scholars inside/outside Japan in 2012. In addition, the ICD decided to invite legal experts from Myanmar and organize open lectures to the public so as to share information on the basic legal system in Myanmar. Invited legal experts were specialists in the company law, contract law, labor law, etc., and had extensive knowledge and affluent experiences in the said fields. Opportunities were also provided for Japanese scholars and legal practitioners to exchange opinions with the invited experts.

The lecture presentation was organized jointly by the Research and Training Institute, Ministry of Justice of Japan; and the International Civil and Commercial Law Centre Foundation, and its organization was supported by the Policy Research Institute of the Ministry of Finance. This institute signed a memorandum with the Central Bank of Myanmar in August 2012, on cooperation for the drafting of the securities transaction law and relevant personnel capacity-building, with the intent of establishing a capital market in Myanmar. The assistance project is currently underway.

II. LECTURERS

1. Professor Daw Than Nwe

She obtained BA and BL degrees from the University of Yangon, and LL.M degree from the University College, University of London in maritime law and private international law. She has served at the University of Yangon since 1967, and became the Head of Law Department before retirement. Currently she serves as a part-time professor and gives lectures and supervises the Master of Research and PhD candidates. She is also an Advocate of the Supreme Court of Myanmar.

She has written textbooks on revenue law, contract law, and administrative law, and submitted several legal research papers. She specializes in business law, labor law, private international law, human rights-related laws and others. She has attended to human rights workshops in Myanmar and numerous international workshops.

2. Mr. U Htin Zaw

He served as a judge for 37 years at the Yangon Divisional Court and others, and was the Director of the Research and International Relation Department at the Supreme Court of the Union before retirement. Because of his extensive experience in legal practice, he acted as the resource person at international seminars on IP field, on behalf of the Supreme Court of the Union.

He has written many books on civil and criminal case practices, which are currently used for reference by incumbent judges in Myanmar.

Currently he acts as advocate and also writes law books and gives necessary legal advice upon request from the Supreme Court.

III. OUTLINE OF THE EVENT

1. Date and Time

In Osaka: Friday, July 27, 2012; 14:30 – 17:30
In Tokyo: Wednesday, August 1, 2012; 13:00 – 16:00

2. Venue

In Osaka: International Conference Hall,
Osaka Nakanoshima National Government Building, 2F
http://www.moj.go.jp/housouken/houso_map.html
In Tokyo: International Conference Hall, International Exchange Building
National Olympics Memorial Youth Center
http://nyc.niye.go.jp/facilities/d7.html

3. Organizer

Research and Training Institute, Ministry of Justice
International Civil and Commercial Law Center Foundation

4. Supporter

Policy Research Institute, Ministry of Finance

5. Lecture topics

Professor Daw Than Nwe:

Osaka venue: Legal framework on doing business in Myanmar

Tokyo venue: Legal framework on doing business in Myanmar, intellectual property rights in Myanmar

Mr. U Htin Zaw:

Osaka venue: The judicial system and court proceedings in Myanmar

Tokyo venue: Foreign direct investment in Myanmar

6. Presentation materials

The lectures were attended by a large number of people at both the Osaka and Tokyo venues. In order to share valuable information offered by the lecturers, presentation materials are attached in the following pages.

LEGAL FRAMEWORK ON DOING BUSINESS IN MYANMAR

Prof. Dr. Daw Than Nwe
Part –time Professor, Law Dept
University of Yangon
MYANMAR

Osaka Nakanoshima National Government Building,
OSAKA ,JAPAN
27－7－2012

1

The Myanmar Legal System

- The Law, Judicial system and the role of lawyers in Myanmar was established in colonial period and continued after Myanmar gained independence in 1948 until 1974 constitution.
- The Judicial system and legal system had changed according to 1974 constitution, whish was based on socialist economic system.
- The current Judicial and legal system resumed to Common law based system with some modifications,

2

Myanmar Legislation

- Myanmar Codes vol.1 to 13_ Codified Laws enacted during 1841 to 1954
- Books on yearly legislation_ 1954 to 1962
- Three volumes of Legislations_ 1962 to 1974
- Books on yearly legislation_1974 to 1988
- Books on yearly legislation_1988 to 2011
- Union Laws_2011 to 2012

3

Changing Trend of Myanmar Economy

- After gaining Independence from British colony in 1948, Myanmar economy continued the same as before.
- After taking over of state power by the Revolutionary Council Government in 1962, the trend of economy was changed into Socialist Economic System.
- For that purpose all the private owned banks and private owned business organizations were nationalized, and laid down the planned economy in long term and short terms as well.

4

In support of the Socialist Economy, the government promulgated

- The Protection of Public Property Law 1963
- The Protection of Opposition against the Construction of Socialist Economic System Law 1964.
- The Law Conferring Powers for Establishing the Socialist Economic System was promulgated in 1965.(This law repealed the 1964 Law and this law was repealed by State-owned Economic Enterprises Law 1989)

5

- In the late 1988, soon after the State Law and Order Restoration Council assumed responsibility of governing the country, socialist economic system was abandoned and adopted a market oriented economic system.
- First of all the Foreign Investment Law 1988 was promulgated in November, 1988,
- The initial step taken towards a more liberalized economy is to allow to foreign direct investment and to encourage the private sector development.
- These economic objectives are aimed to create a market oriented system with the private sector taking the leading role in economy.

6

Encouragement of the promotion of private sector in economy

- Since late 1988 the Government has been actively encouraging foreign investment in Myanmar.
- The fundamental or basic concepts of the following laws fall under this category:

  * The Union of Myanmar Foreign Investment Law (1988)
  * The State–owned Economic Enterprises Law (1989)
  * The Myanmar Citizens Investment Law (1994), and
  * The Financial Institution of Myanmar Law (1990).

7

Union of Myanmar Foreign Investment Law (1988)

A new FIL has been drafted and it is expected to be passed during the current Parliament session which commence on 4th July 2012.

- **The Foreign Investment Law (1988) defines two types of investment : (1) a sole proprietorship, a partnership and a limited company (wholly owned (100%) by foreign investor), (2) a joint venture in the form of limited company in which the foreign capital invested must be at least 35% of the total equity capital. (Companies Act 1914 and Special Company Act 1950 applied)**

8

Investment Commission

- Foreign Investment Commission was formed under section 7 and Procedure in order to administer the foreign investment under this law.
- After Myanmar Investment Law 1992 has promulgated, it is renamed as Myanmar Investment Commission

9

Exemptions, Reliefs and Guarantees

- **Exemptions and reliefs are given to the investors under to S. 21, such as tax holidays for three consecutive years and exemption or relief from custom duty and other taxes. and guarantees under SS. 22 and 23 for not to be nationalised to take back of foreign currency invested**

10

The State–owned Economic Enterprises Law (1989)

- defines 12 economic activities in which private investment is restricted and are reserved to be carried out solely by the State. However it has been relaxed according to section 4 of the said law that the Government may, in the interest of the State, permit to carry out such activities.

  This could be done by notification in any of the following form:

  * Joint-Venture between the organization and a citizen or a foreigner,
  * Joint-Venture between the organization, a citizen and a foreigner,
  * Joint-Venture between a citizen and a foreigner,
  * Enterprise by a citizen and a foreigner.

11

The Sectoral laws concern with respective sector :

(1) Private Industrial Enterprises Law (1990)
(2) Promotion of Cottage Industries Law (1991)
(3) Myanmar Hotels and Tourism Law (1993)
(4) The Forest Law (1992)
(5) The Central Bank of Myanmar Law (1990)
(6) The Myanmar Agriculture and Rural Development Bank Law (1990)
(7) Saving Bank Law (1992)
(8)The Myanmar Insurance Law(1993)
(9) The Insurance Business Law (1996)

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(10) The Myanmar Mines Law (1994)

(11) The Myanmar Gemstones Law (1995)

(12) The Myanmar Pearl Law (1995)

(!3) The Co-operative Society Law (1992)

(14) The Myanmar Accountancy Council Law (1995); etc,

(15) The Commercial Tax Law (1990)

(16) The Tariff Law (1992)

(17)The Law relating to Private health Care Services(2007)

(18) The Myanmar Special Economic Zone Law 2011. etc.

13

The State-owned Economic Enterprises Law, 1989

- The State Law and Order Restoration Council has promulgated the State-owned Economic Enterprises Law on 31st, March 1989(9/89). The Union of Myanmar Foreign Investment law will not be completed without the knowledge of State-owned Economic Enterprises Law (SEE Law). The SEE Law defines 12 economic activities in which private investment is restricted and reserved to be carried out solely by the State.

14

12 activities given under Section 3 of the said Law are as follows: -

(a) extraction of teak and sale of the same in the country and abroad

(b) cultivated and conservation of forest plantation with the exception of village-owned fire-wood plantations cultivated by the villagers for their personal use

(c) exploration, extraction and sale of petroleum and natural gas and production of the product of the same

15

(d) exploration and extraction of pearls, jade and precious stones and export of the same
(e) breeding and production of fish and prawns in fisheries which have been reserved for research by the Government
(f) Postal and Telecommunications Service
(g) Air Transport Service and Railway Transport Service
(h) Banking Service and Insurance Service
(i) Broadcasting Services and Television Service
(j) exploration and extraction of metals and export of the same
(k) Electricity Generating Services other than those permitted by law to private and co-operative electricity generating services
(l) manufacture of products relating to security and defense which the Government has from time to time prescribed by notification.

16

Exception

- Section 4 of the SEE Law, services as a vehicle for privatization, it gives the right to Government to allow these activities to operate under privatization scheme.
- Myanmar Special Company Act 1950 applied

17

The Myanmar Citizens Investment Law 1994

- Citizens are entitled to the same exemptions and privileges of foreigners who are enjoying under Foreign Investment Law, such as 3 years tax holidays and other exemptions and guarantee against nationalization.

18

The Private Industrial Enterprises Law, 1990

- The State Law and Order Restoration Council promulgated the Private Industrial Enterprises Law on 26th November 1990 as an aid to the private industrial enterprise
- It is enacted to enhance the establishment of small, medium and large scale enterprises and promote private industrial enterprises individually or in partnership or by forming a company.
- This expression does not include industrial enterprises conducted in joint-venture with the Government

19

The Financial Institutions of Myanmar Law 1990

- At the time Financial Institutions of Myanmar Law was introduced, it was understood that the banking sector would be liberalized. This law allows the formation of domestic private banks.
- The Financial Institution of Myanmar Law, the Rules Relating to the Financial Institutions of Myanmar Law 1991 and the Central Bank of Myanmar Regulations for Financial Institution 1992 are the laws which regulate the establishment and ongoing operation of financial institutions in Myanmar.

20

Fisheries and Marine Products

- The State Law and Order Restoration Council has promulgated the following Laws to conserve marine and freshwater fisheries, to enable systematic operation in fisheries, wider participation of foreign investor and to promote exports.
- Law relating to Fishing Rights of Foreign Fishing Vessels (1989)
- The Law relating to Aquaculture (1989)
- Myanmar Marine Fisheries Law (1990)
- Fresh Water Fisheries Law (1991).

21

The Forest Law (1992)

- The Forest Law (1992) has been promulgated as the State Law and Order Restoration Council Law No. 8/92 dated 3rd Nov, 1992. It is enacted to enforce and implement forest policy effectively and also for environmental conservation and systematic development of forestry sector.
- Myanmar teak is most popular in the world teak trade. Teak export can be done in conversion forms, plywood, furniture, carving, joinery, flooring products, mouldings, etc. There are also different species of hardwood to be produced .This law administers all these matters.

22

The Myanmar Mines Law 1994

- The Myanmar Mines Law was promulgated on 6th September, 1994. It is enacted for the development of mineral prospecting and exploration works to enhance production of minerals and promotion of exports.

23

The Myanmar Gemstones Law, 1995

- The Myanmar Gemstones Law, 1995 has been promulgated to establish and develop a hundred percent gemstones and it can be deemed as the Government's prudent and generous step to see the flourishing of gem trading of the private sector within the country, and to enable local entrepreneurs to beneficially utilize rich natural resources for their own benefit as well as for national interest on equal terms.

24

The Myanmar Pearl Law, 1995

- Myanmar Pearl Law is promulgated as State Law and Order Restoration Council Law No. 7/95, 10th July 1995. There are 13 Chapters and 38 Sections in this Law. This law is aimed to conserve pearl, to enable systematic operation in pearl industries and to promote export.
- Section 19 of this Law provides the duties and powers of the Chief Inspector. Duties and Powers of an Inspector is provided in Section 22. (M/M)
- Taking of action by administrative means is provided in Section 23, and Section 25 to Section 33 provide the offences and penalties under this Law.

25

The Financial Institutions of Myanmar Law 1990

- At the time Financial Institutions of Myanmar Law was introduced, it was understood that the banking sector would be liberalized. This law allows the formation of domestic private banks.
- This law empowers the Central Bank of Myanmar to grant licenses to financial institutions, whether State, joint-venture, local private or foreign owned to conduct banking activities in Myanmar.
- The Financial Institution of Myanmar Law and the Rules 1991 and the Central Bank of Myanmar Regulations for Financial Institution 1992 are the laws which regulate the establishment and ongoing operation of financial institutions in Myanmar.

26

Laws of Banking

- **The Central Bank of Myanmar Law 1990**, which established the Central Bank of Myanmar (the successor to the Union Bank of Burma) ;
- **The Myanmar Agricultural and Rural Development Bank** Law 1990, which established the Myanmar Agricultural Rural Development Bank to support the development of agricultural and rural socio-economic enterprises;
- **The Saving Bank Law, 1992** , which encourages domestic savings and the promotion and mobilization of the country's financial resources.

27

Currency

National currency- KYATS

Foreign Exchange Certificate – FEC
is issued by Central Bank of Myanmar and accepted by government agencies

One FEC is equal to one USD

28

The Myanma Insurance Law 1993

According to Section 11 of this Law, Myanma Insurance undertakes the following insurance business:-

1. Life Assurance;
2. Third Party Liability Insurance;
3. General Liability Insurance;
4. Fire Insurance;
5. Marine Cargo Insurance;
6. Marine Hull
7. Aviation Insurance;
8. Engineering Insurance;
9. Comprehensive Motor Insurance;
10. Oil and Gas Insurance;

29

11. Cash- in- transit Insurance;
12. Cash-in- save Insurance;
13. Fidelity Insurance;
14. Travelling Insurance;
15. Personal Accident Insurance;
16. Other classes of Insurance;
17. Insurance determined by the Ministry. //

30

Tax Laws

Taxes levied on Income / Profit

Income – tax --- The Income Tax Law (1974)

(Profit – tax---The Profit Tax Law (1976) repealed by Law No. 1/2011 effected from 2012-2013 Budget year applied by 1974 law)

-Flat rate of 30% Foreign Companies formed under MCA.

-35% or graduated rate of 35%-50% for non-resident foreigners

Custom duty --- Myanmar Sea Customs Act 1878 and Land Customs Act 1924

Commercial – tax ---The Commercial Tax Law (1990)

The Tariff Law , 1992 as amended in 2011 by amending law 3/2011

31

- Stamp – duty --
- The Myanmar Stamp Act (1935), as amended by Law Amending Stamp Act , Union Law No. 2/2012
- Court Fees Act (1937) as amended by SLORC LAW No. 6/1990 and the Law Amending the Court Fees Act, Union Law No. 5/2011

32

Income Tax Law, 1974

The Income Tax Law applies to the following types of tax payers and the classes of income.

(a) State economic enterprises
(b) Co-operative societies
(c) Foreigners and foreign organizations engaged under special permission in State sponsored enterprise
(d) Income from salaries
(e) Non-resident foreigners
(f) Income earned abroad by non-resident citizens
(g) Companies
(h) Resident foreigners
(i) Partnerships or joint-ventures formed between or with (a),(b),(c),(e),(g) and (h) of above.

33

The Commercial Tax Law (1990)

- All enterprises with sales of taxable goods and services are required to pay Commercial tax in addition to customs duties.
- commercial tax, which is a form of sales tax is chargeable at the rate prescribed in the schedule 1-5 of the Commercial Tax Law effected in 1990.

34

The Tariff Law , 1992
amended by amending law 3/2011

- The minister may, by notification in respect of goods exported from Myanmar or goods imported into Myanmar by land, sea or air _determine the nature and type of goods, classify the quality of each goods, determine the tariff value on goods on which customs-duties are assessable and determine the tariff based upon the tariff value and reduce or enhance the tariff so determined.

- Under section 4 of this law, the Minister may determine, by notification, the tariff at a special reduced rate in respect of goods exported or imported by the border areas and may reduce or enhance the tariff so determined.

35

- Double Taxation Agreements

- There are DTA with few countries – UK, India, Singapore etc.

36

The Patents and Designs (Emergency Provisions) Act 1946

Myanmar Patents and Designs Act, 1945 was enacted as a substitute for the 1939 Act. However, the 1945 Act was never brought into force even though it has been repealed by the LawNo.4/1993.In 1946, the Patents and Designs (Emergency Provisions) Act, Myanmar was passed which is still in force with only two sections in it. Section 2 of this Emergency Provisions Act provides that until the Myanmar Patents and Designs Act, 1945 comes into operation, the India Patents and Designs Act, 1911 shall continue to have effect in Myanmar as if notwithstanding the separation of India and Myanmar, Myanmar had continued to be a part of India. In fact, Myanmar Patents and Designs (Emergency Provisions) Act, 1946 should have been repealed together with Myanmar Patents and Designs Act, 1945.

37

The Myanmar Copyright Act

If copyright in any work has been infringed, the owner of the copyright is entitled to all remedies by way of injunction or interdict, damages or accounts. In those cases, the Specific Relief Act or the Law of Tort may be applied depending on the nature of the case. However, an action for infringement of copyright is barred to commence after the expiration of three years next after the infringement.

38

Science and Technology Development Law, 1994

In 1994, a new law entitled "The Science and Technology Development Law" has been enacted to cope with the changing situation and developments in the market-oriented economy and to enhance its further development. The law provides that every contract for transfer of technology must be registered and failing of it will not have a right to institute a suit based on it.

39

The Television and Video Law, 1996

For infringement of copyright in television and video, there is a specific law entitled " The Television and Video Law of 1996 " which prescribes penalties for certain offences. Under section 33 of that Law, the offender of such offences as copying, distributing, hiring or exhibiting for commercial purpose a censor-certificated video tape, without the permission of the license holder , may be punished with imprisonment extending up to three years or with fine extending up to kyats 100,000 or with both. In these cases, as the penalty given is effective and deterrent and the trial of offenders is usually expeditions, the owner of the copyright may not wish to have recourse to civil action. However, the fact that the infringer has been punished under the relevant penal law is no bar to civil litigation.

40

The Computer Science Development Law, 1996

As regards the protection of software piracy, no protection can be sought due to the lack of advanced technology. However, section 36 of the Computer Science Development Law, enacted in 1996 penalizes for imports or exports of any type of computer software or any information prescribed by the Myanmar Computer Science Development Council under section 6(g) of the said Law.

41

The existing labor laws in Myanmar

1. Employment and Training Act, 1950
2. Employment Restriction Act, 1959
3. Employment Statistics Act, 1948
4. Factories Act, 1951
5. The Leave and Holidays Act, 1951
6. Minimum Wages Act, 1949 (Bill for new law has been issued)
7. Payment of Wages Act, 1936
8. Social Security Act, 1954 (Bill for new law is ready)
9. Shops and Establishments Act, 1951
10. Trade Disputes Act, 1929
11. Workmen's Compensation Act, 1923
12. The Law Relating to Overseas Employment 1998
13. .The Labour Organisation Law, The Union Law No. 7/2011

ILO Conventions

42

Transport by Sea

- Firstly, the Shipping Law of Myanmar is no stranger to the Shipping Law of other countries.
  - The Myanmar Carriage of Goods by Sea Act 1925 was enacted to give the force of law to the Hague Rules or the Convention for Unification of Certain Rules of Bill of Lading made in Brussels in 1923.
  - Bill of Lading Act 1856 is the same as English Law.
  - The Myanmar Merchant Shipping Act was promulgated in 1923 based on the British Shipping Law.
  – The registration of ships in Myanmar is governed by the Myanmar Registration of Ships Act (1841) and the Law Amending the Myanmar Registration of Ships Act in 1987 .

43

Transport by Air

- Secondly, in the Air Transport Sector, Myanmar rectified the Warsaw Convention 1929 and Chicago Convention (1944).
- -The Aircraft Act of 1934 and Aircraft Rules of 1937 give effect to the navigation of aircraft. The Aircraft Rules were amended by State Law and Order Restoration Council Rules No. 1/94 to issue Air Operators' Certificates to joint ventures airlines that are incorporated in Myanmar.
- The Carriage by Air Act, 1935 governs the loss of life or damages or loss of cargo, baggage and luggage carried by air. This Act gives domestic legal effect to the Convention for the Unification of Rules Relating to International Convention for Carriage by Air (the Warsaw Convention of 1929).

44

Carriage by Land and Multimodal Transport

- Thirdly, The law of carriage by land comprises the Railway Act of 1890 and Motor Vehicle Law, 1964 etc.
- Multimodal Transport refer to a transport system operated by one carrier with more modes o transport under the control of one operator..
- Not yet Multimodal Transport Law but as a member of ASEAN, ASEAN Agreement on Multimodal Transport is bound.

45

Company

- **The Myanmar Companies Act** 1914, covers the procedure aspect of company formation for all types of companies. There are some amendments but the basic principles are the same as the other Common Law Countries.
- - Company registration and permit to trade is required
- - Company management is based on Memorandum, Articles, AGM and Returns and under Common Law principles. There is no special penal provisions for corporate crime except Penal Code 1860.
- **Special Company Act 1950** is to govern together with Myanmar Companies Act , JVs are to apply. 46

Partnership

- The **Partnership Act 1932** is also Common Law rooted legislation.
- Partners are jointly and severally liable for the act of the firm S 25

47

The Arbitration Act 1944

- The Arbitration Act is based upon the English Arbitration laws enacted in 1944.
- The Myanmar Arbitration Act provides for the appointment, powers and duties of arbitrators, Court supervision and enforcement of an appeal from the arbitration award.
- The following is a model of arbitration clause commonly used in commercial contracts in Myanmar.
- "In the event of any disputes arising between the parties to this agreement, which cannot be settled amicably, such dispute shall be settled in the Union of Myanmar by arbitration, through two Arbitrators, one of whom shall be appointed by the purchaser and the other by the supplier. Should the arbitrators fail to reach an agreement, then the dispute shall be referred to an umpire nominated by the arbitrators. The arbitration proceedings shall in all respects conform to the Myanmar Arbitration Act 1944 (Myanmar Act No. IV of 1944) or any subsisting statutory modification thereof.

48

The Arbitration Act 1944- (2)

- Relating to the enforcement of foreign arbitral awards, Myanmar has adopted the Geneva Protocol 1923 on Arbitration clauses and the Geneva Convention 1927 on the execution of foreign arbitral awards. Protocol provides for the recognition and enforcement in Myanmar of foreign arbitral awards made in signatory countries and grants reciprocal rights for enforcement of Myanmar arbitral awards in those signatory countries.

49

Land Laws

- Generally , Land in Myanmar is owned by the State
- A foreign investor can obtain right to use the land in either of the following two ways.
  - Obtaining land use right under a lease from either the government or private citizen approved by the government
  - Land use right are contributed to a joint venture by a government agency

50

Conclusion

- To date, private sector in Myanmar economy is eventually developed under the guidance of new economic policy .
- The above mentioned laws are promulgated after 1988 to promote the private sector in Myanmar economy. The new laws which are designed to fruitfully create a market oriented system, and to promote, encourage, and to aid the private sector of Myanmar economy.

  The old laws relating to Business are mentioned in Annexure 1 of this paper.

51

- Moreover, pre-independence statutory laws relating to commercial matters are applied to commercial transactions, and some of them are modified in line with present day economy. Among the pre-independence laws, the Contract Act of 1872 has the same principles that of other Common Law Countries apply relating to the Law of Contract. It's principles relating to offer the acceptance, consideration, formation, terms and breach of contract are almost the same with other countries
- Until now, there is **lacking** some important laws, such as –Competition Law, Intellectual Property law except Copyright Act though there is Common Law system of protection for IP. Arbitration Act 1944 is still dominant. Needs to sign New York Convention1958 .

52

- and procedures concerning the business transaction are preferable and enabling legal manner to encourage doing of business in Myanmar economy.
- In addition, we can expect that our economic relations with other nations will develop near future, and more and more laws, such as Product Liability law, Competition law, IP protection laws and procedures are necessary for supporting this economic opportunities

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Thank you
and
Good Luck

54

LEGAL FRAMEWORK ON DOING BUSINESS IN MYANMAR

Prof. Dr. Daw Than Nwe
Part –time Professor, Law Dept.
University of Yangon
MYANMAR

National Olympic Youth Center
TOKYO ,JAPAN
1－8－2012

1

Myanmar Legal System

- Myanmar legal system is based on
- - Myanmar Customary Law
- - Statutory laws- Acts, Laws, Rules and
- Regulations
- - Case law- *doctrine of precedent* and
- - Conventions
- International law in municipal courts as of doctrine incorporation

2

Myanmar Legislation

- Myanmar Codes vol.1 to 13_ Codified Laws enacted during 1841 to 1954 (in English up to 1948 and in Myanmar after 1948)
- Books on yearly legislation_ 1954 to 1962 (English version is available)
- Three volumes of Legislations_ 1962 to 1974(No authorised translation)
- Books on yearly legislation_1974 to 1988(No authorised translation)
- Books on yearly legislation_1988 to 2011(Authorised translation)
- Union Laws_2011 to 2012

3

Changing Trend of Myanmar Economy

-1947 Constitution -After gaining Independence from British colony in 1948, Myanmar economy continued the same as before. British made laws on business.

-1962 economy was changed into Socialist Economic System.

-1974 Constitution – Socialist Economy -.Acts continued to exist but defunct

- 1988- SLORC ,More Laws for open market economy

- 2008 - Constitution More updated laws provided

4

New Laws in 2011

- 15 new laws in 2011 and 11 laws in 2012
- Includes*
- Labour Organisation Law
- Labour Dispute Settlement Law
- Environment Law
- Amendment laws for revenue and tax laws

5

– In the late 1988, The State Law and Order Restoration Council abandoned socialist economic system and adopted a market oriented economic system.

First of all the Foreign Investment Law 1988 was promulgated.

- The initial step taken towards a more liberalized economy is to allow to foreign direct investment and to encourage the private sector development.

-

6

Encouragement of the promotion of private sector in economy

- Since late 1988 the Government has been actively encouraging foreign investment in Myanmar.
- The fundamental or basic concepts of the following laws fall under this category:

  * The Union of Myanmar Foreign Investment Law (1988)
  * The State–owned Economic Enterprises Law (1989)
  * The Myanmar Citizens Investment Law (1994), and
  * The Financial Institution of Myanmar Law (1990).

7

Union of Myanmar Foreign Investment Law (1988)

A new FIL has been drafted and it is expected to be passed during the current Parliament session which commence on 4th July 2012.

- **The Foreign Investment Law (1988) defines two types of investment : (1) a sole proprietorship, a partnership and a limited company (wholly owned (100%) by foreign investor), (2) a joint venture in the form of limited company in which the foreign capital invested must be at least 35% of the total equity capital. (Companies Act 1914 and Special Company Act 1950 applied)**

8

Investment Commission

- Foreign Investment Commission was formed under section 7 and Procedure in order to administer the foreign investment under this law.
- After Myanmar Investment Law 1992 has promulgated, it is renamed as Myanmar Investment Commission

9

Exemptions, Reliefs and Guarantees

- **Exemptions and reliefs are given to the investors under to S. 21, such as tax holidays for three consecutive years and exemption or relief from custom duty and other taxes. and guarantees under SS. 22 and 23 for not to be nationalised to take back of foreign currency invested**

10

The Sectoral laws concern with respective sector :

(1) Private Industrial Enterprises Law (1990)
(2) Promotion of Cottage Industries Law (1991)
(3) Myanmar Hotels and Tourism Law (1993)
(4) The Forest Law (1992)
(5) The Central Bank of Myanmar Law (1990)
(6) The Myanmar Agriculture and Rural Development Bank Law (1990)
(7) Saving Bank Law (1992)
(8)The Myanmar Insurance Law(1993)
(9) The Insurance Business Law (1996)

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(10) The Myanmar Mines Law (1994)

(11) The Myanmar Gemstones Law (1995)

(12) The Myanmar Pearl Law (1995)

(!3) The Co-operative Society Law (1992)

(14) The Myanmar Accountancy Council Law (1995); etc,

(15) The Commercial Tax Law (1990)Amended 3/2011

(16) The Tariff Law (1992)

(17)The Law relating to Private health Care Services(2007)

(18) The Myanmar Special Economic Zone Law 2011. etc.

12

The State-owned Economic Enterprises Law, 1989

- The State Law and Order Restoration Council has promulgated the State-owned Economic Enterprises Law on 31st, March 1989(9/89). The Union of Myanmar Foreign Investment law will not be completed without the knowledge of State-owned Economic Enterprises Law (SEE Law). The SEE Law defines 12 economic activities in which private investment is restricted and reserved to be carried out solely by the State.

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12 activities given under Section 3 of the said Law are as follows: -

(a) extraction of teak and sale of the same in the country and abroad

(b) cultivated and conservation of forest plantation with the exception of village-owned fire-wood plantations cultivated by the villagers for their personal use

(c) exploration, extraction and sale of petroleum and natural gas and production of the product of the same

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(d) exploration and extraction of pearls, jade and precious stones and export of the same

(e) breeding and production of fish and prawns in fisheries which have been reserved for research by the Government

(f) Postal and Telecommunications Service

(g) Air Transport Service and Railway Transport Service

(h) Banking Service and Insurance Service

(i) Broadcasting Services and Television Service

(j) exploration and extraction of metals and export of the same

(k) Electricity Generating Services other than those permitted by law to private and co-operative electricity generating services

(l) manufacture of products relating to security and defense which the Government has from time to time prescribed by notification.

15

Exception

- Section 4 of the SEE Law, services as a vehicle for privatization, it gives the right to Government to allow these activities to operate under privatization scheme.
- Myanmar Special Company Act 1950 applied

16

The Myanmar Citizens Investment Law 1992

- Citizens are entitled to the same exemptions and privileges of foreigners who are enjoying under Foreign Investment Law, such as 3 years tax holidays and other exemptions and guarantee against nationalization.

17

Laws of Banking

- **The Central Bank of Myanmar Law 1990**, which established the Central Bank of Myanmar (the successor to the Union Bank of Burma) ;
- **The Myanmar Agricultural and Rural Development Bank** Law 1990, which established the Myanmar Agricultural Rural Development Bank to support the development of agricultural and rural socio-economic enterprises;
- **The Saving Bank Law, 1992** , which encourages domestic savings and the promotion and mobilization of the country's financial resources.

18

Currency

National currency- KYATS

Foreign Exchange Certificate – FEC
is issued by Central Bank of Myanmar and accepted by government agencies

One FEC is equal to one USD

Bank accounts are mainly in US$, some in Euro, Singapore dollars or in FEC
Changing policy to open more – MFTB,MICB, and 4 other Banks Cooperative Bk, Kanbawza Bk, Asia green Development Bk and Ayeyarwady Bk are permitted to operate as foreign currency bk in ASEAN countries.

19

Tax Laws

Income – tax --- The Income Tax Law (1974)
(Profit – tax---The Profit Tax Law (1976) repealed by Law No. 1/2011 effected from 2012-2013 Budget year.

Custom duty --- Myanmar Sea Customs Act 1878 and Land Customs Act 1924

Commercial tax ---The Commercial Tax Law (1990) **as** amended in 2011 by amending law 3/2011

Tariff - The Tariff Law , 1992

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- The Myanmar Stamp Act (1935), as amended by Law Amending Stamp Act , Union Law No. 2/2012

- **Court Fees Act** (1937) as amended by SLORC LAW No. 6/1990 and the Law Amending the Court Fees Act, Union Law No. 5/2011

21

Income Tax Law, 1974
Amended by Amending Law 4/2011

The Income Tax Law applies to the following types of tax payers and the classes of income.

(a) State economic enterprises
(b) Co-operative societies
(c) Foreigners and foreign organizations engaged under special permission in State sponsored enterprise
(d) Income from salaries
(e) Non-resident foreigners
(f) Income earned abroad by non-resident citizens
(g) Companies
(h) Resident foreigners
(i) Partnerships or joint-ventures formed between or with (a),(b),(c),(e),(g) and (h) of above.

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Income Tax

- -Flat rate of
- 30% Foreign Companies formed under Foreign Investment Law and Myanmar Companies Act.
- -35% or graduated rate of 35%-50% (whichever is greater) for non-resident foreigners including a branch company.
- A resident foreigner is a foreigner who lives in Myanmar for not less than 183 days during the income year.

23

The Commercial Tax Law (1990) amended by Amending Law 3/2011(29-9-2011)

- All enterprises with sales of taxable goods and services are required to pay Commercial tax in addition to customs duties.

- commercial tax, which is a form of sales tax is chargeable at the rate prescribed in the schedule 1-5 of the Commercial Tax Law effected in 1990.

- Amended- name of authorities , right of appeals and penalties.

24

The Tariff Law , 1992

- The minister may, by notification in respect of goods exported from Myanmar or goods imported into Myanmar by land, sea or air _determine the nature and type of goods, classify the quality of each goods, determine the tariff value on goods on which customs-duties are assessable and determine the tariff based upon the tariff value and reduce or enhance the tariff so determined.

- Under section 4 of this law, the Minister may determine, by notification, the tariff at a special reduced rate in respect of goods exported or imported by the border areas and may reduce or enhance the tariff so determined.

25

- Double Taxation Agreements

- There are DTA with few countries – UK, India, Singapore etc.

26

Intellectual Property Right in Myanmar

Professor Dr. Daw Than Nwe
(Part-time Professor)
University of Yangon
Myanmar

1-8-2012

1/8/2013

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Traditional Cultural Expression




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Drawings as Trademark

1/8/2013

Letters

KBZ BANK

DHL EXPRESS

IBM

MAI Myanmar Airways International

Figurative Marks

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Distinctive Words

- CANON
- SONY
- NEWSWEEK
- aMu;rHk

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WIPO,WTO and TRIPS

- Myanmar is member of WTO and WIPO
  - The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), came into force in 1995.
  - Provisions in the TRIPS Agreement concerning copyright and related rights, patents, trademarks, geographical indications, industrial designs and layout-designs of integrated circuits, complement the international treaties administered by WIPO, and the TRIPS Agreement directly refers to some of these treaties.

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WIPO,WTO and TRIPS

- In force since 1996, an Agreement between WIPO and the WTO provides for cooperation concerning the implementation of the TRIPS Agreement, such as notification of laws and regulations , and legislative assistance to member countries.
- Assistance continues to be provided to many developing countries, with a special focus on those LDCs that need to meet their TRIPS obligations by 2013 and, in respect of pharmaceuticals, by 2016.

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ASEAN members and the WTO Rules

- Since 9 ASEAN members are WTO members,

Agreement on Trade Related Aspects of Intellectual Property (TRIPs),1994, is their treaty obligation.

- **Constitution of the Republic of the Union of Myanmar, 2008"** has imbedded the IP protection principle in its very first Chapter namely "The Basic Principles of the Union". Moreover, under the Chapter 8 "Citizen's Fundamental Rights and Duties of the Citizens", the Constitution manifests that the Union shall guarantee IP rights according to the existing laws.

Constitution of the Republic of the Union of Myanmar, 2008

- I P laws are kinds of laws enlisted in the Schedule One of Union Legislative List, which means those are concerned of the supreme Union Legislative Body, namely, *Pyidaungsu Hluttaw*, not those of Region or State Legislative Bodies, namely *Regional Hluttaw* or *State Hluttaw*.
-

The Constitution of the Republic of the Union of Myanmar,2008

- Fundamental Principles
  Section 36- Fair Competition
  Section 37- Fundamental Rights –IP Protection
- Rights of Citizen
  Section 372- Right of Citizen-IP Protection
- Legislative Power
  Schedule 1/7- IP Laws-Union Legislative List

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The Constitution of the Republic of the Union of Myanmar,2008 Section 37(c),

- The Union shall permit citizens rights of private property, right of inheritance, right of private initiative and patent in accord with the law.

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Section 372 , 2008 Constitution

- **The Union guarantees** the right to ownership, the use of property and the right to private invention and patent in the conducting of business if it is not contrary to the provisions of this Constitution and the existing laws.

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National Legislations for Intellectual Property Rights in Myanmar

- The Penal Code, 1861
- The Myanmar Merchandise Marks Act ,1889
- The Registration Act ,1908
- The Specific Relief Act ,1877
- The Sea Customs Act ,1878 and Land Customs Act
- The Myanmar Patent and Designs (Emergency Provisions Act) 1946 (Not effective)

Related Laws for IPR in Myanmar

- Myanmar Foreign Investment Law,1988
- Myanmar Citizen Investment Law,1989
- The Private Industry Law,1990
- Science and Technology Development Law, 1994
- The Myanmar Computer Science Development Law, 1996
- The Television and Video Law,1996
- The Motion Picture Law,1996
- The Electronic Transaction Law,2004

SUBSTANTIVE LAW FOR Trademark - Not yet existed

RELATED LAWS FOR Trademark -

- Penal Code,1860
- Merchandise Marks Act,1889
- Specific Relief Act,1877
- Sea Customs Act,1878
- Registration Act, 1908
- Control of Money Laundering Law,2002

Substantive law of Copyright-
Myanmar Copyright Act, 1914

Related Laws For Copyright

- Specific Relief Act,1877
- Merchandise Marks Act,1889
- Television and Video Law,1996
- Motion Picture Law,1996
- Control of Money Laundering Law,2002

SUBSTANTIVE LAW FOR Patent & Industrial Design - Not yet existed

- **RELATED LAWS FOR Patent** & **Industrial Design**
- Patent and Design (Emergency Provisions) Act , 1946
- Specific Relief Act ,1877
- Merchandise Marks Act ,1889
- Science and Technology Development Law, 1994

- Section 54 of **Specific Relief Act** which applies also to civil action against copyrights' infringement.

- **The Control of Money Laundering Law, 2002**, classifies the sanction of **infringement of trademarks and copyright as money laundering offences;**
  (1) imprisonment and
  (2) the confiscation or destruction of infringing goods .
- **Electronic Transaction Law ,2004** "any body committing any act of communication to any other person, directly or indirectly with a security number, password or electronic signature of any person without his/her permission or consent can be punished with up to 5 years imprisonment and/ or with fine."

- **Under section 33 of The Television and Video Law** (1996), some safeguard for copyright holders as it foresees that offences such as copying, distributing, hiring or exhibiting for commercial purpose a censor certified video tape without the permission of the license holder may be punishable with imprisonment of up to 3 years or/and with fines to up to100,000 kyats.
- **Under section 2(2)(e) of The Myanmar Merchandise Marks Act**, any goods making false trade description in respect of copyright (or patent) as regards to which it is applied.

Myanmar specific Laws of IP will be enacted very near future.

- Myanmar specific Laws on

  -**Trademark, Copyright, Patent and Industrial Design** have been already drafted in line with TRIPS provisions and those laws have to be promulgated before 2013 due to her commitment as being WTO member.

Competent Court

- Under the Notification Nos. 100 and 101/2011 of the Supreme Court of the Union of Myanmar, Township Courts, District Courts, High Court of the Region or State and Courts of the Self-Administered in the Region or State have the jurisdiction based on the amount of IP dispute (pecuniary jurisdiction)

Registration should be refused

- If the mark likely to be on immoral on legal grounds objectionable or likely to hurt the religious susceptibilities of any class of citizen of Myanmar.
- Fraud or obscured instrument
- Colourable imitation of a currency note
- The image of General Aung San (under Direction 13 of Inspector General of Registration , S.18 (F)of the Registration Act)
- Signs contrary to Morality or Public Policy
- -Phantom Marks
- -Scandalous Marks

JUDICIAL ACTION

INFRINGEMENT/PASSING-OFF
Civil Remedies

- Declaratory suit for sole proprietorship,
- Interlocutory / Temporary Injunction,
- Perpetual Injunction, (*CPC Order 39, Rule 1, 2 & 3)*
- Damages,
- Delivery-up of infringed articles, products or documents,
- Seizure of infringed articles, products or documents,
- Obliteration of spurious marks from the infringer's goods.

COUNTERFEIT
Criminal Punishments

- Imprisonment, (*PC sec. 482~489) (1~3 years)*
- Fine, *(unlimited)*
- Both Imprisonment and Fine,
- Confiscation of infringed articles, products or documents,
- Destruction of infringed articles, products or documents,
- Compensation out of fine to the claimant. *(Cr P C sec. 545)*

Ways of IP Protection in Myanmar

- Through use &
- Through registration

Challenges of Trademark Registration in Myanmar present and future

- Application for Registration
- Tasks of the trademarks office:
- Examination
- Priority problem between date of Trademark Registration & date of the use
- Publication and access to the register

Trademark Cases of Myanmar

- *Gaw Kan Lye v. Saw Kyone Saing,* 1939, Yangon Law Reports p.18

  Since Myanmar has no statutory provision for registration of trademark and no action could be brought for infringement of a trademark, the court maintained passing- off suits.

  This concept was followed up to *John Walker & Sons Ltd v. U Than Shwe* 1968, MLR (CC), P37

  Aung Gwan Choon v. BYC Soap Factory, 1966.

  According to trademark custom, having used it 9 Yr. continuously obtained the right to use.

Infringement Actions

- *John Walker & Sons Ltd v. U Than Shwe* 1968, Myanmar Law Reports (Chief Court) p.73

The learned Judge held that an action for infringement of a trademark is maintainable. Since then infringement action can be brought in this country. The learned Judges observed that the case of *Gaw Kan Lye v. Saw Kyone Saing[2]* [2]1939, Yangon Law Reports p.18

Trademark Cases of Myanmar

- *U Kyaw* (Applicant*) v. U Ba Aye* (Respondent) 1962, BLR,p.187
- *The Tajmahal Stationery Mart v. K.E. Mohamed Ebrahim and another,* 1949,
- *CM Brothers v. A Kunalan and Two others*, 1950, BLR, p.262
- U Chit Swe (Appellant) v. Ma Than and three Others (Respondents) 1958 MLR(p.377)
  (apmif;aumufzdeyf)

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Trademark Case in Myanmar

- A trademark includes a device, brand, heading etc. and any combination thereof. This definition is arising out of the recent case in Myanmar " Taung Gyi Mauk Mai"(Special Appellate Civil Case No. 23,2000) medicated Thanet Kha which is used as cosmetics and the different name "Shan Maung Mai" but similar trademark, get-up, size of plastic container and instruction cause the passing off action. However, this is the decision for mere temporary injunction in favour of the owner of Taung Gyi Mauk Mai.

1/8/2013 56

- *U Han Kyi* (The creation of Myanmar Co. Ltd) *v. Ko Mya Soe* (Sein Gay Har Store) 2001
- *Crocodile v. La Chemise Lacoste*

  Appeal against the judgment, 2003 for Civil Regular Suit 2002 of Yangon Division Court.

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Trademark Protection under Criminal Law

- Under section 478 to 489 of the Myanmar Penal Code, Owner of trademark may take criminal action (1yr to 3yrs Imprisonment & unlimited fine) against the following offences:

(a) Using false trademark;

(b) Counterfeiting a trademark;

(c) Making and possessing any instrument for counterfeiting a trademark

(d) Selling goods marked with a counterfeit trademark

Trademark Protection Under Civil Law

- Section 18(f) of the Registration Act and the Direction No.13 of Inspector General of Registration, trademark may be registered.
- Registration may constitute *prima facie* evidence for the proprietor in a criminal or civil proceeding against an infringer.

Section 1 of the Myanmar Copyright Act 1914

– Copyright subsists in every original literary, dramatic, musical and artistic work.

Civil Remedies

- Section 6(1) of the Myanmar Copyright Act

  Where copyright in any work has been infringed, the owner of the copyright is entitled to all remedies by way of injunction or interdict, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right.

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Criminal Procedures

- Section 7 of the Myanmar Copyright Act 1914

  If any person knowingly makes for sale or hire, sells or lets for hire, distributes or by way of trade exhibits in public or imports for sale or hire into the Union of Myanmar any infringing copy of a work; he shall be punishable with fine which may extend to twenty kyats for every copy dealt with in contravention of this section, but not exceeding five hundred kyats in respect of the same transaction.

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Maung Nyi Pu v. East End Films A.I.R. 1939 Rangoon 266

- Maung Nyi Pu, proprietor of "A-1 Film Company" filed a suit against the East End Company claiming an injunction to restrain the latter from infringing the A-1 Company's copyright in a photograph of actress Ma Than Tin and also claiming Rs.100 by way of damages.

  This case was decided on 21st February 1939 in favour of the plaintiff.

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U Hla Win and 2 v. Daw Kyi Kyi @ Daw Yin Wai Lwin (Pyay)
1999 M.L.R (Civil) 208

- The Court awarded that damages amounting to K 50,000 be paid by the infringer U Hla Win, proprietor of "Pho Wa" video production, to the copyright owner Yin Wai Lwin (Pyay) for adapting without authorization, the author's novel "Hmine Wai Chit Tet Khet Thitsar" into a video movie under a slightly changed name.

The existing labor laws in Myanmar

1. Employment and Training Act, 1950
2. Employment Restriction Act, 1959
3. Employment Statistics Act, 1948
4. Factories Act, 1951
5. The Leave and Holidays Act, 1951
6. Minimum Wages Act, 1949 (Bill for new law has been issued)
7. Payment of Wages Act, 1936
8. Social Security Act, 1954 (Bill for new law is ready)
9. Shops and Establishments Act, 1951
10. Workmen's Compensation Act, 1923
11. The Law Relating to Overseas Employment 1998
12. **The Labour Organisation Law, The Union Law No. 7/2011**
13. **Labour Dispute Settlement Law 5/ 2012**

ILO Conventions

Transport by Sea

- Firstly, the Shipping Law of Myanmar is no stranger to the Shipping Law of other countries.
  - The Myanmar Carriage of Goods by Sea Act 1925 was enacted to give the force of law to the Hague Rules or the Convention for Unification of Certain Rules of Bill of Lading made in Brussels in 1923.
  - Bill of Lading Act 1856 is the same as English Law.
  - The Myanmar Merchant Shipping Act was promulgated in 1923 based on the British Shipping Law.
  - The registration of ships in Myanmar is governed by the Myanmar Registration of Ships Act (1841) and the Law Amending the Myanmar Registration of Ships Act in 1987 .

Transport by Air

- Secondly, in the Air Transport Sector, Myanmar rectified the Warsaw Convention 1929 and Chicago Convention (1944).
- -The Aircraft Act of 1934 and Aircraft Rules of 1937 give effect to the navigation of aircraft. The Aircraft Rules were amended by State Law and Order Restoration Council Rules No. 1/94 to issue Air Operators' Certificates to joint ventures airlines that are incorporated in Myanmar.
- The Carriage by Air Act, 1935 governs the loss of life or damages or loss of cargo, baggage and luggage carried by air. This Act gives domestic legal effect to the Convention for the Unification of Rules Relating to International Convention for Carriage by Air (the Warsaw Convention of 1929).

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Carriage by Land and Multimodal Transport

- Thirdly, The law of carriage by land comprises the Railway Act of 1890 and Motor Vehicle Law, 1964 etc.
- Multimodal Transport refer to a transport system operated by one carrier with more modes o transport under the control of one operator..
- Not yet Multimodal Transport Law but as a member of ASEAN, ASEAN Agreement on Multimodal Transport is bound.

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Company

- **The Myanmar Companies Act** 1914, covers the procedure aspect of company formation for all types of companies. There are some amendments(1955, 1959,1989, 1991) but the basic principles are the same as the other Common Law Countries.
- - Company registration and permit to trade is required
- - Company management is based on Memorandum, Articles, AGM and Returns and under Common Law principles. There is no special penal provisions for corporate crime except Penal Code 1860.
- **Special Company Act 1950** is to govern together with Myanmar Companies Act , JVs are to apply.

69

Partnership

- The **Partnership Act 1932** is also Common Law rooted legislation.
- Partners are jointly and severally liable for the act of the firm S 25

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The Arbitration Act 1944

- The Arbitration Act is based upon the English Arbitration laws enacted in 1944.
- The Myanmar Arbitration Act provides for the appointment, powers and duties of arbitrators, Court supervision and enforcement of an appeal from the arbitration award.
- The following is a model of arbitration clause commonly used in commercial contracts in Myanmar.
- "In the event of any disputes arising between the parties to this agreement, which cannot be settled amicably, such dispute shall be settled in the Union of Myanmar by arbitration, through two Arbitrators, one of whom shall be appointed by the purchaser and the other by the supplier. Should the arbitrators fail to reach an agreement, then the dispute shall be referred to an umpire nominated by the arbitrators. The arbitration proceedings shall in all respects conform to the Myanmar Arbitration Act 1944 (Myanmar Act No. IV of 1944) or any subsisting statutory modification thereof".

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The Arbitration Act 1944- (2)

- Relating to the enforcement of foreign arbitral awards, Myanmar has adopted the Geneva Protocol 1923 on Arbitration clauses and the Geneva Convention 1927 on the execution of foreign arbitral awards. Protocol provides for the recognition and enforcement in Myanmar of foreign arbitral awards made in signatory countries and grants reciprocal rights for enforcement of Myanmar arbitral awards in those signatory countries.

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Land Laws

- Generally , Land in Myanmar is owned by the State
- A foreign investor can obtain right to use the land in either of the following two ways.
  - Obtaining land use right under a lease from either the government or private citizen approved by the government
  - Land use right are contributed to a joint venture by a government agency

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Conclusion

- To date, private sector in Myanmar economy is eventually developed under the guidance of new economic policy .
- The above mentioned laws are promulgated after 1988 to promote the private sector in Myanmar economy. The new laws which are designed to fruitfully create a market oriented system, and to promote, encourage, and to aid the private sector of Myanmar economy.

  The old laws relating to Business are mentioned in Annexure 1 of this paper.

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- Moreover, pre-independence statutory laws relating to commercial matters are applied to commercial transactions, and some of them are modified in line with present day economy. Among the pre-independence laws, the Contract Act of 1872 has the same principles that of other Common Law Countries apply relating to the Law of Contract. It's principles relating to offer the acceptance, consideration, formation, terms and breach of contract are almost the same with other countries

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Until now, there is **lacking** some important laws, such as –Competition Law, Intellectual Property law Product Liability law,are necessary for supporting this economic opportunities, though there is Common Law system of protection for IP. Arbitration Act 1944 is still dominant and Needs to sign New York Convention1958 .

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- We can expect that our economic relations with other nations will develop near future with liberalized trade policy and supplemented laws-

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Thank you
and
Good Luck

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Annexure . 1

Myanmar Acts and Laws

(1) The Union of Myanmar Foreign Investment Law (1988)(To be replaced soon)
(2) The Myanmar Citizens Investment Law (1994)
(3) The State- owned Economic Enterprises Law (1989)
(4) Contract Act, 1872.
(5) Sale of Goods Act, 1930

Business Organisation

(6) Myanmar Companies Act, 1914.
(7) Myanmar Special Company Act, 1950.
(8) Partnership Act, 1932.
(9) The Co-operative Society Law (9/92)
(10) Private Industrial Enterprise Law (1990)
(11) The Law Relating to Overseas Employment (3/1999_)
(12) Electronic Transactions Law (5/2004)
(13) The Law Relating to Private Health Care Services (2007)

The Financial Institutions

(14) Negotiable Instruments Act, 1881.
(15) Myanmar Insolvency Act, 1920.
(16) Foreign Exchange Regulation Act, 1917.
(17) The Financial Institutions of Myanmar Law (1990)(Amendment 1994)
(18) The Central Bank of Myanmar Law (1990)
(19) Saving Bank Law (1992)
(20) The Myanmar Agriculture and Rural Development Bank Law (1990)
(21) The Myanmar Insurance Law (1993)
(22) The Insurance Business Law (1996)
(23) The Myanmar Agriculture and Rural Development Bank Law (1990)

Arbitration

(24) Arbitration Act, 1944.
(25) Arbitration (Protocol & Convention) Act , 1939.

Intellectual Property

(26) Myanmar Copyright Act, 1914.

(27) Myanmar Patents & Design (Emergency Provisions) Act, 1946.(not operative)

(28) Myanmar Merchandise Marks Act, 1889.

Revenue & taxation

(29) Land and Revenue Act

(30) Land and Revenue Regulation, Upper Myanmar

(31) Revenue Recovery Act, 1890.

(32) Sea Customs Act, 1878.

(33) Land Customs Act, 1924.(Amendments 1956,1959)

(34) Myanmar Income Tax Law, 1974.(Amendment 2006)

(35) Profit Tax Law, 1976.(repealed Sept. 2011)

(36) Myanmar Stamp Act, 1935.

(37) The Burma Excise Act 1917

(38) Commercial Tax Law (1990)(Amendment 1991,2006)

(39) The Tariff Law (1992)

(40) Court Fees Act,1870.

(41) Myanmar Stamp Act (Amendmants 1959, 1990)

Transport Laws

(42) Bills of Lading Act, 1856.

(43) Myanmar Registration of Ships Act, 1841 and its Amendment , 1986.

(44) Conventions on Navigation Act, 1952.

(45) Myanmar Carriage of Goods by Sea Act, 1925.

(46) Myanmar Carriage by Air Act, 1935.

(47) Myanmar Aircraft Act, 1934.

(48) Law Amending the Myanmar Aircraft Act (6/2004)

(49) Myanmar Aircraft Rules , 1937.

(50) Myanmar Airways Corporation Act, 1952.

(51) Carriers Act, 1865.

(52) Railways Act, 1890.

(53) Myanmar Five Star Shipping Corporation Law, 1964.

(54) Merchant Shipping Act, 1894.

Transfer of Immoveable Property

(55) Transfer of Property Act, 1882

(56) Restriction of Transfer of Immoveable Property Law 1987

(57) Law Amending Transfer of Immoveable Property restriction Law (1/2005)

(58) The Land Acquisition Act 1894

(59) Land Acquisition (Mines) Act, 1885.

(60) Registration Act, 1909.

Labor laws in Myanmar are:

(1) Basic Rights and Duties of Workers Law, 1964

(2) Dock Labourers Act 1934

(3) Employment and Training Act, 1950

(4) Employment Restriction Act, 1959

(5) Employment Statistics Act, 1948

(6) Factories Act, 1951

(7) The Leave and Holidays Act, 1951(Amendments1958, 1963)

(8) Minimum Wages Act, 1949

(9) Payment of Wages Act, 1936

(10)Social Security Act, 1954(New law in process)

(11)Shops and Establishments Act, 1951

(12)Trade Disputes Act, 1929

(13)Trade Unions Act (Amendment 1959)

(14) Workmen's Compensation Act, 1923 (Amendment 6/2005)

(15) Fatal Accident Act 1855

Business Transaction Laws

1. The Science and Technology Development Law (1994)
2. Promotion of Cottage Industries Law (1991)
3. Myanmar Hotels and Tourism Law (14/1993)
4. The Forest Law (1992)

Fishries

5. The Laws relating to Fishing Rights of Foreign Fishing Vessels (1989)
6. The Law Relating to Aquaculture (1989)
7. The Myanmar Marine Fisheries Law (1990)
8. The Fresh Water Fisheries Law (1991)

Natural Resources/Mining

9. Petrolium Act 1934

10. The Myanmar Mines Law (1994)
11. The Myanmar Gemstones Law (1995)
12. Law Amending the Myanmar Gemstones Law (8/2003)
13. The Myanmar Pearl Industries Law (1995).
14. Fertalizer Law 2002
15. Pesticite Law 1990
16. Plant Pest Quanrantine Law 1993
17. National Drug Law 1992
18. National Food Law 1997

19. The Myanmar Special Economic Zone Law 2011. etc. //

2011_____2012

New Myanmar Laws

2011

Subject: Laws approved and enacted by the Union Parliament (Pyidaungsu Hluttaw) in its second , August to November 2011

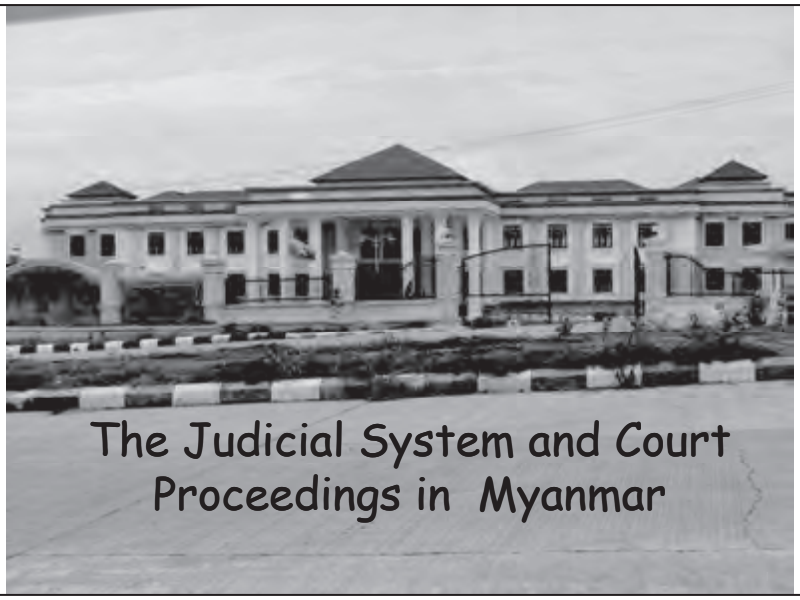
No.	Date of Approval	Name of the Law	Remarks
1.	29-9-2011	Law Revoking the Revenue Law	Union Parliament Law No. 1/2011
2.	29-9-2011	Law Amending Myanmar Stamp Act	Union Parliament Law No. 2/2011
3.	29-9-2011	Law Amending the Commercial Tax Law	Union Parliament Law No. 3/2011
4.	29-9-2011	Law Amending the Income Tax Law	Union Parliament Law No. 4/2011
5.	29-9-2011	Law Amending the Court Fees Act	Union Parliament Law No. 5/2011
6.	5-1-2011	Law Amending the Union Election Commission Law	Union Parliament Law No. 6/2011
7.	11-10-2011	Labour Organization Law	Union Parliament Law No. 7/2011
8.	18-10-2011	Law Amending the People's Parliament Election Law	Union Parliament Law No. 8/2011
9.	18-10-2011	National Parliament Election Law	Union Parliament Law No. 9/2011
10.	18-10-2011	Law Amending the Division Regional or State Parliament Election law	Union Parliament Law No. 10/2011
11.	4-11-2011	Law Amending the Registration of Political Parties Law	Union Parliament Law No. 11/2011
12.	21-11-2011	The Law Revoking the 1964 Law Defining the Fundamental Rights and Responsibilities of the People's Workers	Union Parliament Law No. 12/2011
13.	30-11-2011	Microfinance Law	Union Parliament Law No. 13/2011
14.	2-12-2011	Private Schools Registration Law	Union Parliament Law No. 14/2011
15.	2-12-2011	Peaceful Demonstration and Peaceful Assembled Law	Union Parliament Law No. 15/2011

New Myanmar Laws

2012

Subject: Laws approved and enacted by the Union Parliament (Pyidaungsu Hluttaw) in its third session, February to April 2012.

1	25-2-2012	Ward and Village Administration Act	Union Parliament Law No. 1/2012
2	25-2-2012	Union Supplementary Budget Allocation Law (2012)	Union Parliament Law No. 2/2012
3	20-3-2012	Union Election Commission Law	Union Parliament Law No. 3/2012
4	20-3-2012	National Planning Law for Financial Year 2012-2013	Union Parliament Law No. 4/2012
5	29-3-2012	Labour Disputes Settlement Act	Union Parliament Law No. 5/2012
6	30-3-2012	Union Budget Law 2012	Union Parliament Law No. 6/2012
7	30-3-2012	Ward and Village Administration Amending Act	Union Parliament Law No. 7/2012
8	31-3-2012	Families of Disabled or Deceased Soldiers Supporting Act	Union Parliament Law No. 8/2012
9	1-4-2012	Environment Protection Act	Union Parliament Law No. 9/2012
10	2-4-2012	Vacant, Fallow and Virgin Land Management Act	Union Parliament Law No. 10/2012
11	3-4-2012	Farmland Act	Union Parliament Law No. 11/2012



The Judicial System and Court Proceedings in Myanmar

Introduction

Situation of the Union of Myanmar

- In Southeast Asia
- bordered by China on the North and Northeast.
- And Laos and Thailand on the East and Southeast.
- bordered by Bangladesh and India on the West.
- bordered by Andaman sea and Bay of Bengal on the South.

Total Land Area

- 676.578 sq Kilometers
- forest covering area is 344.23739 Kilometers
- harvested gross area is 14,772,803 hectares
- sown gross area is 15,449,850 hectares

population

- population is about 64 millions in 2012
- 135 National Races – Mainly (Kachin,Kayah,Kayin,Chin,Bamar, Mon,Rakhine and Shan)

2

Country vast potential

Myanmar has a wide variety of ecosystems such as :

- land,
- mountain,
- forest,
- wetland,
- coastal and
- marine ecosystems.

The country is rich in resources and enjoys an unusually great diversity of flora and fauna. Forests, wetlands including mangroves, swamp forest, lakes, marshes and seas provide a natural habitat for this large variety of biological species. Myanmar's rivers, numerous steams, creeks, lakes and seas also provide home to a large variety of fresh water and marine fish, shrimps and prawns species.

Myanmar has rich mineral deposits and also has a large potential of energy resources such as hydro carbons and a great potential of hydropower.

3

"Burma is fairly rich in Minerals, Gold, Silver and other valuable metals have been found in small quantities in various parts: fine marble is work near Mandalay, Coal of fair quality has recently been discovered in several parts of Upper Burma. Mogok supplies the world with rubies: and sapphires are found there, and in the Shan States. Petroleum is obtained in large quantities at Yenangyoung in Upper Burma, and smaller quantities in Arrakan and else-where. Jade and amber are extracted in considerable quantities in the northern part of the people. Cotton, sesames, and tobacco are extensively grown and orchards are found near every village but rice covers about five-sixths of the total area under cultivation. The soil is lavish in its yield, requires little labour and no artificial stimulus beyond the ash of the past year's stubble, which is burned down and worked into the land. Upper Burma though inferior in point of fertility to the low-lying tracts of Lower Burma, is far from unproductive. The chief crops are rice, maize, millet, wheat, pulses, tobacco and sesames".

4

Original and Development of Legal System in Myanmar

Legal Framework and Judicial Administration In olden days

Dammathat - collections of *Corpus Jurist* of Myanmar customary traditions conventions and *ratio decidendi* of eminent judges and learned personal in their decisions or writings, collected and consolidated versions of Myanmar Customary Law throughout the ages. Indeed, *Dammathets* are composed of Legal Rules and Principle for Civil matters and Civil Law; mainly relate to Marriage, Divorce. Partition, Succession, Inheritance and Adoption etc. Those Legal Rules and Principles are based on egalitarian Rights relating to equality under Law; and still being apply by the present day courts of the Union of Myanmar.

Phyahton – the Judicial decisions passed by Courts, Benches and the King's Hluttaw; like the present day Law Reports (Rulings) of Supreme Court.

5

Legal System at present

The legal system of the Union of Myanmar is a unique combination of the customary law of the family, codified English common law and recent Myanmar legislation. The principles of English common and statutory law were implanted in Myanmar by the British law codes of the pre-independence India Statutes. These statutory laws, based on and incorporating the English common and statutory law of the time, include the Arbitration Act, Companies Act, Contract Act, Evidence Act, General Clauses Act, Negotiable Instrument Act, Registration Act, Sale of Goods Act, Transfer of Property Act, Trusts Act and the Civil and Criminal Procedure Codes.

Where there is no statute regulating a particular matter the Courts are to apply Myanmar's general law, which is based on English common law as adopted and molded by Myanmar case law, and which embodies the rules of equity, justice and good conscience. Where there is no relevant statutory general law on point , the Myanmar Courts are obliged to decide the matter according to justice, equity and good conscience.

6

Development

- After becoming an independent State, the Supreme Court and High Court were established and Courts at different levels were also formed under the Union Judiciary Act, 1948.
- On 2nd March 1962, the Revolutionary Council took over the sovereign powers and the judicial system was transformed into socialist system. The Revolutionary Council abolished the Supreme Court and the High Court and established the Chief Court instead.
- Under the 1974 Constitution, the Central Court, the State and Divisional Courts, The Township Courts and the Wards and Village Tracts courts were formed. The salient feature of the then Judicial system was the participation of the working people in all level of courts.
- On the 26th of September, 1988 when the State Law and Order Restoration Council promulgate the Judiciary Law, 1988 for the formation of the Courts at different levels and for the administration of Justice in the Union of Myanmar. It was subsequently repealed by the Judiciary Law, 2000 which was promulgated on June 27, 2000 by the State Peace and Development Council, for the promotion of the Judiciary, and to revamp the formation of Courts.

7

The present Judicial System of Myanmar

- On the 28th of October 2010, the Union Judiciary Law had been enacted to adopt the present Judicial System under the Constitution of the Republic of the Union of Myanmar,2008

8

Judicial Principles

The administration of justice shall be based upon the following principles (Section 3 of the Judiciary 2010)

(a) to administer justice independently according to law;
(b) to dispense justice in open Court unless otherwise prohibited by law;
(c) to obtain the right of defence and the right of appeal in cases according to law;
(d) to support in building of rule of law and regional peace and tranquility by protecting and safeguarding the interests of the people;
(e) to educate the people to understand and abide by the law and nurture the habit of abiding by the law by the people.
(f) to cause to compound and complete the cases within the framework of law for the settlement of cases among the public.
(g) to aim at reforming moral character in meting out punishment to offenders.

9

- No penal law shall have retrospective effect.
- Any person who committed an offence shall be convicted only under the relevant existing law at the time of its commission. Moreover, he shall not be sentenced with a penalty more than that which is applicable under the said law.
- If a person is convicted or acquitted by a competent court for an offence, he shall not be retried for such offence unless a superior Court sets aside such convicting or acquitting judgment and passes order for retrial.

10

Judiciary

Formation of Courts under section 293 of 2008 Constitution

S.293 - Court s of the Union are formed as follows:

(a) Supreme Court of the Union. High Courts of the Region, High Courts of the State, Courts of the Self-Administered Division, Courts of the Self-Administered Zone, District Courts, Township Courts and the other Courts constituted by law;
(b) Courts martial;
(c) Constitutional Tribunal of the Union;

11

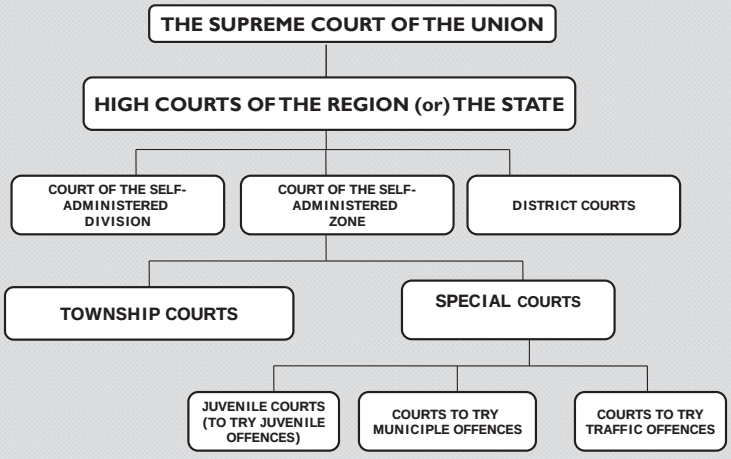
Formation of Courts at Different Levels under Judiciary Law,2010

Under the Judiciary law, 2010 the following courts were established in the Union of Myanmar-

- The Supreme Court of the Union of Myanmar
- The High Court of the Region or the State
- Court of Self-Administered Division
- Court of Self-Administered Zone
- District Courts
- Township Courts
- Other Courts established by Law

12

THE FORMATION OF COURTS IN MYANMAR



13

The Supreme Court

Formation

The Supreme Court of the Union is the highest organ of the State Judiciary of the Union of Myanmar. The Supreme Court consists of team a minimum of 7 to a maximum of 11 judges, including the chief justice.

Jurisdiction

The Supreme Court is the highest court of appeal. It exercises both appellate and revision powers. It also has original jurisdiction which enables it to hear cases as the court of first instance. It is the only court in Myanmar which can try maritime cases in its original jurisdiction

14

Only the Supreme Court of the Union has original jurisdiction in the following matters-

(a) Matters arising out of bilateral treaties concluded by the Union;
(b)Other disputes between the Union Government and the Region or State Government except the Constitutional problems;
(c)Other disputers among the Regions, among the State, between the Region and the State and between the Union Territory and the Region or the State except Constitutional problems;
(d)piracy, offences committed at international water or airspace, offences committed at ground or international water or airspace by violating the international law;
(e)Cases prescribed under any law;

15

Subject to any provision of the Constitution or any other law, the Supreme Court of the Union, has the jurisdiction on:

(a) The appeal against the judgment, decree or order passed by the Supreme Court of the Union by exercising its original jurisdiction.
(b) The appeal against the judgment, decree or order passed by the High Court of the Region or the State
(c) The appeal against the judgment, decree or order passed by other Court in accord with law.

The Supreme Court of the Union has the jurisdiction on revision in accord with law against the judgment or order passed by a Court.

16

The Supreme Court of the Union has the jurisdiction on confirming death sentence and appeal against the death sentence.

The Supreme Court of the Union:

(a) Has the Jurisdiction on a case transferred to it by its own decision.
(b) Has the Jurisdiction for the transfer of a case from a Court to any other Court.

The Supreme Court of the Union:

(a) Has the power to issue the following writs:
  (i) Writ of Habeas Corpus:
  (ii) Writ of Mandamus;
  (iii) Writ of Prohibition
  (iv) Writ of Quo Warranto;
  (v) Writ of Certiorari;
(b) At the time of the occurrence of the following situation, the right to claim the rights contained in section 377 of the Constitution shall not be suspended unless it is required for public security:
  (i) in time of war;
  (ii) in time of foreign aggression;
  (iii) in time of insurrection;

17

Duties and Powers of the Supreme Court of the Union

The Supreme Court of the Union is the superior court of record and has supervisory powers over all courts in the Union and its decisions are binding upon all courts.

A case finally and conclusively adjudicated by the Supreme Court exercising its original jurisdiction, or a case finally and conclusively adjudicated by the Supreme Court on the final and conclusive decision of any court may, on being admitted for special appeal by the special Bench in accordance with the procedures, be heard and adjudicated again by the Special Appellate Bench. The Special Appellate Bench will consist of a total of 3 Justices including the Chief Justice. Only when substantial question are arisen will the Supreme Court interfere by way of appeal by special leave in criminal and civil matters. The decision of the Special Appellate Branch is final and conclusive.

The Supreme Court of the Union:
(a) shall supervise all Courts in the Union;
(b) may direct to adjudicate the important cases of the High Court of the Region or State, Courts of Self- Administered Division, Self - Administered Zone and District Courts by a bench consisting of more than one judge.

The Supreme Court of the Union is entitled to submit the bills relating to the judiciary to the Pyidaunsu Hluttaw in accord with the stipulated manners.

18

Appointments of Supreme Court Staff

The Chief Justice of the Supreme Court may, subject to such rules and restrictions as may be prescribed by the Pyidaungsu Hluttaw appoint so many and such clerks and other judicial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted to the Supreme Court of the Union.

19

High Courts of the Region or the State

Formation

The High Courts of the Region or the State are established under the Judiciary Law, 2010.

Composition

From a minimum of 3 to a maximum of 7 judges of the High Court of the Region or State including the Chief Justice of the High Court of the Region or State may be appointed in each High Court of the Region or State.

The President shall, in co-ordination with the Chief Justice of the Union, relevant Chief Minister of the Region or State, appoint a person who fulfils the qualification under section 310 of the Constitution and section 48 of this Law as the Chief Justice of the relevant Region or State, with the approval of the Region or State Hluttaw.

The President shall appoint the persons in respect of whom the Chief Minister of the Region or State co-ordinates with the Chief Justice of the Union, and who fulfill the qualifications under section 310 of the Constitution and section 48 of this Law as the Judges of the High Court of the Region or State with the approval of the Region or State Hluttaw.

20

Jurisdiction

The High Courts of the Region or State have the following jurisdictions in accord with law:
(a) adjudicating on the original case;
(b) adjudicating on the appeal case;
(c) adjudicating on the revision case;
(d) adjudicating on the cases prescribe by any law;

The High Court of the Region or State has the jurisdiction:
(a) to adjudicated on a case transferred to it by its own decision within its jurisdiction of the Region or State;
(b) to adjudicate on transfer of a case from any court to any other court within its jurisdiction of the Region or State.
© Original Civil Jurisdiction – unlimited pecuniary jurisdiction in original Civil Suit.

The High Court of the Region or State may, in exercising its jurisdiction, adjudicate on cases by a judge or a bench consisting of more than one judge as determined by the Chief Justice of the Region or State.

21

The District Court , The Court of Self- Administered Division; the Court of Self-Administered zone

Formation

The District courts of Self-Administered Division and Self Administered Zone are established under the Judiciary Law, 2010.

Composition

In every District Court, a District Judge is appointed by the Supreme Court of the Union. Judge may also be appointed by the Supreme Court of the Union depending on the volume of work. Those Judges are conferred with judicial powers by the Supreme Court of the Union in accordance with the provisions of the Criminal Procedure Code and Civil Procedure Code.

22

Jurisdiction

The District Judges Self-Administered Division and Self Administered Zone are conferred with original criminal jurisdictional powers, criminal appellate and revision jurisdictional powers according to the Criminal Procedure Code. They also invested with original civil jurisdictional powers, civil appellate and revision jurisdictional powers according to the Civil Procedure Code. As courts of original jurisdiction they hear and determine serious criminal cases and civil cases.

(1) District Judge	Pecuniary Jurisdiction to try original civil suit for a maximum value of 500 million Kyats
(2) Deputy District Judge	Pecuniary Jurisdiction to try original civil suit for a maximum value of 100 million Kyats

23

The Township Courts

Formation

The Township courts are established under the Judiciary Law, 2010.

Composition

In every Township court a Township Judge is appointed by the Supreme Court of the Union. Additional Township Judges or Deputy Judges may also be appointed by the Supreme Court depending on the volume of work. Those Judges are conferred with judicial powers by the Supreme Court in accordance with the provisions of the Criminal Procedure Code and Civil Procedure Code.

A Township Judge is the officer in charge of court administration matters. He or she also has the power to distribute all cases received in the Township court to other judges of Township courts. But every judge has independent jurisdiction over cases assigned to him or her.

24

Jurisdiction

Township courts are mainly courts of original jurisdiction. The judges appointed to a Township court are Township Judges, additional Township Judges and Deputy Township Judges. Township Judges by virtue of their posts are specially empowered as Magistrates who can pass sentences of up to seven years imprisonment where as an Additional Township Judge, if he or she is especially empowered with such special magisterial powers, may award sentences not exceeding seven years. The remaining Deputy Township Judges can impose sentences according to their magisterial powers.

Some of the civil cases in which the amount in dispute or value of the subject matters is not exceeding 10million kyats are adjudicated in Township courts. They also exercise Juvenile Jurisdiction specially conferred under 1993 Child Law.

(1)Township Judge	Pecuniary Jurisdiction to try original civil suit for a maximum value of ten million Kyats.
(2)Additional Township Judge	Pecuniary Jurisdiction to try original Civil suit for a maximum value of seven million Kyats.
(3)Deputy Township Judge	Pecuniary Jurisdiction to try original civil suit for a maximum value of three million Kyats.

25

Other Courts Constituted to Try Separate Cases

Separate court can be established either under special provisions in any law or in respect of those cases which occur irregularly in populous areas. Separate courts specially constituted by the Supreme Court to achieve speedy and effective trial under some special laws include:-

- Juvenile Courts
- Courts to try Municipal Offences
- Courts to Try Traffic Offences

26

Juvenile Courts

The State Law and Order Restoration Council enacted the Child Law of 1993. The Child Law, 1993 was adopted to implement the rights of the child envisaged in the United Nations Convention on the Rights of the Child. In the administration of Justice in the Union of Myanmar a juvenile offender is usually tried summarily by a competent court irrespective of the severity of the offence. In ordinary circumstances the legislature intended the juvenile offender to be punished as leniently as possible so that he or she may be able to enter the mainstream of life with a clear conscience, confident, efficient and with high normal. To achieve that spirit, juvenile offenders cannot be sentenced to death or transportation for life, or whipping.

In accord with the Child Law, Township courts are conferred with powers to try juvenile offences. A separate Juvenile court (Yangon) has been constituted to try juvenile cases occurring at 20 townships in Yangon City Development Area. A separate Juvenile court (Mandalay) has been constituted to try juvenile cases occurring at 5 townships in Mandalay City Development Area. Apart from that, Juvenile court has been established separately township within the Court House.

27

Courts to try Municipal Offences

7 separate courts have been opened in Yangon after consultation with the Yangon City Development Committee to try municipal offences. Such offences include; violating provisions of the City of Yangon Municipal Act, Rules, By-Law, Orders and Directions still in force and those under the Yangon City Development Law enacted by the State Law and Order Restoration Council, 4 separate courts have also been established in Mandalay after consultation with the Mandalay City Development Committee, to try municipal offences.

28

Courts to Try Traffic Offences

In order to try offenders violating vehicle rules and road discipline, 7 separated courts in Yangon City Development area and 2 separated courts in Mandalay City Development area, exclusively for that purpose have been constituted in consultation with the Traffic Rules Enforcement Supervision Committee.

29

The Legal Profession

There are 2 classes of Lawyers in Myanmar. They are Advocates and Higher Grade Pleaders. Advocated are authorized to practise in all courts including the Supreme Court and Higher Grade Pleaders are licensed to practices in subordinate courts only, i.e. State and Divisional courts, District courts, and Township courts. Both classes of lawyers are also allowed to practise in all Revenue Tribunal, subordinate to the Ministry of Finance and Revenue and other separate courts.

30

In early 1997 there were approximately 6,400 locally qualified legal practitioners in Myanmar and still only a few resident foreign –qualified lawyers.

Legal practitioners in Myanmar are made up of "advocates" and "pleaders". Advocates are entitled to appear before any Court or tribunals in Myanmar. However, pleaders are only entitled to appear before those courts and tribunal for which they are specifically licensed (in practice, all courts except the Supreme Court.)

The activities of legal practitioners (*i.e.* advocates and pleaders) in Myanmar are governed by the legal Practitioners Act 1879 and the Bar Council Act 1926. The Legal Practitioners Act is mainly concerned with the entry qualifications, practice and discipline of pleaders, whereas the Bar Council Act creates the Bar Council (run along similar lines to Bar Council Act creates The Bar Council region), determines the necessary qualifications of persons wishing to practice as advocates and is responsible for the conduct of advocates.

The minimum educational requirement to become an advocate is a Bachelor of Laws degree (L.L.B), a post graduate Bachelor of Law degree (B.L) or a post graduate Registered Lawyer certificate (R.L) and three years practice as a pleader. In order to become a pleader (without the right to become an advocate), one must pass the Higher Grade Pleader's examination. To become a judicial officer or judge it is necessary to have completed the requirements for admission as an advocate and to pass a special examination held by the Public Service Commission.

A legal practitioner may, by private agreement, settle the terms of his/ her engagement and the fee to be paid for his/ her professional services, and may institute and maintain legal proceeding to recover any fee due to him/her. Legal practitioners are not exempt from liability in respect any fee loss or injury due to any negligence in the conduct of his/ her professional duties and may be sued in respect of such.

31

Judicial mottos

- Adjudicate as to the laws;
- Adjudicate fairly and speedily;
- Act as to the procedure;
- Maintain the integrity and reputation of the court.

32

Thank You

33

Court Martial

Under Section 319 - the Constriction of the Republic of the Union of Myanmar 2008

- The Courts-Martial shall be constituted in accord with the Constitution and the other law and shall adjudicate Defence Services personnel.
(No other Court shall take cognizance of any cases relating with military personnel.)

34

The Constitutional Tribunal of the Union

Formation of the Constitutional Tribunal of the Union

- **Section 320** - The Constitutional Tribunal of the Union shall be formed with nine members including the Chairperson**.**
- **Section 321** – The President shall submit the candidature list of total nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw and three members chosen by the Speaker of the Amyotha Hluttaw, and one member from among nine members to be assigned as the Chairperson of the Constitutional Tribunal of the Union, to the Pyidaungsu Hluttaw for its approval.

Functions and Duties of the Constitutional Tribunal of the Union

- **Section 322** – The functions and the duties of the Constitutional Tribunal of the Union are as follows:

a) Interpreting the provisions under the Constitution;

35

b) Vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not;

c) Vetting whether the measures of the executive authorities of the Union, the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution or not;

d) Deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among the Regions, among the State, between a Region or a state and a Self-Administered Areas and among the Self-Administered Areas.

e) Deciding disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self-Administered Area;

f) Vetting and deciding matters intimated by the President relating to the Union Territory;

g) Functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw(Parliament of the Union).

36

Effect of the Resolution of the Constitutional Tribunal of the Union

- **Section 323** - In hearing a case by a Court, if there arises a dispute whether the provisions contained in any law contradict or conform to the Constitution, and if no resolution has been made by the Constitutional Tribunal of the Union on the said dispute, the said Court shall stay the trial and submit its opinion to the Constitutional Tribunal of the Union in accord with the prescribed procedures and shall obtain a resolution. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases.

- **Section 324** - The resolution of the Constitutional Tribunal of the Union shall be final and conclusive.

37

1

FOREIGN DIRECT INVESTMENT IN MYANMAR

Introduction

1

Economic Reform in Myanmar

- The State Constitution of the Republic of the Union of Myanmar, Article 35 of the Constitution clearly declared that the Economic system of the Union is market economy system.
- This new constitution, implemented on January 31, 2011 after the general-election in November 2010. Then the new era is emerging.
- The new President U Thein Sein came to office in March 31, 2011. He promptly declared in his inaugural speech that "it was no longer ruler-based economic system and no more exercising cronyism. There also was to be no permit for grafts. He also expressed that "there are many steps to be taken and to work hard." His mentioned steps including legislation rule of law and the country's basic infrastructure. He also committed that the urgent need is to amend the existing laws and business sector

3

For several reasons, Myanmar, remains worthy of consideration for investment due to:

- a population of approximately about 64 million (4.5 million in Yangon);
- vast and virtually untapped natural resources;
- a relatively educated labour force and low wages;
- its strategic location in the region;
- sea and air links within the Asia region and beyond;

4

Myanmar's goods benefit, as a developing nation from the Generalized System of Preferences in trade with most developed nations (*i.e.* lower import duties and not subject to quotas);

- ❑ access for 100 per cent foreign-owned enterprises;
- ❑ familiar business structures and commercial laws (based on the British law codes of the pre-independence India Statutes);
- ❑ English being widely spoken and usually used when dealing with foreigners;
- ❑ significant incentives under the Foreign Investment Law for larger investments; and
- ❑ member country of ASEAN.

ECONOMIC PRIORITIES

5

Since late 1988 the Government of the Union of Myanmar has made significant economic reforms and introduced new liberal trade policies to promote the development of the Myanmar economy. The "four economic objectives" of the nation under the present Government are the:

- ❑ development of agriculture as the base as well as all-round development of other sectors of the economy;
- ❑ proper evolution of the market-oriented economic-system;
- ❑ development of the economy, inviting participation in terms of technical know-how and investments from sources inside the country and abroad; and
- ❑ initiative to shape the national economy must be kept in the hands of the State and the national peoples.

FOREIGN INVESTMENT POLICY

6

- □ Since late 1988 the Government has been actively encouraging foreign investment in Myanmar. Its main foreign investment policy objectives are started as the:
- □ Adoption of a market-oriented system for the allocation of resources.
- □ Encouragement of private investment and entrepreneurial activity.
- □ Opening up Myanmar's economy to foreign trade and investment which includes
  - promotion and expansion;
  - exploitation of natural resources which require heavy investment;
  - acquisition of high technology;
  - developing production and services industries involving large capital;
  - creating local employment opportunities;
  - developing of works which would save energy consumption; and
  - regional development.

OPPORTUNITIES

7

The Government has identified a number of potential investment opportunities for foreign investors and has also embarked on a privatization programme.

LEGAL SYSTEM

8

The legal system of the Union of Myanmar is a unique combination of the customary law of the family, codified English common law and recent Myanmar legislation. The principles of English common and statutory law were implanted in Myanmar by the British law codes of the pre-independence India Statutes.These statutory laws, based on and incorporating the English common and statutory law of the time, include the Arbitration Act, Companies Act, Contract Act, Evidence Act, General Clauses Act, Negotiable Instrument Act, Registration Act, Sale of Goods Act, Transfer of Property Act, Trusts Act and the Civil and Criminal Procedure Codes.

Where there is no statue regulating a particular matter the Courts are to apply Myanmar's general law, which is based on English common law as adopted and moulded by Myanmar case law, and which embodies the rules of equity, justice and good conscience. Where there is no relevant statutory general law on point , the Myanmar Courts are obliged to decide the matter according to justice, equity and good conscience.

Incentives

9

- A foreign investor (whether investing through a joint venture or a 100 per cent owned entity) manufacturing goods or providing services in Myanmar under the Foreign Investment Law will be granted an exemption from income tax for three consecutive years. inclusive of the year of commencement.
- In addition, any one or more of the following incentives *may* be granted by the Myanmar Investment Commission to the foreign investor:
  - Exemption or relief from income tax on the profits of the business kept in a reserve fund and reinvested in the business within one year after the reserve is made.
  - Accelerated depreciation in respect of machinery, equipment, building or other capital assets used in the business, at a rate approved by the Commission.
  - Relief from tax on up to 50 per cent of the profits accursed from the export of goods produced in Myanmar.
  - The right to pay foreign employees' income tax and deduct such payments from assessable income.

10

- The right to deduct from assessable income expense incurred in respect of necessary research and development carried out within Myanmar.
- The ability to carry forward and set off losses up to three consecutive years after the year in which the loss is sustained.
- Exemption from commercial tax on export-oriented commodities.
- Exemption or relief from customs duty, licensing requirements and internal spare parts and materials used in the business and deemed required by the Commission during the initial period/ period of construction.
- Exemption or relief from customs duty, licensing requirements and internal taxes on the import of raw materials imported within the first three years' of commercial production following start up/ the completion of construction.

The incentives actually granted by the Commission to the foreign investor are specified in the permit. Section 21 o f the Foreign Investment Law.

11

In addition to the above tax incentives,-

- Foreign investors holding a permit under the Foreign Investment Law are entitled to lease land for up to 30 years from the Government and may be exempted from customs duties and internal taxes and from obtaining an import license form the Ministry of Commerce for the import of certain capital investment items and raw materials.
- Also, the Foreign Investment Law guarantees that foreign investment under a Foreign Investment Law permit shall not be nationalized and the ability of the Foreign investor to repatriate " the rightful entitlement of the foreign investor" in foreign currency after the termination of the business.
- A permit under the Foreign Investment Law also enables foreign employees of the company resident in Myanmar to repatriate their savings.

INVESTING UNDER THE COMPANIES ACT

12

For smaller investments on where the foreign investor does not wish to go through the Foreign Investment Law procedures, there is an alternative way of doing business in Myanmar, under the Myanmar Companies Act 1914 and Companies Rules 1940.

The Companies Act governs the activities of both locally and foreign-incorporated companies wishing to carry on business in Myanmar and is in a form similar to early company law codes of other former British colonies in the region and England, which codes remain the foundation of the current company law in those countries.

Application for a Permit to Trade

13

The application for a Permit to Trade is to be submitted along with the application for incorporation of the company or registration of a branch to the Directorate of Investment and Company or Administration. Where a permit under the Foreign Investment Law is being applied for, the Permit to Trade application and company incorporation or branch registration steps are to be followed only after issuance of the Foreign Investment Law permit. The application for a Permit to Trade under the Companies Act must be in the prescribed form and accompanied by the following documents.

The Government is also seeking to encourage foreign investment in the development of golf course, beach resorts, tourist villages, amusement parks, recreational centres, serviced apartments, condominiums, office complexes and infrastructure projects such as airports, roads, railways, telecommunications facilities, etc.

The right of any person (whether citizen or foreign, individual or company) to carry any economic activity or enterprise, apart from the 12 areas of economic activity specifically "reserved" to the Government, is enshrined in the State-owned Economic Enterprises Law 1989. The following common entities are recognized and available for foreign investment/ trade in such economic activities or enterprise. As to incorporation requirements, see below under "Incorporation".

INVESTING UNDER THE FOREIGN INVESTMENT LAW

14

Although not always possible or advisable to obtain a permit under the Foreign Investment Law, the benefits attaching to investments under a Foreign Investment Law permit can be substantial. In addition, for those foreign investors who do invest under the Foreign Investment Law, a permit application and relevant documents addressing all areas appropriate to the proposed operation in Myanmar (including all other necessary approvals) can effectively provide a "one stop" approval process only dreamt about in many other countries in the region.

For large-scale projects, serious thought should be given to investing under the Foreign Investment Law which provides significant tax and other incentives. However, such investments must comply with a rigorous set of criteria and may be subject to significant conditions as to the operation of the investment.

In practice, any investment requiring Government land and all joint ventures with State-owned economic enterprises or any part of the Government are subject to and must apply under the Foreign Investment Law. Also, joint ventures to be formed with local private citizens or entities which have obtained approval or concessions under the Citizens Investment Law 1994, must obtain, prior to formation, a permit under the Foreign Investment Law. Failure to obtain a Foreign Investment Law permit in these circumstances will breach the Citizens Investment Law and will expose the joint venture company (and each of the shareholders) to the possibility of fines and, more importantly, of being blacklisted from any Government approval for any future business venture in Myanmar.

Foreign Investment Policy

15

The Government's main foreign investment policy objectives, which will be considered when appraising an application under the Foreign Investment Law are.

- Adoption of a market-oriented system for the allocation of resources.
- Encouragement of private investment and entrepreneurial activity.
- Opening up Myanmar's economy to foreign trade and investment which includes
- promotion and expansion of reports;
- exploitation of natural resources which require heavy investment;
- acquisition of high technology;
- developing production and services industries involving large capital;
- creating local employment opportunities;
- developing of works which would save energy consumption; and
- regional development.

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In order to provide more specific guidance to potential foreign investors, some 85 types of activities have been specified as open to foreign investment. Annexure 2 to this Chapter broadly outlines the areas declared available for investment under the Foreign Investment Law. A foreign investor may apply for and obtain a permit under the Foreign Investment Law for an economic activity not so specified, provided the foreign investor can explain how the activity would be mutually beneficial to Myanmar and the foreign investor.

Application Procedures

17

A foreign investor wishing to invest in Myanmar under the Foreign Investment Law must apply to the Myanmar Investment Commission in the prescribed form for a permit, for the Commission's permission to undertake the proposed investment. Alternatively, the permit may simply not be renewed at the end of the relevant two-year period.

Paragraph 7 of "Procedures Relating to the Union of Myanmar Foreign Investment Law" (Notification No. 11/88).

Amended foreign investment law set for July 4 parliament session

18

- Myanmar's amended Foreign Investment Law will be resubmitted to parliament on July 4.
- Key changes to the draft that was submitted earlier this year concern land use. President U Thein Sein highlighted the importance of workable laws and regulations to potential investors during his state of the union address on national television on June 19. "That is why the needed laws and regulations are drawn again according to the international regulations and soon, the foreign investment law will be submitted to the Pyidaungsu Hluttaw."
- Also, the draft Myanma Special Economic Zone Law has been finished and after getting opinions from respective departments and business organistations, it will be submitted to the Hluttaw.
- The financial, taxation, trade, investment and industrial regulations within the draft law have also been amended.
- The country's economic doors were open and he welcomed investors.

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- An additional amendment changes the duration of investment from an initial period of 30 years, followed by two 15-year extensions to a 50-year investment followed by two 10-year periods.
- The amended law enables companies to form joint ventures with domestic partners by putting in at least 35 percent of the investment or enter the country as wholly owned foreign enterprises. However, some sectors would remain protected and would not be open to 100pc-owned foreign firms.
- The economic situation of Myanmar in 2012 has improved from before.
- It could be considered that there are not any situations for potential investors to be worried about and the situation is looking good.
- Locals who rent land to foreign investors also opt to use the lease money to buy a share in the project, which is one way of providing extra opportunities for people.
- Although the Myanmar Foreign Investment Law has not passed yet we feel that poople should be prepared.
- While huge multinationals had not begun investing in Myanmar yet, a patient approach would yield dividends in futures.

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- US sanctions were only eased about a month ago, so it will take some time for big investments to come. And the investment law is going to passed soon.

21

Thank You

II. ACTUAL

REPORT ON THE RESEARCH ON THE JAPANESE CONSTITUION BY THE DELEGATION OF THE SOCIALIST REPUBLIC OF VIET NAM

Takeshi NISHIOKA
JICA Long-Term Expert

I. INTRODUCTION

From July 2 - 6, 2012, a high-level delegation from Vietnam - composed of 24 high-level officers (more than half of them of the level of deputy prime minister), including Delegation Chief H.E. Deputy Prime Minister Nguyen Xuan Phuc, Honorable Chief Justice of the Supreme People's Court Truong Hoa Binh, and H.E. Minister of Justice Ha Hung Cuong - visited Japan to conduct research on the Constitution of Japan, with support by the Japan International Cooperation Agency (JICA). This paper reports detailed contents of their research in Japan, especially those of the lectures and Q&A sessions given by Japanese constitutional scholars, exchanges of opinions held at Nagoya University and the Supreme Court of Japan, and lectures at the Ministry of Justice and Aichi Prefectural Government Office.

Currently, Vietnam is making a nationwide effort to promote its legal and judicial reforms with the aim of constructing a law-abiding country, and establishing legal and judicial systems better-suited to a market economy. The reforms are being undertaken in line with Resolution No.49 of the Politburo of the Communist Party on judicial reform strategies, which was adopted for the purpose of forcing through, and completing the reforms by 2020. In promoting the judicial reform, Vietnam realized a strong need to amend its Constitution, its domestic basic law. Thus, they have begun work on the amendment of the Constitution so as to complete it by the end of 2013, by organizing a Constitution Amendment Drafting Committee (composed of 30 members) within the National Assembly (led by the Chairman of the National Assembly), and an editing committee (composed of 40 members) as a subsidiary organization of the former.

Under the current Constitution of Vietnam, the sovereignty as the ultimate right to make a decision on national politics is not vested in the people. The governance system is based on the principle of

democratic centralism, and does not adopt the system of the separation of power. Thus, courts are not independent judicial institutions, without the right to independently interpret laws, or the right to constitutional control. The Constitution does not provide even a local autonomy system, and the people are granted freedom and rights only under several legal conditions. Thus, Vietnam requested that JICA accept their research delegation with the aim of learning Japanese experience in the establishment of its Constitution, and thereby using this knowledge in amending their Constitution. Their focal points included popular sovereignty, separation of power, independence of the judiciary, local autonomy, and protection of human rights.

The dispatch of the research delegation from Vietnam was coordinated by Professor Tsuboi of Waseda University, and administered by JICA (Headquarters in Tokyo and the Vietnam Office) and JICA Project of Technical Assistance for the Legal and Judicial System Reform. This research program would not have been possible without the help of Mr. Sengoku, a former member of the House of Representatives; Professors Takami and Hasebe in constitution at Sophia University and the University of Tokyo, respectively; Professor Nakanishi in administration law at Chuo University; Mr. Hamaguchi, Principal, and faculty members of Nagoya University; Legislative Bureau of the House of Representatives; Ministry of Foreign Affairs (Japan Embassy in Vietnam); Ministry of Justice; Aichi Prefectural Government, etc. I would like to take this opportunity to express my sincere appreciation to all the people who cooperated in the research of the Vietnamese delegation.

II. DELEGATION MEMBERS AND SCHEDULE

A. Delegation members

See the attached list of delegation members.

B. Schedule

After attending several lectures delivered by constitutional scholars and other law scholars on the basic points proposed by the Vietnamese side, the delegation members visited (i) the Supreme Court for an exchange of opinions on legal interpretation by judges and the judicial precedent system; (ii) the Ministry of Justice to attend a presentation by the Ministry's Human Rights Bureau; and (iii) Aichi Prefectural Government for a presentation on the actual state of local administration. They also visited Nagoya University to exchange opinions with Professor Ayukyo, an expert in the Constitution of Vietnam, and Professor Emeritus Morishima, who is one of the precursors of legal technical assistance to Vietnam. The main activities included in the itinerary of the Vietnamese delegation are listed below:

July 2, a.m. – Lecture by Professor Takami of Sophia University
p.m. – Lectures by Professor Takami and Professor Nakanishi of Chuo University
July 3, a.m. – Lecture by Professor Hasebe of the University of Tokyo
Lunch with, and lecture by Mr. Sengoku, then member of the House of Representatives
p.m. – Lecture by Mr. Tachibana, Director of the Planning Coordination Department, Legislative Bureau, House of Representatives
July 4, a.m. – Visit to the Ministry of Justice
p.m. – Visit to the Supreme Court
July 5, p.m. – Visit to Aichi Prefectural Government Office
July 6, all day – Nagoya University
a.m. – Exchange of opinions with Professor Ayukyo and others
p.m. – Seminar on business legal affairs in Vietnam
(Exchange of opinions with companies expanding into Vietnam)

Note: Five officials including Deputy Prime Minister Nguyen Xuan Phuc and Chief Justice of the People's Supreme Court returned to Vietnam on July 5.

III. LECTURES BY CONSTITUTIONAL SCHOLARS

On July 2, lectures were given all day by Professor Takami and Professor Nakanishi at JICA Headquarters. Professor Takami spoke primarily on the meaning of the constitution, popular sovereignty, separation of power and local autonomy. Professor Nakanishi, meanwhile, spoke on the administrative remedy law -- especially the state compensation law and administrative litigation law.

On July 3, the delegation attended lectures all day at the Parliamentary Museum. In the morning, Professor Hasebe explained his thoughts of the Constitution of Japan, with a focus on the constitutionalism, the significance of justice and legal interpretation by judges. During the lunch break, Mr. Sengoku of the House of Representatives gave a talk on the significance of the constitution and the legal structure centered in the constitution. In the afternoon, Mr. Tachibana, Director of the Legislative Bureau of the House of Representative, spoke on the realization of the rule of law in the legislative process, etc.

In the morning of July 6, an exchange of opinions was conducted on the Constitution of Vietnam under the chairmanship of Professor Ayukyo at Nagoya University

A. Lecture by Professor Takami (July 2, morning and afternoon)

1. Lecture Summary

Professor Takami explained that the constitution has three or four meanings, with the most important being the constitutional meaning, with "human rights protection and the separation of power" as its nucleus. He said the Constitution of Japan prescribes the rights and freedoms of the people, and adopts the governance system based on the separation of power. In comparison with the Constitution of Vietnam, he explained that:

- Under the Constitution of Japan, legislative power and judicial power are positioned equally under the Constitution;
- Courts, the only judicial institution of the country, are independent, and are granted authority to interpret laws and the Constitution, and the right to constitutional control; and
- Human rights are protected without being subject to any legal conditions.

Moreover, he also referred to the fact that judges are allowed to do judicial review in relation to laws enacted by the Diet, which has a democratic basis, in accordance with the principle that human rights of the people cannot be protected only by sticking to the majority rule in the parliament. He also explained the significance of the separation of power, etc. and in doing so, introduced to the parliamentary regime of Switzerland where the government and executive power are submitted to the parliament which has legislative power.

When explaining the concept of sovereignty embraced in popular sovereignty, Professor Takami compared the Constitutions of Japan and Vietnam: While in the Japanese Constitution, the people, the sovereign of Japan, shall exercise the power to amend the Constitution, Article 147 of the Constitution of Vietnam[1] provides that only the National Assembly has the right to amend the Constitution. Through this comparison, he raised a question that the latter adopts not the sovereignty of the people, but the sovereignty of the National Assembly. He added, presenting a sample precedent (Urawa Case concerning administrative investigation rights), that the Constitution of Japan provides that the Diet is considered as the highest organ of state power just as a political eulogistic expression.

Lastly, regarding local autonomy, he explained the historical background in which the Meiji Government (in the latter half of the 19th century) approved independent local administration, reasons for which local assemblies were established, and the actual conditions of local politics under the Meiji Constitution. He also added that local autonomy is provided under the Constitution of Japan for the purpose of realizing separation of power between the central government and local regions, and upon amendment of the Local Autonomy Act (1999) efforts have been made to realize equal and cooperative relationships between the central and local governments.

[1] Article 147 of the Constitution of Vietnam: The National Assembly alone shall have the right to amend the Constitution. An amendment to the Constitution must be approved by at least two-thirds of its total membership.

2. Q&A

The Vietnamese delegation asked questions including:

- The background and history of the enactment of the Constitution of Japan;
- American influence on the Constitution of Japan;
- Method of constitutional control by courts in Japan;
- Pros and cons of judicial review on treaties;
- Reasons for which the Constitution has not been amended to date ; and
- Handling of national security affairs in local governments.

In response to the above questions, the following answers were given:

- History of the enactment of the Constitution based on the August Revolution Theory upon acceptance of the Potsdam Declaration in 1945;
- The nature of the Constitution as the supreme law of the land and the court's function to conduct judicial review are under the influence of the American Constitution;
- Constitutional control by the courts is conducted on a case-by-case basis;
- The Cabinet Legislation Bureau and the Legislative Bureaus of both Houses review the compliance of each draft law with the Constitution at the legislative level;
- Under the effect of domestic laws, treaties are subject to judicial review, and are deemed to be included in "official act" provided in Article 81 of the Constitution;
- The Constitution of Japan contains minimal necessary provisions, and has not been amended as individual affairs are addressed by laws, and social changes have been reflected by revising laws.
- Local governments deal primarily with administrative duties necessary for residents, and therefore they do not handle defense security.

B. Lecture by Professor Hasebe (July 3, morning)

1. Lecture Summary

Professor Hasebe first explained the common features and differences between the modern and ancient/medieval constitutionalism as follows:

- Common features: political power is limited;
- Differences: the modern constitutionalism recognizes the existence of diverse values and world views which primordially conflict with each other, and holds that there is no single correct answer to fundamental questions faced by human beings.

He continued that: justice means application of laws to individual matters so as to reach a detailed conclusion; the trial based on law is not the best but the second best way to avoid the worst-case scenario; and in some individual cases application of statutory provisions in the way their words indicate may not be sufficient but a certain amount of interpretation is necessary on the meaning of relevant statutes so as to draw an appropriate conclusion. He added that there are also cases where proper conclusions cannot be reached even by interpreting law provisions, and thus the Constitution

of Japan grants the courts the right to constitutional control; a judge must decide the most appropriate resolution for a dispute, in light of his/her sense of good as a human being, setting aside the authority of law; in order to make such judgments, appropriate circumstances must be provided to judges, and thus the Constitution of Japan guarantees the life tenure of judges.

Lastly, regarding Montesquieu's words: "The judges must be 'no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour," the professor commented that as an optional interpretation of these words, it can be assumed that Montesquieu had meant -- as judges are simply months of the law and do not add any interpretation to it, their judgments must be accepted directly as the law. On the other hand, another interpretation is also possible -- under the absolute monarchism at that time, it was extremely dangerous to openly argue that judges had the right to interpret law in their own way. Thus, when reading classics, it is necessary to read between the lines.

2. Q&A

The Vietnamese delegation asked several questions including:

- The reason for the necessity of the modern constitutionalism;
- The role of judicial precedents in a society of statutory law;
- The distinction of public and private realms in the Constitution of Japan;
- The reason for which one of the three powers provided in the Constitution of Japan is executive power, not law enforcement power;

To these questions, the professor answered that:

- In modern society, the modern constitutionalism is required as there are values in primordial conflict; adversely, in Vatican City as an extreme case, all citizens are Catholic, and so there are no compelling values and they do not need the modern constitutionalism;
- Even with the establishment of statutory law, they may be interpreted in several ways, and in such cases it is necessary to draw a solution in reference to precedents; therefore, judicial precedents continue to be counted even with the existence of statutory law;
- The Constitution of Japan does not clearly distinguish public and private realms; and
- The Cabinet's executive power includes law enforcement function, etc.

C. Lecture by Professor Nakanishi (July 2, afternoon)

1. Lecture Summary

Professor Nakanishi's lecture can be summarized as follows:

i. Objectives and prerequisites of the administrative relief law:

- Direct objective: remove infringement on the rights and interests of the people caused by illegal or unjust administrative activities;

- Indirect objective: maintain legal and appropriate administrative activities through the law.
- Prerequisites: the rule of law and relief by judiciary in case of law infringement by the executive branch.

ii. Three types of judicial relief:
- Relief by the administrative court established within an administrative body as in France;
- Relief by the administrative court established within a judicial body as in Germany; and
- Relief through administrative litigation at the ordinary judicial court as in Japan.

iii. Types of judicial relief system:
- The state compensation system in case an illegal act by a public servant has caused damage to the people; and
- Administration litigation in case the rights or interests of the public have been infringed upon by an illegal order or cancellation of permit by an administrative body.

2. Q&A

The Vietnamese delegation asked questions on i) the number of state compensation cases appealed to the appellate and the Supreme Court against first-instance judgments; and also ii) the existence of cases on legislative illegality where state compensation was granted.

Professor Nakanishi gave the following answers to the above questions:

i. It is rare that a state compensation case terminates at the first-instance level, and especially when the nation loses in the first instance, most cases are brought to the second- and last-instance courts;

ii. A legislative act is considered illegal only under strict conditions, including:
- The content of legislation clearly violates the rights guaranteed under the Constitution; and
- It is imperative to go through the required legislative procedure in order to ensure opportunities for the people to exercise their rights guaranteed by the Constitution;

and he presented a leprosy litigation case as a sample state compensation case.

D. Talk by Mr. Sengoku, Member of the House of Representatives (Lunch time on July 3)

Mr. Sengoku's talk focused on the issues below:

i. In addition to serving as an adjudication criteria source in criminal and civil cases, the Constitution can be roughly divided into two parts: one on basic human rights, and the other on governance structure;

ii. In a legal system having the constitution as the supreme law, the contents of the constitution are materialized in the form of a law, order and official act, and contrarily the contents of marginal official acts are abstracted to finally return to their source, the constitution.

To the Vietnamese question regarding the distinction between public law and private law, Mr.

Sengoku answered that private law is concerned with human rights, while public law is related to governance structure. He also mentioned that tax law is related to the rights and obligations of the people, and thus is categorized as both public and private law.

E. Lecture by Mr. Tachibana (July 3, afternoon)

From the viewpoint of the realization of the rule of law in the legislative process, Mr. Tachibana delivered two lectures on the "Roles of the Legislative Bureaus of the House of Representatives as a supporting body in the legislative process in Japan," and "Controversies on the Constitution in the Diet of Japan."

In his first lecture, Mr. Tachibana focused his discussion on:

i. The organization of the Legislative Bureau of the House of Representatives and the outline of its duties;
ii. The selection process of Diet members who are representatives of the people, and the importance of their roles, as institutional conditions for creating better laws;
iii. Legislative drafting work by the Legislative Bureau of the House of Representatives, as a professional body to create better law, and the importance of its joint work with Diet members; and
iv. Comments on the professional qualities required to officials of the Bureau and their training.

In the second lecture, he presented:

i. The reason for which the Constitution has never been amended;
ii. Reasons for the recent active debate on the amendment of the Constitution; and
iii. Points at issue in the debate.

After the two lectures, a Q&A session was held which dealt with the following questions:

Regarding the first lecture;

i. The number of draft laws in which the Bureau has been involved, and the trend in the breakdown of new laws and amended laws;
ii. Detailed bill-screening procedure;
iii. Procedural requirements in presenting general draft laws and/or draft laws requiring budgets for enforcement (required number of Diet members in favor, how to handle modified draft laws, whether or not the government makes inquires regarding draft laws);
iv. Psychological trend of Diet members toward making laws;
v. Possibility of political deviation by the Legislative Bureau of the House of Representatives.

Regarding the second lecture;

i. Details on the administrative monitoring organization proposed before by the opposite parties;

ii. Pros and cons on statutory provisions of the national flag, national anthem and political parties in the Constitution, which are not currently provided in the Constitution;
iii. In relation to local government, differences in legal regulations on the Tokyo Metropolitan Government and other local governments;
iv. Position of districts (called '*gun*' in Japanese) as administrative units, etc.

F. Exchange of Opinions at Nagoya University (July 6, morning)

In the presence of University President Mr. Hamaguchi and Professor Emeritus Morishima, an exchange of opinions was conducted by Moderator, Professor Ayukyo, on the Constitution of Vietnam in general.

1. Opinion of Professor Ayukyo

Professor Ayukyo pointed out issues that the current Constitution of Vietnam faces, including:

i. Article 1 of the Constitution of Vietnam[2] includes such words as "independent," "sovereign," "united," and "territorial integrity." These provisions are quite unique and reflect the historical background of Vietnam, which experienced colonial rule and a war with the United States.
ii. In Article 2[3] which reads "The state of the Socialist Republic of Vietnam is a State ruled by law of the people…, the reasons for which the adjective "socialist" is added to "state ruled by law", the relationship between the socialist state ruled by law and socialist legality, which is a traditional concept of socialist law, are unclear; and
iii. As required in connection with the International Covenants on Human Rights, the term "human rights" is introduced in Article 50[4]. However, the relationship between this term and the rights of citizens (which is a conventional socialist idea) is not elucidated clearly.

2. Opinions of Professor Emeritus Morishima

According to Professor Morishima, in considering the amendment of the Constitution in Vietnam, it is important to examine how to understand legal features of the Constitution and the whole concept of the rule of law. In other words, it is necessary to consider the Constitution, not as a basic law but a substantive law, and fully examine - in case of providing the right to file a suit to the people on the grounds of the Constitution, possible problems that may arise; for example, to what extent the people

[2] Article 1 of the Constitution of Vietnam: "The Socialist Republic of Vietnam is an independent, sovereign and united country, which in its territorial integrity comprises its mainland, off-shore island, airspace and territorial waters."
[3] Article 2: "The State of the Socialist Republic of Vietnam is a State ruled by law of the people, by the people, for the people. All State power belongs to the people whose foundation is the alliance between the working class and the peasantry and the intelligentsia.
State power is unity with delegation of power to, and co-ordination among State bodies in exercising legislative, executive and judicial rights.
[4] Article 50: In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law.

are allowed to file a suit on the basis of the Constitution, and whether the people are allowed to sue the state against the executive branch.

The professor added that rights are subject to changes in social situation, and so it is important to consider, in view of the actual situation in Vietnam, the type of rights conferrable to the people within the framework of the socialist regime.

3. Opinions of the delegation

In response to the comments by the above professors, the delegates mentioned:

i. It is necessary, not simply to include the term "law-abiding state" in the Constitution, but to incorporate the idea of the rule of law in the contents and provisions of the Constitution; and
ii. Though the term "human rights" is included in Article 50 of the current Constitution in consideration of the International Covenants on Human Rights, the distinction between the term and the rights of citizens has not yet been made clear, and further examination is necessary on this issue, etc.

IV. LECTURES AT THE MINISTRY OF JUSTICE (JULY 4, MORNING)

At the Ministry of Justice, following the courtesy call on H.E. Minister Taki, lectures were given on human rights administration in Japan by Mr. Ishii and Mr. Kuzuya, Director-General and Counsellor of the Human Rights Bureau of the Ministry of Justice, respectively. In Vietnam, there is consideration to establishing a human rights institution, and so these lectures were included in this program so as to serve as a reference for the delegation.

The lectures included explanations on the following issues:

i. Organizational structure of the Bureau;
ii. Background to the establishment of the Human Rights Bureau in the Ministry of Justice, modeling after the Human Rights Section of the Criminal Affairs Bureau, Department of Justice of the United States, upon suggestions from the Allies after World War II;
iii. Main activities of the Bureau, including human rights relief efforts and campaigns for enlightening the public on human rights, and as an example of such activities, human-rights counseling using postcards, e-mails, etc.

Moreover,

iv. Upon requests from the international community, Japan is currently considering the establishment of a new human rights organization as an independent administrative commission.

In response to Vietnamese questions regarding the legal grounds for the activities of the Human Rights Bureau and the independence of a new human rights organization, the following answers were given:

i. The Human Rights Bureau has been established in accordance with the Act for Establishment of the Ministry of Justice, which provides for the establishment of an organization to protect human rights, enlighten the public, provide advice, and give relief in relation to human rights;
ii. A new human rights organization will be established in the form of an independent administrative commission, and its decision becomes final without being subject to instructions from the Minister. In this sense, its independence may be maintained.

V. EXCHANGE OF OPINIONS AT THE SUPREME COURT (JULY 4, AFTERNOON)

At the Supreme Court, the research delegation from Vietnam paid a courtesy call on Chief Justice Mr. Takezaki and subsequently attended lectures by Chief Research Law Clerk Kanai and Senior Research Law Clerk Ojima on the role of precedents in the court system of Japan. Following that, an exchange of opinions was held with the court officials.

In the lecture on the judicial precedent system, an explanation was given on basic matters including the significance, binding effect and changes of precedents. As an extension of those matters, the lecturers referred to issues such as:

i. While the Constitution of Japan provides that legal interpretation is an inherent right of the courts, judges shall be bound by the Constitution and the laws (Article 76). Therefore, legal interpretation which clearly goes against the wording of a law enacted by the Diet is not assumed from the beginning (relationships between legislative power and the right to legal interpretation);
ii. In light of the great influence of precedents, though they are not statutory, a careful examination is conducted with a focus on the parts which can form judicial precedents (precedent-formation process), etc.

In the exchange of opinions, several questions were asked regarding judicial precedent, the personnel system of judges and legal training, including:

i. Trend in cases requiring constitutional interpretation;
ii. Unconstitutional judgments, effects of laws deemed unconstitutional, and the response of the legislative branch to these judgments;
iii. Actual efforts to change case law into statutory law;
iv. Procedure to recognize a court decision as precedent (necessity of publishing and selecting it,

enactment timing, etc.);

v. Actual situation of the application of precedents by judges in lower courts;
vi. Position of precedents in statutory law countries, in comparison with that in common law countries;
vii. Recruitment and dismissal procedure of judges;
viii. Details of training at law school, the bar examination and legal apprenticeship program, and treatment of students or legal apprentices; etc.

When one of the delegates asked whether judges were allowed to engage in political activities or join a political party, it was answered that judges assume the mission of being fair and neutral, and thus, in terms of political matters as well, they must maintain themselves fair and neutral with the people.

VI. LECTURES ON LOCAL AUTONOMY BY AICHI PREFECTURAL GOVERNMENT (JULY 5, AFTERNOON)

At Aichi Prefectural Government, the delegation paid a courtesy call on Governor Omura and subsequently attended a lecture on the current situation of local autonomy at Aichi Prefectural Government. During the lecture, a focus was placed on the role-sharing between the central and local governments, financial system, personnel system, local assembly system, etc.

The delegation members asked several questions, including:

i. Whether there are any local governments administered only by their independent financial resources with no reliance on the central government;
ii. Involvement of the central government in the issuance of prefectural bonds;
iii. Detailed personnel evaluation method of superiors by subordinates, etc.,

These were answered as follows:

iv. There is no local government in Japan administered without receiving any subsidies from the national government;
v. Discussions are held with the central government before issuing prefectural bonds;
vi. Subordinates evaluate the leadership of their superiors in five levels and submit their evaluation paper to the department in charge of personnel evaluation.

VII. SEMINAR ON CORPORATE LEGAL AFFAIRS AT NAGOYA UNIVERSITY (JULY 6, AFTERNOON)

As the last program of the research by the Vietnamese delegation, a seminar was held at Nagoya University. In the seminar, the delegates exchanged opinions with companies located in Aichi Prefecture, which are expanding businesses in the Vietnamese market, on legal issues the companies are facing in Vietnam. The participating companies included Toyota Motor Corp., Toyota Tsusho Corp., Brother Corp., Rinnai Corp., Bank of Tokyo-Mitsubishi UFJ, and others.

The seminar began with a keynote speech by H.E. Minister of Justice Ha Hung Cuong under the topic, "Issues in the civil and commercial field in Vietnam, and their Solutions." In his speech, the Minister explained the status of legal development in Vietnam after the adoption of the *Doi Moi* policy in 1986.

Subsequently, Professor Emeritus Morishima of Nagoya University gave a keynote speech titled, "History of Legal Development in Vietnam," in which the professor spoke on Japanese legal technical assistance to Vietnam since 1990s.

In the following Q&A session, Japanese participants asked about the disclosure status of judgments in Vietnam, reasons for the difficulty in executing judgments, modes of remittance in investing in Vietnam through M&A, etc. These were answered by the Minister of Justice and other delegates.

VIII. CONCLUSION (COMMENTS)

The constitution amendment process will soon progress in full scale in Vietnam. I cannot stop thinking about interesting matters involved in this process, such as the image of an ideal law-abiding nation that Vietnam is aspiring, the contents of new systems to be incorporated in the new Constitution, etc.

Values and ideologies to be reflected in the Constitution must not be imposed on by outsiders. As a matter of course, the voluntariness of the Vietnamese side must be fully respected. It is supposed that, as the Vietnamese side highly evaluated the Japanese stance of respecting their voluntariness in its cooperation activities through longstanding JICA projects, they requested cooperation from JICA in the amendment of their Constitution.

For the time being, I will cease to think, "How much of the information provided by Japan will be

reflected in the amendment of the Constitution of Vietnam." I would rather like to focus on the image of the law-abiding country Vietnam must pursue, and the underlying direction to realize such an image, and based on that image and direction, we should implement cooperative arrangements as requested by Vietnam and in the essential form Japan should offer in a down-to-earth manner.

In the process of expanding the scope of JICA Project for Legal and Judicial System Reform in Vietnam, I have felt the necessity of support from a wider range of people.

Last but not least, I would like to acknowledge all the stakeholders for their generous support to our legal technical assistance activities and to the dispatch and acceptance of the Vietnamese research delegation.

Thank you very much.

Participants of the Constitution Research Delegation of Vietnam

No.	Name (Honorific titles are omitted)	Title and Institution	Level of Minister	Level of Vice-Minister
1	Nguyen Xuan Phuc	Deputy Prime Minister, Member of the Politburo of the Community Party	Head	
2	Truong Hoa Binh	Secretary of the Party Central, Chief Justice of the Supreme People's Court	○	
3	Ha Hung Cuong	Minister of Justice, Member of the Central Party	○	
4	Giang Seo Phu	Member of the Central Party, Minister, Chairman of the Committee for Ethnic Minorities	○	
5	Phan Trung Ly	Chairman of the Legal Committee of the National Assembly	○	
6	Nguyen Hoang Viet	Member of the Central Party, Vice Chairman of the Central Organizing Committee	○	
7	Le Thi Thu Ba	Member of the Central Party, Permanent Vice Chairwoman of the Central Steering Committee of Judicial Reform	○	
8	To Lam	Member of the Central Party, Vice Minister of the Ministry of Public Security	○	
9	Doan Xuan Hung	Vietnamese Ambassador to Japan		○
10	Le Luong Minh	Vice Minister of the Ministry of Foreign Affairs		○
11	Nguyen Si Dung	Vice Chairman of the Office of the National Assembly		○
12	Vo Khanh Vinh	Vice President of the Vietnam Academy of Social Sciences		○
13	Pham Tuan Khai	Director of the Department of Law, Office of the Government		
14	Nguyen Khanh Ngoc	Director of the International Cooperation Department, Ministry of Justice		
15	Chu Trung Dung	Deputy Director of the International Cooperation Department, Supreme People's Court		
16	Nguyen Truong Son	Deputy Director of the Department of Northeast Asia, Ministry of Foreign Affairs		
17	Nguyen Duy Tien	Deputy Director of the Department of Law in name, Office of the National Assembly, Secretary to the Chairman of the Legal Committee of the National Assembly		

18	Nguyen Vu Bang Tam	Vice Head of the Protocol Division, Administrative Management Department, Office of the Government		
19	Vu Xuan Hung	Expert, International Cooperation Department, Office of the Government		
20	Thanh Mai	Senior Expert, Ministry of Justice		
21	Nguyen Dieu Linh	Assistant to Director, Bureau State Protocol, Ministry of Foreign Affairs		
22	Le Hong Hai	Japanese Interpreter, Department of Southeast Asia, Ministry of Foreign Affairs		
23	Bui Minh Hien	Doctor		
24	Nguyen Manh Duc	Guard Officer		

*H.E. Mr. Hung currently resides in Tokyo, Japan, and met the delegation for the research.

*H.E. Mr. Phuc, Deputy Prime Minister; H.E. Mr. Binh, Chief Justice; H.E. Mr. Cuong, Minister of Justice; and H.E. Mr. Ly, Chairman of the Legal Committee of the National Assembly, are members of the Constitution Amendment Drafting Committee.

*H.E. Mr. Dung, Vice Chairman of the Office of the National Assembly; H.E. Mr. Vinh, Vice President of the Vietnam Academy of Social Sciences; Mr. Khai, Director of the Department of Law, Office of the Government; and Mr. Mai, Senior Expert of the Ministry of Justice; are members of the Editing Committee.

JOINT STUDY ON THE JUDICIAL SYSTEM OF VIETNAM 2012
- PROGRESS IN THE CRIMINAL JUSTICE REFORM -

Kenichi NAKAMURA
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International Cooperation Department

I. BACKGROUND TO, AND OUTLINE OF THE JOINT STUDY

Since 2000, the Research and Training Institute (RTI) has conducted an original joint study program on the judicial system of Vietnam, in cooperation with the Supreme People's Procuracy[1] (hereinafter referred to as "SPP") of the Socialist Republic of Vietnam, and has mutually dispatched legal experts from each institution[2].

The SPP exercises authority in a wide-range of areas, from prosecution and supervision of court proceedings to drafting of criminal procedure-related laws. Through exchange of information with experts from the SPP, the RTI has acquired and accumulated the latest information on the legal system in Vietnam, including law amendment movement, actual state of law operation, legal issues, etc. -- so as to use such information in legal technical assistance activities.

The 2012 joint study was conducted from May 23 - 29, under the theme of current practices of, and issues concerning the criminal procedure in Vietnam, the progress status of the amending process of the Criminal Procedure Code and the Law on the Organization of the People's Procuracy, and recent relevant issues (for details, see the attached schedule).

The following two experts were invited for the 2012 joint study:

1. Mr. Ho Duc Anh, Senior Prosecutor, Deputy Director of the Personnel Department, SPP
2. Mr. Nguyen Van Hop, Senior Prosecutor of the Department of Public Prosecution and Supervision over Criminal Adjudication, SPP; and Vice Chief of the Division of Public Prosecution and Supervision over Criminal Adjudication in Vietnam Southern Localities

In this paper I will briefly discuss the reasons for which the above-mentioned theme was selected for

[1] Vietnam has used this term to mean former Soviet Union-style prosecution office.
[2] This study program is called "RTI-SPP Exchange Program." Regarding the background to the initiation of the program, see "2009 RTI-SPP Exchange Program" in ICD NEWS No.42 (in Japanese). In and after 2009, due to several reasons, only the Japanese session has been organized, inviting legal experts from the SPP to Japan.

the joint study in 2012, and subsequently focus on the movement in the criminal justice system reform in Vietnam[3], which was explained by the two experts in their presentations.

II. REASONS FOR THE THEME OF THE JOINT STUDY

Currently, Vietnam is in the process of large-scale legal and judicial system reforms in accordance with Resolutions No.48 and 49, which were adopted by the Politburo of the Central Committee of the Communist Party in May and June 2005. The SPP is responsible for drafting criminal procedure-related laws, including the Criminal Procedure Code and the Law on the Organization of the People's Procuracy. These two laws were enacted in 2003 and 2002, respectively. Since their enactment, problems in both practice and theory have emerged in relation to these laws, and therefore, as part of the judicial reform based on the above resolutions, efforts have been made to amend these laws[4].

In response to requests from the SPP, the RTI has helped contribute to the reform of practices in criminal investigations and trial, by cooperating in the amendment of the two laws through introduction of legal systems useful for that purpose, and assisting their effort in drafting a prosecutor's manual and improving criminal trial practices in the pilot area. This is the reason for which the theme (current practices of, and issues in the criminal procedure in Vietnam, and the progress status of the amending process of the above two laws and relevant points at issue) was selected for the recent joint study with the SPP.

III. CURRENT PRACTICES OF, AND ISSUES IN THE CRIMINAL PROCEDURE, PROGRESS STATUS OF THE AMENDING PROCESS OF THE CRIMINAL PROCEDURE CODE, AND RECENT RELEVANT POINTS AT ISSUE IN VIENAM

Senior Prosecutor Nguyen Van Hop gave a presentation which can be summarized as follows:

The current Criminal Procedure Code enacted in 2003 considers the criminal procedure not as a way to solve disputes between parties, but as a function of maintaining the public order, by making a decision on a crime infringing on the public order. The procedure is inquisitorial-tinged and stresses

[3] The 2011 Joint Study's topic was also the amendment of the Criminal Procedure Code and the Law on the Organization of the People's Procuracy in Vietnam. For reference, see "Movement in the amendment of the criminal justice system in Vietnam" in ICD NEWS No.48 (in Japanese).

[4] They aim to realize deliberations on, and enactment of the two laws in the beginning of FY2014.

the importance of the discovery of objective facts.

These features of the criminal procedure are reflected in the Criminal Procedure Code (hereinafter referred to as "CPC") in the following aspects:
- Not only in the investigation stage but also in the trial stage, investigative measures are taken as necessary.
- Persons involved in the criminal procedure are divided in two types: procedure-conducting bodies (investigating bodies, procuracies, and courts) and procedure participants (persons held in custody[5], accused, defendants, victims, civil plaintiffs, persons with interests and obligations related to criminal cases, defense counsels, witnesses, interpreters, experts). It is construed that procedure-conducting bodies are granted and monopolize all authority to prove crimes.

Conversely, the accused and the defendants, who are procedure participants, are positioned in the opposite side to the above-mentioned procedure-conducting bodies, and it was found necessary to strengthen the status of defense counsels who defend these procedure participants throughout the criminal procedure.

Due to this necessity, the law newly provided that defense counsels can participate in the procedure, not only to defend the accused or defendants, but from when criminal proceedings have initiated. In the case of persons arrested in urgent cases or offenders caught "in the act", defense counsels are also allowed to participate in the procedure from when a custody decision has been made against offenders (Articles 48 to 50 of the CPC). Moreover, they are allowed to be present when a person held in custody or accused is interrogated or in other investigative activities, and to read the minutes of the proceedings in which they have participated (Article 58).

In reality, however, it is not guaranteed that defense counsels are always able to exercise their power. For example, when they visit investigating bodies to interview the accused, these bodies may take several measures to prevent their interviews on some occasions.


(A scene of a meeting for exchange of opinions)

Due to the above, as a direction that the new CPC should pursue, consideration is being given to incorporating the following factors,

[5] See Article 48 of the Criminal Procedure Code.

including merits of the essential parts of the adversarial system:

1. Distribution of three functions of prosecution, defense and adjudication in trial

According to the current CPC, investigating bodies and prosecutors assume the function of prosecution; persons held in custody, accused, defendants and defense counsels have the function of defense, and courts function not only to adjudicate but also to prosecute[6] and defend.

In the new CPC, it will be provided that courts will concentrate on the function of adjudication, and not assume prosecutorial functions. Moreover, investigating bodies and prosecutors will be responsible for prosecution and defense, and collect evidence for both functions. Prosecutors are responsible for supervising law compliance at trial, and this function will be strengthened. Accordingly, the classification of procedure-conducting bodies and procedure participants will be abolished.

2. Burden of proof of crimes, discretion in deciding prosecution

It will be examined to adopt the principle of presumption of innocence[7] and it will be clearly specified that the burden of proving crimes lies in the prosecuting side, that is, prosecutors.

At the same time, in contrast to the conventional mandatory prosecution system, prosecutors will be allowed to decide whether or not to prosecute at their discretion (however, this does not necessarily mean they are allowed to select counts).

3. Order of the examination of witnesses

In trial, witnesses will be examined first by the prosecutor and defense counsel. In cases where there remain unclear points or there have not been enough grounds to reach a judgment, the chief judge may ask the prosecutor or defense counsel to continue the examination.

4. Mechanism to maintain equality between both parties

Both the accused and defendants will be granted statutory authority so as to exercise their power and argue against the prosecution on an equal footing. In other words, the CPC will include a provision regarding the right of the accused and defendants to prove their innocence or present a proof to reduce their criminality.

The court will respond to requests equally from the prosecutor and defense counsel and accept their

[6] Where it is necessary to conduct an additional investigation, where there are grounds to believe that the defendant has committed another offense, or where serious violations of the procedure are detected, judges shall return files to procuracies (Article 179).

[7] Article 9 of the CPC provides that no person shall be considered guilty and be punished until a court judgment on his/her criminality takes legal effect.

requests when there are grounds.

Moreover, in cases where parties have committed an action against the procedure, the court will impose sanctions.

5. Other improvements in the procedure

Measures will be taken to encourage both the prosecution and defense to conduct arguments that are more democratic.

IV. PROGRESS STATUS OF THE AMENDING PROCESS OF THE LAW ON THE ORGANIZATION OF THE PEOPLE'S PROCURACY AND RECENT RELEVANT POINTS AT ISSUE

Mr. Ho Duc Anh delivered a presentation, the outline of which is as follows:

The current Constitution of Vietnam 1992 provides for the organization of the procuracy. In line with the Constitution to be amended in the near future, it is anticipated that the Law on the Organization of the People's Procuracy will also be revised.

The direction to follow in revising the Law includes the following four factors:

a. In Vietnam, the democratic centralism is adopted and the Communist Party is the only leading party. Thus, the judicial reform policies of the Party shall be followed;
b. As mentioned above, the amendment of the Constitution is underway, and the Law on the Organization of the People's Procuracy will be revised in line with the amended Constitution;
c. The law will be codified by integrating three legal norm instruments: the current Law on the Organization of the People's Procuracy 2002; Decree of the National Assembly on the People's Procuracy; and the Decree of the National Assembly on the Military Procuracy; and
d. On the basis of current practices and with reference to the experience of other countries (including Japan), the Law will be revised in a comprehensive manner that better corresponds to the legal culture and tradition in Vietnam.

(Back left: Mr. Ho Duc Anh, back right: Mr. Nguyen Van Hop)

Discussions are ongoing to adopt the following five systems in the amended law:

a. Position, function, mission, etc. of the Procuracy

Under the current Constitution, the Procuracy is an independent organization within the governance structure in Vietnam. Its independence will be maintained in the amended law[8].

The Procuracy will continue to assume the function of performing the right to prosecute and supervise judicial activities. Details of their duties in performing these two functions will be provided in a separate law in order to flexibly respond to demands for amendment.

b. Organization of the Procuracy

At present, the Procuracy is divided into two types: the People's Procuracy and the Military Procuracy. The People's Procuracy is composed of three levels: the Supreme Procuracy, the Provincial-level Procuracy and the District-level Procuracy. The High Procuracy will be added[9] to create a four-level hierarchy in the Procuracy (in accordance with this change, the People's Court will also be composed of four levels).

The court system in Vietnam adopts the two-instance system. In principle, the District-level People's Court has jurisdiction over the first-instance trial of crimes punishable by not more than 15 years of imprisonment, and the Provincial-level People's Court conducts first-instance trials of crimes not falling under the jurisdiction of the District-level People's Court[10]. Traditionally, the Supreme People's Court has been in charge of the appeal instance, cassation[11] and re-trial procedures against first-instance judgments rendered by the Provincial-level Courts. As the jurisdiction over these procedures will be transferred to the High People's Court in the amended law, the Supreme People's Court will be in charge of only the cassation and re-trial procedures of judgments rendered by the High People's Court[12]. As a result, burdens of the SPP corresponding to the Supreme People's Court will also be reduced, enabling the SPP to further strengthen its directive function to the lower People's Procuracy.

In principle, the People's Procuracy will be subjected to supervision by each level

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[8] Though there are opinions to place the Procuracy under the direct jurisdiction of the Ministry of Justice or under the government (Cabinet), a general agreement has been reached to maintain its independence.

[9] The country will be divided into three regions and a High Procuracy will be established in each of (i) the northern part and the north side of the central part; (ii) the south side and the west highland region of the central part; and (iii) the south part.

[10] See Article 170, paragraphs 1 and 2 of the CPC, and Article 8, paragraph 3 of the Penal Code.

[11] Cassation is a procedure in which a legally valid judgment or decision is reviewed because it has been protested against due to serious law violations (Article 272 and onwards, CPC)

[12] After the amendment, the Provincial-level People's Court will not conduct cassation procedures. The Judicial Council of the Supreme People's Court will be responsible for the cassation procedure against judgments rendered through the cassation procedure at the High People's Court.

popularly-elected organizations (National Assembly, Provincial People's Council, District People's Council). However, regarding the District-level Procuracy, as several districts will be integrated (thus the District-level Procuracy will be changed into so-called Regional First-Instance People's Procuracy), it will not report to the District People's Council. Through this organizational change, the District-level Procuracy will increase its independence from political power.

The High Procuracy will give guidance to, and supervise the Provincial-level and lower People's Procuracy in relation to their duties, except for personnel matters[13].

c. Change in the personnel system of the Procuracy

While no special changes will be made to the system in the Military Procuracy, at the People's Procuracy, the hierarchy of prosecutors will be changed in accordance with the establishment of the High Procuracy.

Currently, the hierarchy of prosecutors is composed of three levels: SPP prosecutors, prosecutors of the Provincial-level Procuracy and those of the District-level Procuracy. Consideration is being given to changing it to four levels: SPP prosecutors, high-level, intermediate-level, and primary-level prosecutors. In the new hierarchy, the following guidance system will be introduced:

- To the District-level People's Procuracy, primary-level and intermediate-level prosecutors will be assigned, and the latter will give instructions to the former;
- To the Provincial-level People's Procuracy, intermediate-level and high-level prosecutors will be assigned, and the latter will give instructions to the former;
- To the High-level People's Procuracy, high-level and SPP prosecutors will be assigned, and SPP prosecutors will coach high-level prosecutors.

Regarding the tenure of prosecutors, it is provided that they serve 5-year terms[14], and are re-appointed repeatedly. This tenure will be extended or will be abolished.

d. Prosecutor-appointment system

Officials of the People's Procuracy are currently recruited without through an employment examination. Efforts will be made for quality improvement of officials and for labor-saving in

[13] Regarding personnel matters, the District-level People's Procuracy will be subjected to the supervision by the Chief Prosecutor of the Provincial-level People's Procuracy, and the High and Provincial-level People's Procuracies will be supervised by the Prosecutor General of the SPP. Please note that the Chief Prosecutor of the High People's Procuracy will not be given authority in relation to personnel affairs.

[14] Article 44 of the Law on the Organization of the People's Procuracy

the cumbersome recruitment procedure, through a system in which officials will be selected through a recruitment examination like the one in Japan, and will be appointed by the Prosecutor-General[15].

e. Establishment of conditions to guarantee prosecutor's performance

In reference to the salary system for prosecutors in Japan, Vietnam is considering the improvement of salaries and labor conditions for their prosecutors.

V. CONCLUSION

The direction of the amendment of the Criminal Procedure Code and the Law on the Organization of the People's Procuracy of Vietnam, which I discussed above, is simply the SPP's opinion, and it is important to continue paying attention to the movement in Vietnam and observe how the two statutes will finally be amended. The Constitution of Vietnam will be amended in 2013 and the position of the Procuracy will be determined within the governance system in the new Constitution. Therefore, criminal procedure-related laws will also be revised in line with the new position of the Procuracy.

In amending the Criminal Procedure Code, Vietnam has aimed at adopting the adversarial system partially. However, as legal practitioners are accustomed to practices in the criminal procedure based on the conventional inquisitorial system, even if the adversarial system is partly adopted, it will require a long period of time for its establishment. Thus, in the course of improving court practices after the amendment, Vietnam may necessitate Japanese assistance. For this reason as well, Japan will need to carefully observe subsequent developments in statutory amendments in Vietnam.

[15] With regard to training, the Ministry of Justice desires to implement unified training to judges, prosecutors and lawyers at the National Judicial Academy under the jurisdiction of the Ministry. On the other hand, training at this academy does not meet the needs of the Procuracy in terms of both quality and quantity, and therefore the Procuracy intends to establish a "Prosecutor's University" so that its graduates can become prosecutors or Procuracy's officials,

Schedule for RTI-SPP Exchange Program 2012 Japan Session

(Lecturers:Mr. Nakamura, Mr. Matsubara; Administrative Officers: Ms. Sugawara, Ms. Hori) as of : 13/04/2012

MM DD		9:30 12:30	14:00 17:00		Remarks
5 ／ 23	Wed	Leave Hanoi at 00:20 -VN330 -Arrive in Osaka at 06:40		15:00～ ICD Orientation ICD Professor	
5 ／ 24	Thu	10:00～ Lecture: " Japanese criminal proceedings including recent topics such as the lay judge system " ICD Professor 4F Seminar Room, ICD	14:00～ Courtesy call to the Superintending Prosecutor of the Osaka High Public Prosecutors Office	14:30～ Presentation by visiting experts on Ⅰ "Current Pratical Issues concerning the Criminal Procedure in Vietnam" Ⅱ " Progress Status of the Amending Process of the Criminal Procedure Code and the Law on the Organization of the People's Procuracies" 4F Seminar Room, ICD	
5 ／ 25	Fri	10:00～ Visit to the Kobe District Court Kobe District Court	14:00～ Exchange of opinions with ICD professors ICD Professors 4F Seminar Room, ICD		
5 ／ 26	Sat				
5 ／ 27	Sun	Travel to Chiba			
5 ／ 28	Mon	10:00～ Visit to the Chiba District Public Porsecutors Office	14:00～ Wrap-up,Q&A ICD Professors	16:00～ Presentation by the visiting experts: "Criminal Procedure in Vietnam" APA HOTEL & RESORT TOKYO BAY MAKUHARI	
5 ／ 29	Tue	10:00～ Visit to the Chiba Prison	14:00～ Wrap-up,Q&A		
5 ／ 30	Wed	Leave Narita at 10:30 -VN311 -Arrive in Hanoi at 14:15			

REPORT ON THE TRAINING SEMINAR FOR CHINA ON THE ADMINISTRATIVE PROCEDURE LAW AND OTHER ADMINISTRATIVE-RELATED LAWS

Mikine ETO
Professor and Government Attorney
International Cooperation Department

I. CURRENT ADMINISTRATIVE PROCEDURE LAW OF CHINA

The current Administrative Procedure Law of China was enacted on April 4, 1989 (came into effect on October 1, 1990). Since its enactment to the end of 2011, the first-instance trial courts in China have received approximately 1,800,000 administrative cases in total. In recent years, its annual figure exceeds 100,000 cases[1].

As mentioned above, while the number of administrative cases has drastically increased in China, the current Administrative Procedure Law (hereinafter referred to as "APL") contains many problems. For example, it is not properly applicable to actual cases which have diversified in accordance with social changes. Although the Supreme People's Court has made efforts to solve these problems by issuing over ten types of judicial interpretations, the academia and society still strongly demand amendment to the APL.

Due to the above, the Standing Committee of the National People's Congress included the amendment of the APL in its 11th Legislative Plan (2008 – 2013). In accordance with this decision, the Administrative Law Office of the Commission of Legislative Affairs, which is responsible for drafting the APL, intends to submit the first amended draft law to the Standing Committee in December 2012.

II. COMMENCEMENT OF ASSISTANCE IN AMENDING THE ADMINISTRATIVE PROCEDURE LAW AND OTHER ADMINISTRATIVE-RELATED LAWS

In 2010, JICA received a request for assistance in the amendment of the APL from the

[1] In comparison with the figure in Japan; i.e. 2,287 administrative cases newly received at the District Courts nationwide in 2011, a significantly larger number of cases have been filed in China.

Administrative Law Office of the Commission of Legislative Affairs. As the International Cooperation Department (ICD) of the Research and Training Institute has extended assistance to China in a project to improve its Civil Procedure Law and Arbitration Law, the ICD decided to join the JICA's program to assist in the amendment of the APL.

In November 2010, the first local seminar was held. Visiting Professor Keiichi Murakami at Doshisha University Law School was invited as a lecturer, and he introduced to the Japanese Administrative Case Litigation Act. In March 2012, upon decision of providing large-scale assistance in relation to the APL and administrative-related laws, an advisory group was formed in Japan. Following this preparation stage, in July 2012, a three-year assistance project on the APL and administrative-related laws was commenced.

III. OUTLINE OF THE FIRST TRAINING SEMINAR IN JAPAN

From July 10 to 18, 2012, the first training seminar (Country-Focused Seminar for China on "the Administrative Procedure Law and Administrative-Related Laws") was held in Tokyo and Osaka, Japan. Regarding the seminar itinerary and participants, see the attached schedule and list of participants.

In this seminar, as requested by the Chinese counterpart, lectures were given on the Immigration Control Law and others, as well as on the APL -- the first draft of which was to be submitted by the end of 2012. The following is an overview of the seminar:

1. Introduction to the Legal and Judicial System in Japan, Activities of the ICD

As this was the first training seminar held in Japan on this topic, and many participants were visiting Japan for the first time, lectures on the Japanese legal and judicial system in general were given at the beginning of the seminar. Through these lectures, the participants gained basic knowledge on the Japanese legal system, which was useful for promoting their understanding of subsequent lectures. The participants had special interest in the right to constitution control, and questions were asked as to the courts being granted the right to constitution control, judgment criteria, etc.

2. Current Efforts of the Administrative Law Office, Discussions with the Advisory Group

During the seminar, time was allotted for presentations by the participants. Mr. Huang Hai Hua spoke of the basic system of the APL and current relevant issues[2], and Mr. Li Hui explained the

[2] Current issues of the APL include the classification of administrative cases, scope of cases to be received, review of reasonableness, stay of execution, relations between administrative litigation and administrative reconsideration,

outline of the recently-enacted Immigration Control Law. Following their presentations, an exchange of opinions was held with the advisory group.

A few participants asked to omit their oral presentations, replacing them with the submission of written reports on the above presentations topics to save time. However, they were persuaded to make oral presentations, as it was an opportunity for us to collect information directly from the Chinese draftsmen, and also useful for better administration of training seminars. We hope to continue having presentations by seminar participants in the future.

(Mr. Huang Hai Hua)

3. Background to the Amendment of the Administrative Case Litigation Act in Japan and Future Challenges

Counsellor Yasuhiko Kobayashi of the Counsellor's Office, Civil Affairs Bureau, Ministry of Justice, delivered a lecture on the amended points of the Japanese Administrative Case Litigation Act in 2004. The participants were especially interested in the expanded classification of litigation cases through statutory amendment, and their questions focused on lawsuits for injunction.

4. The Immigration Control System of Japan

Government Attorney Syo Urabe of the Counsellor's Office, Immigration Bureau, Ministry of Justice, and Professor Yoshiaki Nishikawa at the 3rd Training Department of the Research and Training Institute gave lectures on the immigration control system in Japan. The participants showed a high level of interest in the topic, and their questions varied in content, including: amended points of the Immigration Control and Refugee Recognition Act; reasons for taking three years for the enforcement of the amended Act and the deportation procedure. Coincidentally, on July 9, the arrival date of the participants, the amended Immigration Control Act was enforced in Japan, and they were stranded at the airport for one hour due to confusion caused by the new immigration procedure. It appeared that the participants learned the amended law through this experience firsthand.

5. Litigation System Affecting National Interests in Japan

Mr. Norio Nagaya, Director of the Litigation Planning and Coordination Division of the Minister's Secretariat, Ministry of Justice, was invited to speak on the litigation system in which the Ministry of

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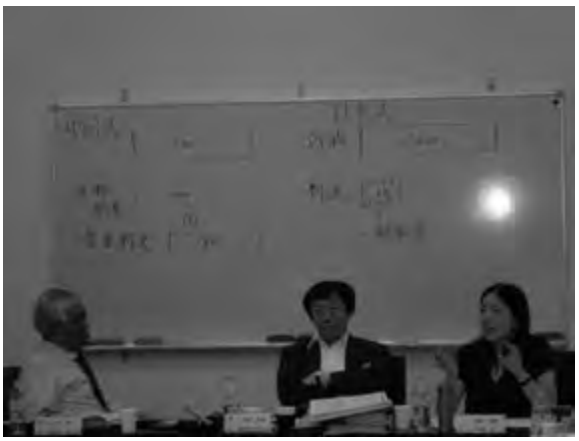
determination of the plaintiff's standing, litigation affecting public interest, etc.

Justice stands in court on behalf of the state. Under this system, the Ministry of Justice is responsible for unified litigation activities at courts from the state position, including allegation and proof, in relation to suits affecting national interest. As there exists no system equivalent to this in China, the participants expressed a strong interest in the system, and asked various questions, including those on the actual operation of the system, arrangement method in case of conflicts of opinions between the Litigation Division of the Ministry of Justice and administrative agencies.

6. Issues in relation to the Amendment of the Administrative Procedure Law in China

Two periods of classes were allotted to answer questions which the participants had submitted in advance, and an exchange of opinions was conducted with advisory group members: Visiting Professor Keiichi Murakami at Doshisha University Law School; Professor Katsuya Ichihashi at the Graduate School of Law, Nagoya University; and Professor Takio Honda at Ryukoku University Law School. Questions ranged from the types of administrative cases, to the scope of cases to be received, review of reasonableness of administrative discretion, stay of execution and litigation in relation to public interest. These issues constitute an important part in the upcoming statutory amendment in China. Obviously two periods of classes were not enough for the participants to engage in thorough discussions, and many asked for more time for discussion. This request should be reflected in preparing future training seminars.



Discussion on issues
(left: Prof. Murakami, middle: Prof. Ichihashi)

7. Administrative Appeal System against National Tax

Officials from the Osaka National Tax Tribunal and the Osaka Regional Taxation Bureau gave lectures on the administrative appeal system against national taxes. As cases in relation to national taxes and immigration account for the major part of administration cases in Japan, it is important to understand the administrative appeal system in relation to these topics in learning practices in the Japanese administrative procedure system. The participants were interested in the reasons for the adoption of the appeal-prior-to-action principle (doctrine of exhaustion of remedies) in relation to national taxes. They were also interested in the reasons for the establishment of the National Tax Tribunal in 1970, etc.

8. Visit to the Administrative Division of the Osaka District Court

The participants visited the Osaka District Court and an exchange of opinions was held with judges at the Administrative and Labor Divisions. It was explained that the Court receives approximately

250 administrative cases annually, and cases in relation to immigration and refugee recognition, social security and local autonomy account for the major part, and that many cases draw attention from society, including litigation cases demanding the shutdown of nuclear power plants. The participants focused on the attitude of Japanese judges toward trial. For example, an explanation was given on the increase in the number of actions filed by inmates with complaints about the treatment they have received at penal institutions, or by traffic offenders against facts of traffic violation, without support from defense counsels. Regarding this issue, questions were presented on how judges strike a balance between individual plaintiffs and administrative agencies -- which are not on an equal footing. The fact that, under the conditions of the adversarial system, it is not directly detrimental for judges to render erroneous judgments, was a surprise to the participants. This is because, in comparison with China -- where the independence of judges is not sufficiently guaranteed -- the judiciary independence in Japan is complete.

9. Visit to the Osaka Immigration Control Bureau

On the last day of the training seminar, the participants visited the Osaka Immigration Control Bureau to observe its detention house and window counter, and to exchange opinions with its officers. They were satisfied with the explanations given by immigration officers using the Bureau's DVD and brochure in Chinese. The participants enthusiastically asked questions regarding issues in practice, including the number of requests for information disclosure, the contents of those requests, requirements for permanent residency, etc., and detailed answers were given to all of them.

Visit to the Osaka Immigration Control Bureau

IV. FUTURE ASSISTANCE

Our assistance will continue for three more years in relation to the Administrative Procedure Law and other related laws. As the Chinese counterpart requests support from Japan in wide-ranging legal fields, including the environmental law field, in accordance with their diversified legislative needs, our future challenge is how to respond to such varied requests.

After the first amended draft law is submitted to the National People's Congress of China, deliberations will continue on the subject. Thus, we will take up the APL in our next local seminar as well.

(At the International Conference Hall of the ICD)

Schedule for the 1st Training Seminar for China on the Administrative Procedure Law and Administrative-Related Laws in 2012

[Government Attorney in Charge：Ms. Eto, Administrative Officers in Charge: Mr. Yokoyama, Mr. Kitaguchi］

As of June 12, 2012

mm dd		10:00 12:30	14:00 17:00		Place
7 ／ 9	Mon.	Arrive at Haneda, Tokyo at 12:50		Briefing by JICA Orientation by ICD TIC[*1]	Tokyo
7 ／ 10	Tue.	Legal and judicial system in Japan, activities of ICD Ms. Eto, ICD Attorney MOJ[*2]	Current efforts by the Administrative Law Office (with a focus on the amendment of the Administrative Procedure Law and the Immigration Control Law), Discussion with the Advisory Group Visiting Prof. Murakami at Doshisha Univ. Law School, Attorney-at-law Prof. Ichihashi at Nagoya Univ. Graduate School of Law Prof. Honda at Ryukoku Univ. Law School Mr. Muramatsu, Counsellor's Office, Civil Affairs Bureau, MOJ MOJ		Tokyo
7 ／ 11	Wed.	Background to the amendment of the Administrative Case Litigation Act and future challenges in Japan Counsellor Kobayashi, Counsellor's Office, Civil Affairs Bureau, MOJ MOJ	Immigration control system in Japan Mr. Urabe, Counsellor's Office, Immigration Bureau, MOJ Mr. Nishikawa, 3rd Training Dep., RTI[*3], MOJ MOJ		Tokyo
7 ／ 12	Thu.	Litigation system affecting national interest in Japan Mr. Nagaya, Director of the Litigation Planning and Coordination Div., Minister's Secretariat, MOJ MOJ	Review of issues in the amendment of the Administrative Procedure Law 1. Visiting Prof. Murakami at Doshisha Univ. Law School, Attorney-at-law Prof. Honda at Ryukoku Univ. Law School MOJ		Tokyo
7 ／ 13	Fri.	Review of issues in the amendment of the Administrative Procedure Law 2. Visiting Prof. Murakami at Doshisha Univ. Law School, Attorney-at-law Prof. Ichihashi at Nagoya Univ. Graduate School of Law MOJ	12:15 Exchange of opinions with Director General of RTI	Travel to Osaka	Tokyo
7 ／ 14	Sat.	Free			Osaka
7 ／ 15	Sun.	Free			Osaka
7 ／ 16	Mon.	National holiday			Osaka
7 ／ 17	Tue.	Administrative appeal procedure on national tax Mr. Nishikawa and Mr. Uda, President and Judge at the Osaka National Tax Tribunal; Mr. Hirasawa and Mr. Murakami, Chief Investigator and Litigation Expert at the Osaka Regional Taxation Bureau ICD	Visit to the Administrative Div., Osaka District Court, exchange of opinions (-16:30) Osaka District Court		Osaka
7 ／ 18	Wed.	Visit to the Osaka Immigration Bureau, exchange of opinions	Evaluation, discussion on progres (15:00 -)		Osaka
7 ／ 19	Thu.	Leave Osaka at 13:50 and arrive in Beijing at 16:00 on CA928			

*1 TIC: Tokyo International Center, JICA

*2 MOJ: Ministry of Justice

*3 RTI: Research and Training Institute

List of Participants in the 2012 Training Seminar for China on the Administrative Procedure Law and Administrative-Related Laws

1	Mr. TONG Wei Dong Deputy Director, Administrative Law Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
2	Ms. TIAN Yan Miao Deputy Director General, Regulation Filing and Reviewing Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
3	Mr. NING Xiao Lu Researcher, Administrative Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
4	Mr. HUANG Hai Hua Deputy Division Chief, Administrative Law Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
5	Mr. LI Hui Principal Senior Staff Member, Administrative Law Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
6	Mr. TIAN Lin Senior Staff Member, Administrative Law Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
7	Ms. ZHANG Xiao Ying Senior Staff Member, Administrative Law Office, Commission of Legislative Affairs, Standing Committee, National People's Congress
8	Mr. ZHOU Yong Deputy Director, Commission of Legislative Affairs, Standing Committee, Jiangxi Provincial People's Congress
9	Mr. CAO Jian Qiang Director, Comprehensive Laws and Regulations Office, Standing Committee, Hubei Provincial People's Congress
10	Mr. LI Guang Yu Deputy Chief Judge, Administrative Division, Supreme People's Court,

KICKOFF SEMINAR 2012
- A NEW INITIATIVE BEFORE THE ORGANIZATION OF THE SYMPOSIUM FOR YOUTH -

Kenichi NAKAMURA
Professor and Government Attorney
International Cooperation Department

I. BACKGROUND TO THE SEMINAR

The Research and Training Institute (RTI) began to organize its original symposium called "Symposium for Youth" in 2009, from the standpoint of promoting legal technical assistance and developing human resources with capacities to engage in legal international cooperation. This symposium provides young people, including undergraduate and graduate students, with an opportunity to present their opinions regarding legal technical assistance, so as to encourage their interest in it.

In the initial year, as it was organized in summer, it was officially named "Summer Symposium – Our Legal Technical Assistance."

In Japan, mainly Nagoya University, Kobe University, Keio University and Chuo University offer programs on "legal technical assistance" or "law and development." Especially in Nagoya University, a research institute named "Center for Asian Legal Exchange (CALE)" is committed to legal technical assistance activities. Coincidentally, the CALE began a three-day summer school on legal technical assistance in 2009. Thus, in 2010 and 2011, the RTI and the CALE organized a tie-up program named "Power-up Summer 2010/2011," which was a combination program of the summer school and the Symposium for Youth. In the summer school, the Director and professors of the International Cooperation Department (ICD) of the RTI delivered lectures and gave an assignment to students, who would present the results of their studies in the symposium.

In organizing the Symposium for Youth, the RTI and Nagoya University gained the participation and cooperation of Keio and Kobe Universities and discussions were held between the RTI and relevant professors on ideal collaborative initiatives. Through this process, they reached an agreement that it would be better to organize the Symposium for Youth in winter[1], rather than organizing both the

[1] It was also intended to give opportunities for students to visit the RTI and question its professors in between the summer school and symposium.

summer school and symposium successively in summer, so that students would have a certain amount of time to absorb what they had learned in the summer school and reflect their learning in their presentations. Therefore, in 2012, the symposium was held on Saturday, November 17 at Keio University, on the subject of the access to justice, with a title "Access to Justice in Asian Countries."

On the other hand, in order to enhance public relations activities, it was decided to hold a kickoff seminar in spring in Tokyo so as to provide students who had interest in legal technical assistance with opportunities to have access to it throughout the year. Thus, on Saturday, May 26, the first kickoff seminar was organized at Keio University, Mita Campus[2], with the aim of providing basic information of, and annual events relevant to legal technical assistance. The outline of the program and detailed contents of the seminar are presented below.

II. OUTLINE OF THE PROGRAM

The seminar was largely divided into two parts. The first part consisted of:

1. Explanation on the purpose of the seminar and the annual schedule of the ICD by Mr. Yamashita, then Director of the ICD, RTI;
2. Explanation on the summer school and other projects of Nagoya University, by Professor Ichihashi, Professor Matsuura and Associate Professor Okochi of the Graduate School of Law, Nagoya University; and
3. Explanation on the assignment of the Symposium for Youth by Professor Matsuo of Keio University Law School.

The program of the second part was as follows:

4. Discussion between Professor Aikyo, Vice President of Nagoya University and Mr. Yamashita on the topic, "Lawyers and Law Scholars in the Next Generation in the Asia-Pacific Region – Why We Need to Study Asian Law and Legal Technical Assistance"; and
5. Q&A with Ms. Shibata, Professor of the ICD; Mr. Sato[3], an expert in international cooperation of the Japan International Cooperation Agency; and the two student moderators, on the subject "What I Have Acquired Through My Involvement in the Law and Society in Asia."

It is hoped that the Symposium for Youth will be administered by students in the near future, and as a trial for this purpose, this kickoff seminar was run by Mr. Sumitani and Ms. Suto, both students of

[2] The Symposium for Youth will be organized in Tokyo, Nagoya and Osaka in rotation.
[3] Mr. Sato was dispatched to Vietnam from 2004 to 2006 as a JICA long-term expert. Upon return to Japan, he has served as a senior advisor in the field of legal technical assistance at JICA HQs.

the Faculty of Law, Keio University.

III. DETAILS OF THE KICKOFF SEMINAR

A. First Part

As an introduction to the seminar, Mr. Yamashita explained, in association with his own career, the types of posts related to international affairs which prosecutors can assume. Furthermore, he explained the organization of the RTI, its relationship with JICA, background to the commencement of legal technical assistance by the RTI, its detailed activities, and importance of assistance. He also introduced the ICD's activities in relation to international cooperation and legal assistance scheduled for 2012.

Following Mr. Yamashita's lecture, Professor Ichihashi referred to the background to the establishment of the CALE and its activities, and Associate Professor Okochi explained the details of the summer school and other events organized by the CALE[4]. Professor Matsuura spoke of the Leading Graduate School of Nagoya University which aims to train personnel capable of transplanting law[5].

(Mr. Yamashita explains the purpose of the seminar)

Subsequently, Professor Matsuo elaborated on the assignment of the Symposium "Access to Justice in Asian Countries," which was scheduled for November 17. The topic of the assignment was "The Current Situation of, and Improvement Measures for 'Access to Justice' in the Recipient Countries

[4] As part of its activities, the CALE administers the Research and Education Center for Japan Law in five cities in four countries (Tashkent in Uzbekistan, Ulan Bator in Mongolia, Hanoi and Ho Chi Minh in Vietnam, and Phnom Penh in Cambodia) where Japanese law is taught in Japanese.

[5] Prof. Matsuura referred to a website in which one can search legal terms in the multiple languages registered in EU (http://iate.europa.eu/iatediff/SearchByQueryEdit.do).

of Legal Technical Assistance." In his explanation, Professor Matsuo divided the assignment into the following five parts to facilitate understanding of the attending students:

1. "Legal technical assistance"
2. Recipient countries of legal technical assistance
3. "Access to justice"[6]
4. "Current situation of the access to justice"
5. "Measures to improve" the access to justice

(Prof. Matsuo explains the assignment of the symposium)

B. Second Part

The second part of the kickoff seminar started with a discussion between Professor Aikyo of Nagoya University and Mr. Yamashita.

Professor Aikyo emphasized two important points as below on how to get involved in Asian countries:

1. How to be involved in Asia varies according to times and individual interests. Therefore, one must get involved in other Asian countries in the field of his/her interest.
2. While being aware of the diversity of Asia, it is important to focus on, and try to understand one country, including its language, step by step.

In relation to these points, Mr. Yamashita mentioned that: one should work on regional (law) studies, not by following current trends but by foreseeing future trends; by pursuing one's interest, without being swayed by trends, his/her efforts would be rewarded; and that patience is required in legal

[6] Prof. Matsuo referred to the "access to justice" in a broad sense to mean that: 1. For the purpose of protecting and realizing people's rights, there exist legal (both substantive and procedural) rules approved and shared by the people in society; 2. fair adjudication and judgment are made based on such legal rules, and the contents of adjudication and judgments are determined and effectively enforced, and 3. the legal system in which 2. is viable is in widespread use in a user-friendly way by all citizens.

technical assistance.

(Discussion between Mr. Yamashita (left) and Prof. Aikyo (right)

The discussion was followed by a Q&A with ICD Professor Ms. Shibata, JICA Expert Mr. Sato, and the two moderators. The latter two asked questions such as:

- Their careers and involvement in legal technical assistance;
- How did they get into legal technical assistance;
- The significance of being involved in international cooperation;
- The difference between students in the recipient countries and Japan;
- The abilities and qualities required in international cooperation;
- What activities are recommended during school life;
- Accidents and difficulties in the recipient countries; etc.,

and the two panelists talked about them[7].

(Dialogue between the guests and audience)

The audience also participated in the Q & A by asking the panelists and commentators questions,

[7] During the Q&A, a recorded TV program was run in which Ms. Shibata appeared when working as a JICA long-term expert in Cambodia

including:

- Why they engage in legal technical assistance;
- If there are any gaps between humanitarian requests and global standards in legal technical assistance;
- If there are any fields where beginning legal professionals can contribute;
- How power struggles and dialogues are coordinated in providing legal technical assistance; etc.

IV. COMMENTS

The kickoff seminar was attended by a wide-range of individuals totaling over 60 people, including undergraduate and graduate students, as well as legal and other professionals. According to the results of the questionnaire after the seminar, the audience had varied impressions and found different parts of the seminar useful. All of this indicates that the seminar offered a variety of information to the participants, and was a good start to the first collaborative program between the ICD and universities.

The second part of the seminar was presided over by student moderators in an attempt to promote the voluntariness of students. The ICD and host universities hope that in the near future a student group for studying and promoting legal technical assistance will be launched. Though this may not be realized in a single step, it is anticipated that the student network will expand and be strengthened further, through repeated organization of the summer school in August and the Symposium for Youth in November.

III. CONTRIBUTIONS

EXPANDING LEGAL TECHNICAL ASSISTANCE

Mitsuyasu MATSUKAWA
Judge of the Osaka District Court[1]
(Former Professor and Government Attorney
International Cooperation Department)

I. ENHANCED RECOGNITION OF LEGAL TECHNICAL ASSISTANCE

Eleven years have passed since the International Cooperation Department (ICD) was established within the Ministry of Justice of Japan on April 1, 2001. In the early days almost no one, except for just a select few people, knew of the existence of the ICD, let alone legal technical assistance. Contrary to the ICD's initial stage, legal technical assistance has become more broadly known within Japan, and a wider group of people are, or intend to be, involved in it. For example, if you have a chance to talk with legal apprentices or law school students, ask them if they know about legal technical assistance. Most will answer that they have heard of it, to a greater or lesser extent, which was unimaginable in the past.

Since April 2010, two judges have been dispatched to Cambodia as JICA long-term experts. It is interesting that people in the legal field react in different ways according to the generation when they heard about judges engaging in legal technical assistance in developing countries. Roughly speaking, a lawyer with over 10-years experience would say, "That must be a tough job. I feel sorry for him," and the older they are, the more often they tend to show this type of reaction. On the other hand, for those lawyers with less than 10-years experience, especially those with less than 5, more than the expected number would say, "It must be a very challenging job but I want to try it."

When JICA holds a capacity-development course for legal experts to be dispatched abroad for a long term mission, it is always flooded with applications with the deadline being moved forward. When the ICD organizes a 3-day summer course and a symposium on legal technical

[1] The author wrote this article during his tenure at the International Cooperation Department.

assistance in cooperation with universities, typically over 100 students from various regions of Japan participate in the events at their own expense. Moreover, when the Japan Federation of Bar Associations organizes a paid seminar on international cooperation (including legal technical assistance) jointly with the Ministry of Foreign Affairs and the Ministry of Justice, more than the allowable number of attorneys-at-law, graduate school and college students apply for it. All this was unimaginable 10 years ago.

The mass media is also paying attention to, and supporting, legal technical assistance nowadays. For example, in an NHK (Nippon Hoso Kyokai) television program, a commentator gave a detailed explanation on legal technical assistance as follows:

- Japan has developed its modern legal system since the Meiji Era by combining the legal systems of various Western countries. Due to this experience, Japan has become adept at providing legal technical assistance best suiting the conditions of developing countries.
- It is expected that Japan will continue to make substantive contributions to the international community through its experience in Cambodia and other countries in order to boost its presence in Asia.

These changes are not limited to the area of law or legal technical assistance. Along with the increasing presence of Asian countries, especially Southeast Asian countries, the above-mentioned changes are deemed as a sign of globalization even in the legal community of Japan (which is one of the least internationalized sectors) causing major shifts in our sense of distance from or our way of associating with Asian countries. Following such a trend of the times, it may be that the "Strategy for Rebirth of Japan II[2]", a Cabinet decision on December 24, 2011, has adopted "promoting support for developing legal framework that will serve as a foundation for inclusive growth" as one of the "short-term major high-priority projects in each area."

II. LAW FIRMS EXPANDING TO ASIA

In addition to legal technical assistance, similar changes are also being observed in other legal fields. The most remarkable change is that Japanese law firms have been rapidly expanding their operations into Asia over the last few years. Although there formerly existed "international law offices," it was said their operations mainly dealt with Japanese law.

[2] http://www.npu.go.jp/policy/pdf/20120127/20120127_en1.pdf

However, in the last few years more and more law firms are stationing their lawyers not only in China but across Asia, including Singapore, Vietnam, Thailand, Indonesia, India, etc., to offer legal services to Japanese companies there. It should just be a matter of time before law offices expand their operations into Cambodia, Laos, and Myanmar. Moreover, some practicing lawyers are leaving Japanese law firms to become partners of law offices in Singapore, and some are even opening new law offices with locals in Indonesia.

According to the dynamics of an economy, it is quite natural that, in the midst of a series of negative incidents such as Lehman's fall, the Great East Japan Earthquake, and the unprecedented appreciation of the yen, Japanese companies are expanding their operations overseas in an accelerating manner and law firms consequently need to follow their clients. Most Japanese lawyers -- rather than being reluctant to work abroad on orders of their law offices, have voluntarily sought these new opportunities. That is, the distance with Asia has diminished in their thinking.

When speaking with such lawyers, it is interesting to know that they show a keen interest in and understanding of legal technical assistance and that many are willing to offer their help. While distances between Asia and Japan are deceptively diminishing, so-called business lawyers have drastically changed their sense of distance from legal technical assistance. As practicing lawyers can exercise their expertise only when there are well-established legal systems and law is being applied in a transparent way, they may feel an interest in legal technical assistance which contributes to the improvement of their legal environment. It is also attractive for them to be able to acquire legal information of a target country or build a human network with local lawyers through legal cooperation.

In the field of international trade, the English law has long been used broadly as the governing law, and it has served as a strong base for English lawyers to explore business opportunities overseas and the strong international presence of England. Singapore has actively used their inherited English law as one of the measures to attract foreign investment. On the other hand, in the European Union which mainly consists of civil-law countries, commonalizing their legal systems including contract law has become a big issue, and such trend of making common legal systems has expanded globally. As attorneys-at-law have firsthand knowledge of these realities, they seem to be welcoming a more active legal interaction between Japan and other countries through a channel of legal technical assistance.

Thus, for the first time in the history of Japanese legal assistance, practicing lawyers have come into contact with problems related to law and justice in developing countries in

performing their corporate legal duties. It is expected that legal technical assistance may become more effective and better-grounded through cooperation with such lawyers at each stage of planning, designing and implementation. It may sound exaggerated, but legal technical assistance is embarking on a new stage thanks to the emergence of these new actors.

III. COOPERATION WITH PRIVATE LAWYERS

In the target countries of legal technical assistance, we have already started to work with Japanese lawyers privately stationed there. For example, in 2011 the Research and Training Institute to which the ICD belongs, commissioned research on civil execution, civil preservation and the exercise of security interest in Indonesia to a practicing lawyer dispatched to the country by a major law firm. The entrusted lawyer, in collaboration with his colleague Indonesian lawyers, compiled highly interesting survey results based not only on local publications and available materials but also on interviews with Indonesian judges and jurists. The survey results were published on the ICD's website to more broadly share information in Japan on the realities and challenges of civil execution, civil preservation and the exercise of security interest in Indonesia.

Japanese legal technical assistance is characterized by its merits of collaborating with target countries based on research and understanding of their actual conditions. Through partnerships with practicing lawyers, information, knowledge and findings on target countries can be accumulated effectively and efficiently to serve as the prerequisites for Japanese unique technical assistance.

I understand that Japanese private lawyers dispatched abroad are offered a host of opportunities to give presentations in local areas. If they partake of these opportunities to make comparative analyses between Japanese law and local law or provide suggestions on local legal issues based on the results of the above-mentioned type of research, this is exactly what is considered as unique Japanese assistance taking advantage of the strength of Japanese law and lawyers. It may also be possible for them to give lectures in ICD seminars designed for judges, prosectors, lawyers or government officers of target countries (use of Japanese law or legal textbooks translated into participants' languages makes those seminars more effective).

In the course of formation of assistance projects as well, it should be positively considered to incorporate the opinions of those private lawyers who are exposed first hand to the realities

and challenges in target countries. Compared to our conventional research methods, it will surely enhance the access to, and analysis of local information in both quantity and quality.

IV. POSITION OF THE MINISTRY OF JUSTICE

Then, can legal technical assistance be left in the hands of private lawyers without the need for the involvement of the Ministry of Justice (MOJ)? The answer is no, though it may be necessary to accept the reality that more and more Japanese private lawyers with excellent expertise are playing actively in Asia, and to re-consider the position or role of the MOJ in the development of legal technical assistance. If we fail to do so, we may end up providing assistance activities vertically divided between the public and private sectors, leading to unnecessary or redundant assistance. Instead, we should seek the possibility of joint initiatives between the public and private sectors in which the strength of each sector is leveraged, and such multi-layered cooperation between both sectors, including the academia and other ministries and agencies, may make Japanese legal technical assistance more productive.

What is the role and strength of the MOJ in providing legal technical assistance? As the first answer to this question, there is a formal reason that, because the targets of legal technical assistance are public institutions in many cases, such as government offices or courts, the liaison office in Japan must be a public organization. Moreover, in practice it is true that a public institution may be trusted easily by recipient countries and there is a human network which may be built only by a public institution. There may be some challenges or needs for assistance in target countries that can be identified only through such a relationship of trust and human network.

As mentioned above, even though private lawyers may be counted more and more in the future in the field of legal technical assistance, unless assistance addresses to the capacity building of private lawyers in target countries, those who take the initiative in deciding and formulating the direction and framework of Japanese assistance will continue to be the government and JICA. The MOJ will also be widely expected to possess the necessary expertise for assistance.

Furthermore, in actual locations of assistance, there is an advantage which the MOJ can enjoy. In addition to the fact that the Ministry can constantly secure human resources to focus on assistance and work exclusively for recipient countries, through these personnel the Ministry is able to accumulate and transmit in the whole organization the know-how and expertise

necessary for assistance. Contrary to this, in the case of practicing lawyers in the private sector, those stationed abroad need to engage in their original businesses in addition to assistance activities, so they cannot focus exclusively on legal technical assistance.

In the development of human resources in target countries, the most important area in legal technical assistance, a lengthy amount of time and patience is required to achieve substantive results in a real sense. Whether or not the MOJ can deliver the detailed know-how or wisdom of waiting for the opportune moment as its own knowledge will largely influence the meaning for the MOJ to be involved in legal technical assistance.

Needless to say, there is certain knowledge or experience that only Japanese judges or prosecutors can offer, and which cannot be provided by practicing lawyers. Therefore, when legal technical assistance is partially related to courts or prosecution, even if practicing lawyers may collaborate in some way, assistance may not be completed without some type of involvement from judges and prosecutors. In this sense, the MOJ, with judges seconded thereto, must be the main actor.

Returning to the story of commission of research in Indonesia, this research was not completely left to a commissioned private lawyer. I, having an experience as a judge, gave comments based on my experience in the course of the research, and the human network established between the MOJ and Indonesia was utilized in obtaining materials or setting up interviews in the target country. Moreover, the MOJ was responsible for liaising with scholars of Indonesian law and Japanese Embassy in Indonesia, to receive great support in conducting the research. Though this is just an example of collaboration between the MOJ and the private sector in legal research, similar kinds of cooperation may be applied in a larger scale of assistance, such as in the formation of an assistance project.

V. COOPERATION WITH OTHER MINISTRIES AND UNIVERSITIES

The MOJ is not the only ministry within the government that provides legal technical assistance. For example, assistance on competition law is offered by the Japan Fair Trade Commission, and that on labor law by the Ministry of Health, Labour and Welfare. Legal technical assistance has been conducted by a ministry which exercises jurisdiction over the specific area of law for which assistance is required, and there has been almost no case of collaboration between ministries in delivering legal technical assistance.

However, in the case of the ongoing JICA project for strengthening protection of intellectual property rights in Indonesia, not only the Japan Patent Office which has been responsible for assistance in the area of intellectual property but also the Customs and Tariff Bureau of the Ministry of Finance, and the ICD have been cooperating on the project. The role the MOJ is expected to play will be to: (i) share, with counterparts in the target country and other related organizations in Japan, the idea that intellectual property rights cannot be protected effectively without improvement of the basic litigation system, and of its operation, including civil execution and civil preservation; and to (ii) highlight the importance of assistance in the improvement of basic laws. It seems that assistance in basic laws and in business laws has been provided separately to date, so based on a shared recognition that basic and business laws are closely related to each other like the first and second floors in the whole legal system, cooperation between ministries is expected to expand as in the above-mentioned project.

Collaboration with universities and scholars, who have been the main driving force of legal technical assistance from the beginning, has been increasing in importance. For example, Nagoya University runs the Research and Education Centers for Japanese Law in Vietnam, Cambodia and other countries in which Japanese law is taught in Japanese[3]. As a result of these efforts, the number of people who understand Japanese law in Japanese is steadily increasing in those countries. When discussing law with them in Japanese, we can convey a much greater amount of, and a higher quality of, knowledge and information compared to communication through an interpreter. As in the Meiji Era in Japan, these talented individuals will play important roles in the transmission of knowledge and development of law in their countries. The MOJ may be able to deliver much more effective assistance by interacting and cooperating with these human resources.

VI. NEW IDEAS IN A NEW PHASE

Legal technical assistance is a win-win national policy which is beneficial not only for the recipient country but also for Japan. It has evolved into a new phase of expansion through an enhanced recognition thereof, changes in the sense of distance from Asian countries, advance of practicing lawyers in Asia, cooperation with other ministries and universities, and an increase in the number of foreigners who understand Japanese law in Japanese. It is my sincere hope that by taking this opportunity, unprecedented assistance framework and ideas are created leading to the development of further fruitful legal assistance.

[3] Recently the University has launched activities to promote exchanges of personnel in East Asia, especially among universities in Japan, China and Korea.

CENTRAL ASIA, CIS AND JAPAN

Kie MATSUSHIMA[1]
Attorney-at-Law (Japan)
Former JICA Long-Term Expert in Uzbekistan

I. INTRODUCTION

In Japan, recently there is growing interest among practitioners, academics and students, in official development assistance to developing countries in the legal and judicial sphere. Japan has been supporting legal developments in Vietnam, Cambodia, Laos, and Indonesia for more than a decade. In recent years Japan has also extended assistance to China, Nepal and East Timor; with Myanmar also coming into its field of vision for legal cooperation. This increase of interest may be attributable to institutional and individual efforts, including those of the Japan International Cooperation Agency ("JICA"), Japan Federation of Bar Associations, Ministry of Justice, and universities, which have actively publicized their activities. In addition, major investment in developing countries -- particularly in Southeast Asia -- has brought public attention to the business legal environment in this area.

How about other areas in Asia – for example, Central Asia? Who can name countries in Central Asia or locate them on the world map in his or her mind? Who knows about Japanese legal technical assistance to Central Asia?

[1] The author was involved in a JICA technical assistance project on the Commentary on the Bankruptcy Law of Uzbekistan between April 2005 and March 2008. Since 2010, the author has been working for PwC Russia in Moscow, Russia, to support Japanese businesses in Russia, Central Asia and other CIS countries. She also takes part in a JICA region-wide programme on corporate law in Central Asia.

II. CENTRAL ASIA AND CIS

Central Asia lies in the west of China and south of Russia. There is no clear definition of Central Asian countries. In this article, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are referred to as Central Asian countries. In this region, Islam prevails, as in neighbouring countries, including Afghanistan and Iran -- though Islamic beliefs are comparatively moderate. The Turkic peoples are the major ethnic groups that reside in the area - except in Tajikistan, which is a Persian nation - and Russian and Korean also reside in Central Asia for historical reasons.

Central Asian countries were once members of the former Union of Soviet Social Republics, and are now of the Commonwealth of Independent States ("CIS") – an association formed by many of the former Soviet republics in 1991, right after the dissolution of the former Soviet Union. Currently, the CIS consists of Russia, Ukraine,[2] Belarus, Armenia, Azerbaijan, Moldova and Central Asian countries[3]. CIS member states vary in ethnicity, religion and culture, and economically speaking they mark distinct differences. According to the World Bank report on GDP per capita in 2011,[4] Russia is ranked highest with 13,089 USD among CIS countries, followed by Kazakhstan (11,245 USD), Turkmenistan (4,722 USD), Ukraine (3,615 USD), Uzbekistan (1,546 USD), Kyrgyzstan (1,075 USD) and Tajikistan (935 USD).

[2] Ukraine is not an official CIS member state as it has not ratified the CIS charter.

[3] Turkmenistan is also not an official CIS member state as it has not ratified the CIS charter.

[4] The website of the World Bank: http://data.worldbank.org/indicator/NY.GDP.PCAP.CD [2012.10.30]

In relation to the World Trade Organisation, Russia acceded to the organisation in August 2012, while Kyrgyzstan, Moldova, Armenia, and Ukraine did so in 1998, 2001, 2003 and 2008 respectively.

Each CIS member state is independent, as its name indicates, and has its own legal institutions. However, common particularities can be observed in their legal development process. Under the Soviet Union, its member republics had operated the standardised legal rules and regulations of a planned economy which Moscow had directed for over 60 years. However, in the immediate aftermath of the Soviet downfall, the member countries were urged to establish their own legal systems which could accommodate a market-oriented economy.

III. LEGAL DEVELOPMENT IN CIS COUNTRIES

A. Assistance by the West for Economic Transition

In the 1980s, Western countries began supporting East Europe in their economic transition, as the region broke away from communist rules of the Soviet Union. This support was extended to CIS countries upon the collapse of the Soviet Union. The European Bank of Reconstruction and Development ("EBRD"), which was founded in 1991, provided technical assistance to CIS countries (as well as financial support to their businesses) for improving their investment climates. The European Commission launched a TACIS programme (Technical Assistance to CIS countries) in 1991. Likewise, the World Bank and the International Finance Corporation implemented a series of legal and judicial projects in the region. There was also German assistance rendered by a specialized agent (Deutsche Gesellschaft für Technicshe Zusammenarbeit, "GTZ"[5]), universities and courts. The USA also supported CIS members in legislative improvements through a governmental organisation (US Agency for International Development, "USAID") and bar associations.

B. CIS Model Legislation

The transition in legal institutions in CIS countries has been backed by model laws, which were prepared by the CIS Inter-Parliamentary Assembly ("IPA") with support by Western countries and donor organisations. The IPA was established by parliaments of CIS countries (except Uzbekistan and Turkmenistan) in 1992. Its activities aim at preventing the disintegration of, and harmonising private law in CIS states, which is to be achieved by the enactment of model laws. Taking into account their economic ties with Europe, CIS model laws have benefited greatly from European

[5] GTZ has been merged into Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ.

legislation. IPA stresses that the application of model laws enables domestic legislation to be aligned with European legal standards.

As of October 2012, IPA approved 284 model laws, including a wide range of civil, criminal and administrative laws.[6] Model laws are sent to parliaments or relevant lawmaking bodies in CIS countries, together with explanations and recommendations for consideration and application to domestic legislation. These laws are not binding and it is not obligatory for CIS states to consider them. Minutes of parliaments make no note on whether or how much model laws have been referred to, or discussed in the process of national legislation.[7]

Among model laws, the model Civil Code – which covers commercial matters - made a great contribution to legal developments which have fostered market economies in CIS. Parts One, Two and Three of the model Civil Code were adopted between 1994 and 1996 (Part Three was revised in 2003). Part One provides for the basic principles of civil affairs, including legal entities, property rights and obligations. Part Two deals with contracts, such as sale and lease. Part Three regulates issues on intellectual property rights.

Initially, Netherlands (the Centre for International Legal Cooperation, "CILC") provided separate assistance to Russia, Kazakhstan, Ukraine and Belarus, in drafting civil codes, and subsequently added support to prepare the CIS model Civil Code in cooperation with GTZ and USAID.[8] In the process of drafting the model Civil Code, discussions were held among specialists from CIS countries and foreign experts from Netherlands, Germany and others. The model Civil Code was referred to, in drafting civil codes in the above four countries, Azerbaijan, Kyrgyzstan and Tajikistan, and also in Uzbekistan, though it was not an IPA member.[9]

In regard to corporate activities, model laws were introduced on limited liability companies (1996), joint stock companies (1996), bankruptcy (1997), bankruptcy of financial institutions (1997, 2005), capital markets and securities (2001), and protection of investors (2005) with further support from EBRD, CILC and GTZ. In recent years, IPA provided a model commercial code (October 2009), model intellectual property code (April 2010), model laws on joint stock companies (October 2010) and ownership (May 2012).

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[6] The website of IPA: http://www.iacis.ru/html/?id=22&str=list&nid=1 [2012.10.30]

[7] Юрий С. Безбородов, *Международные модельные нормы*. Москва: Wolters Kluwer, 2001, pp.34-35.

[8] William B. Simons, "The Commonwealth of Independent States and legal reform: the harmonisation of private law", *Law in transition - Spring 2000*. London: EBRD, 2000, p.19.

[9] The website of the Bremen University project, "Civil and Economic Law of Caucasian and Central Asian countries": http://www.cac-civillaw.org/gesetz/gesetz.ru.html#kas [2012.10.30]

In my ODA and business activities, the harmonisation of legislation in CIS is helpful to comprehend law in this region. By virtue of the CIS model Civil Code, civil and commercial laws in CIS countries share common basic concepts. It is also very useful that Russian versions of their laws are available in most cases.[10] This may be because the model Civil Code and other model laws are prepared in Russian, which was the standard language in the former Soviet republics. Even in cases where provisions are different, it is still easier to compare and understand them in terms of content and text. One example is the Uzbek Bankruptcy Law of 2003, which largely owes to the CIS model law of 1997 and Russian law of 2002. Commentaries on the Russian Bankruptcy Law helped me frame an understanding of Uzbek law. Moreover, the analysis of Russian corporate, contract, security and procedural laws was of great advantage. These realms of legislation are closely related to bankruptcy, but there was little literature available on Uzbek laws. In business, Dutch or Cypriot laws are occasionally referred to, as investment to Russia, Kazakhstan or CIS countries often comes through Netherlands or Cyprus. Dutch civil law has contributed to Russian legislation, but it is not always possible to have Dutch law in English or Russian, to examine. Cypriot security and insolvency laws were understandable, but required different points of view from Russian law to understand. It can be admitted that CIS nations can take advantage of the knowledge of their legal institutions in understanding other members' systems, which is useful in streamlining businesses within CIS countries. This is what IPA and model laws aim at.

C. Civil Legislation Reform in Russia

As of October 2012, an extensive reform has been ongoing over the Russian Civil Code, which was made based on the CIS model Civil Code, in order to accord civil legislation with the rapidly growing economy. With Part One of the Civil Code having come into force in 1995, the modernisation of the Civil Code had already been discussed in 2004, and officially began by the President Decree[11] in 2008, when Part Four of the Civil Code (intellectual property) became effective.

The Decree sets out six purposes of the thorough reform. One of the purposes is to bring provisions of the Russian Civil Code into line with those under EU law, and another is to make the best use of recent good practice in the modernisation of European civil codes. Concept papers of the reform were delivered to the public for discussion in 2009.[12] The papers analysed laws and practices in European countries, particularly Germany, Austria and Netherlands. The draft new Civil Code was

[10] For example, the Ministry of Justice of Uzbekistan runs the legal database on legislation in Uzbek and Russian: http://lex.uz/ru/main [2012.10.30]. The database was established with international cooperation support, including JICA.
[11] The Decree of the President of the Russian Federation dated 18 July 2008, No 1108, on "Completion of the Civil Code of the Russian Federation"
[12] The website of the Russian School of Private Law: http://www.privlaw.ru/index.php?section_id=24 [2012.10.30]

finalised in February 2012,[13] and is currently discussed and amended at the lower house of the legislature. The new Civil Code would introduce new concepts, including good faith in transactions and the protection of possession, and reclassify joint stock companies in a similar way to the provisions in Kazakh law and the model law of 2010 on joint stock companies. The new Russian Civil Code is anticipated to enter into force in 2013.

Interestingly, as stated in the Degree as one of the purposes, the reform aims at supporting the unification of civil legal norms in CIS countries. No concrete measure to achieve this aim is proposed, but as a matter of fact, influences from the Russian legislation can be seen, at least, over the Central Asian legislation. In relation to the unification of legislation in CIS, it is also worth noting that Russia has been promoting an economic integration in the region. One of the integration phases is the formation of the Customs Union of Russia, Kazakhstan and Belarus in July 2010, which allows free movement of goods within these three countries. The Customs Code of the Customs Union is applied to all the three, leaving discretion to domestic legislation to some extent. Further, these countries intend to unify their anti-monopoly regulations and adopt an anti-monopoly code applicable to all three by 2015. Among the three, the free movement of labour force was realised in January 2012, and that of capital is also expected in the future alike. Such tendency of economic integration might lead to the unification of legislation. Moreover, there is a possibility that other CIS countries would join the integration, as Russia desires. Apart from CIS model laws, the disintegration, or rather the re-integration, of legislation in CIS is advancing in such a manner.

IV. CENTRAL ASIA AND JAPANESE ODA IN THE LEGAL FIELD

A. Arguments

The application of CIS model laws or Russian legislation in Central Asian countries can mean that their legal framework entails two elements: European standards and harmonisation with other CIS countries. In this connection, one might argue the justification of Japan supporting legal developments in Central Asia. Japan does not belong to Europe or CIS. As for economic relations, Japanese investment in Central Asia is incomparably less than that in Southeast Asia. Taking account of limited financial and human resources for ODA, it is reasonable and inevitable to conduct most effective and efficient projects in a highly selective way. Nonetheless, this article would like to discuss some points of view regarding Japanese support to Central Asia in the legal and judicial sphere, outlining activities which have been implemented to date and are ongoing at present.

[13] The website of the Supreme Commercial Court of the Russian Federation: http://arbitr.ru/press-centr/news/44088.html [2012.10.30]

B. Japanese Assistance Operations

Cooperation between Japan and Central Asia for legal development began with the mutual understanding of commercial and economic laws with Uzbekistan in 2000, which led to two JICA projects in Uzbekistan in 2005. One project aiming at improving administrative procedures and relevant legal institutions for the development of activities in the private sector was completed in September 2012. The project involved the Ministry of Justice of Uzbekistan, Nagoya University and a number of JICA legal experts providing advice to reform the administrative procedure and mortgage system in the country. The other project focused on making the Uzbek bankruptcy regime operate smoothly, by publishing a commentary on the newly enacted Uzbek bankruptcy law and disseminating the understanding of the law. The project was carried out by JICA partnering with the Supreme Economic Court of Uzbekistan, the Ministry of Justice of Japan (International Cooperation Department, "ICD") and Japanese academics and lawyers, including the author of this article. While the project was once closed in 2008, follow-up activities are underway to revise the commentary in line with recent practice. The Russian version was already published as of October 2012. The Uzbek edition is also expected to be published shortly, and seminars are subsequently planned in regional cities.

Since 2008, a region-wide JICA programme on the comparative study of Central Asian laws has been organised in partnership with the ICD. Judges and officers from Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan and Japanese legal professionals discuss corporate law and deepen the understanding of corporate issues in their own country and others.

C. Issues to be Addressed

It has been repeatedly noted that Japanese technical assistance in the legal and judicial sphere does not aim to transplant Japanese law in developing countries. The purpose is to understand laws, legal circumstances and needs in target countries, and tune their legal instruments with practices or improve law application, so that their legal systems function in a real sense. In this respect, similarities in legal bases between Japan and the recipient country, or the possibility of harmonising their law with Japanese law, are inessential.

In general, the CIS has strong economic ties with Europe, but Central Asia is also linked to Asian countries. While Japanese investment activities have only slightly increased in the geographically and industrially limited area in Central Area, Chinese businesses are expanding markedly in the region. Korean communities have maintained their presence in Central Asia since the Second World War, when they were forcibly displaced there. Thus, it may be beneficial to take Asian factors into consideration in the course of their legal development.

The promotion of Japanese investment is sometimes mentioned in the context of legal development assistance. Certainly, it is not the first priority, but may indeed be one of the desired results of assistance. Actually, the improvement of investment climate as a whole and the understanding of legal systems in target countries in the course of assistance activities would be beneficial in achieving the above desired result. This is also true in Central Asia. In Japan clearly there still lacks information on legislation and business practices in Central Asian countries. As JICA develops its assistance activities, more material on companies, mortgages and insolvencies in Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is becoming (or will become) available.

As noted earlier in relation to the Uzbek bankruptcy law, and observed in the ongoing comparative study programme for Central Asian countries, laws and regulations in Central Asia have benefited from CIS model laws or Russian legislative institutions, as it was possible to adopt similar legal instruments in a short time. However, a problem has arisen that such instruments do not always work in practice. This is because they have been drafted by simply referring to CIS model laws or those of a more developed country, without considering the realities in countries or fully understanding model legislation. Discussions have revealed that various provisions of their statutes poorly or never function in practice. It may be said that those not-operating provisions are not harmful to the local people as they are not simply in use, and little attention has been paid to them. However, they have caused confusion to outsiders intending to work on the legal documents in Central Asia. For example, Uzbek law appears to allow a foreign company to open both its representative and branch offices in the country; however, it is practically impossible to have a branch office of a foreign entity there due to a lack of relevant regimes and infrastructures. It is expected that dialogue between Japan and Central Asia will make mention of these issues and make legal environments in the region more understandable, workable and transparent.

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Edited by the International Cooperation Department
Research and Training Institute
Ministry of Justice, Japan
Published in February 2013