

Introduction

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| シリーズタイトル(英) | Development Perspective Series |
| シリーズ番号 | 3 |
| journal or publication title | Law, Development and Socio-Economic Changes in Asia |
| page range | xx-xxvi |
| year | 2003 |
| URL | http://hdl.handle.net/2344/00015326 |

Introduction

NAOYUKI SAKUMOTO

I. New Role of Asian Law in the Changing Environment

Asian countries are making efforts to carry out legal reform to cope with rapidly changing environment. In order to understand the development of legal reforms in Asia, an example of the recent democratization movement in Indonesia might be helpful. The author witnessed drastic socio-economic and political changes in Jakarta, Indonesia, in 1998. Former President Suharto, who had sustained Indonesian authoritarian rule for 32 years, was toppled down by people's power movements triggered by the Asian economic crisis of 1997. In a few months after the breakout of economic crisis, rupiah fell down to almost one fourth of the original value. Indonesian political situation became almost chaotic. People on the streets were shouting for "Demokratisasi" (democratization), "Reformasi" (reform), and "Supremasi Hukum" (the rule of law). With such changes of people's awareness toward law and the increase of aspirations toward democratization, legal reform in Indonesia has begun. Installation of the new mechanism based on law and order was seriously needed in order to replace the old mechanism.

Further, in order to solve the debt problem of Indonesia that arose from the economic crisis, IMF and donors requested the Indonesian government to conduct legal reforms. IMF officially requested, as part of the loan's conditionality, to revise the bankruptcy law of Indonesia. The new bankruptcy law was promulgated in 1998 and the Commercial Court was established to solve bankruptcy issues fairly and promptly. Legal technical assistance to Indonesia, supported by international organizations such as World Bank and ADB as well as developed countries, became more and more active and was expanded to wider fields of law. It is surprising that hundreds of laws and regulations have been made annually in order to replace the old laws as part of these reforms.

Democratization, reform, and the rule of law are the key words to understand the changes of legal reform in Asian countries. Similar changes as said above are taking place in other Asian countries. Legal systems in Asian countries differ to each other; however, most countries seem to be

experiencing more or less common problems. Confronted by such changes, Asian countries are challenged to establish new legal systems through legal reforms, to cope with new political, socio-economic, and international environments.

The objectives of this study are to rethink the role of law in the socio-economic changes and development process of Asian countries, and to examine the judicial systems and their reform as one of the key dimensions of the socio-economic changes. In Japan, although Asian law study has been developing and gaining weight in its academic positions, interest on foreign law has mostly been directed toward legal studies of Western countries. As a result, hardly any attention has been paid to Asian law studies, except old Chinese law studies, which had influence on premodern Japanese law. But, because the political and socio-economic ties are becoming closer and stronger among Asian countries in the process of globalization, there is an urgent need to mutually understand the contemporary legal systems of the respected countries.

To do so, more comparative legal studies must be developed among Asian countries. This is one reason why we invited Asian legal scholars from several Asian countries to conduct joint studies on Asian law. Fortunately, we were able to receive positive appraisal from our counterparts, that such a project like this "A study on Asian law, held in Asia, organized by fellow Asians" was first of its kind and definitely needed to promote mutual understanding. The phrase "mutual understanding" is very suggestive also to the recent legal technical assistance projects. Without accurately understanding the legal system, legal awareness, and the role of law in the concerning country, no project will meet its expected goals. Legal technical assistance should be based on full understandings of their culture and society. This book will hopefully provide necessary materials for both scholars and practitioners of Asian law as well as some insights to legal technical assistance to Asian countries.

II. Overview of the Study

This book consists of three parts: (1) Law and Socio-Economic Changes in Asia, (2) Governance and Judicial Review in Asia, and (3) Judicial System and ADR in Asia. These three parts are closely interconnected. Following are the brief overview of our research and the basic observations of our study.

Law and Socio-Economic Changes in Asia

Remarkable progress is seen in the areas of economic laws in this region. Most Asian countries are rapidly arranging their legal infrastructure to provide an adequate environment for economic activities, especially after the Asian economic crisis. Asian countries are establishing fair and competitive environments for economic activities. Areas of economic law included are banking, bankruptcy, fair competition/anti-monopoly, and intellectual property. Further, as the globalization process becomes more important, legal measures are regarded as an essential instrument to defend and consolidate their legal status in the international society. The role of law in these countries also becomes important. The number of international treaties and agreements signed and ratified by Asian countries is increasing. Transition countries, including China, Indochina, and Central Asia, are introducing new laws through legal reforms based on market economy, and innovatively revising their old laws into new ones that are more adaptive to their changing conditions. In order to support their smooth transition to open economies, international organizations and developed countries have been providing legal technical assistance to these countries. Areas of law included are widespread: judiciary, tax, banking, investment, company, land, economic transaction, mortgage, labor, and so on.

Next relates to the discussion of law and development. The question is whether importation of law as a means to accelerate economic development alone is acceptable or not. It emphasizes that sophistication of economic laws is indispensable in order to accelerate economic development in developing countries as economic laws are regarded as an engineering tool to achieve economic development. However, it should be noted that economic development and social development are interrelated and inseparable. The Rio Declaration of 1992 declares in Principle 1: "Human beings are at the center of concerns for sustainable development," which means that human beings must be at the center of sustainable development, and any developmental idea or scheme must take into consideration the people who will be affected by economic changes. In terms of legal development, it is essential to give more consideration toward harmonizing economic development and social development. Without such a perspective, any developmental idea or scheme would not be successful, and the introduction of development-oriented laws would come to a deadlock. This gives us a message that transplantation of new laws by means of legal technical assistance to developing countries might fail without sufficient attention to both sides of development.

Development of social laws is noteworthy in Asia. Through rapid development of economies, the disparity between rich and poor has widened. Not much consideration has been given to the economic rights of the weak and the poor, in most Asian countries and regions. However, we can see remarkable development of laws in the area of social development. One outstanding area of law relates to the protection of persons with disabilities in Asia. Emergence of laws in the area of social development is a feature characteristic of the development of Asian law. Indications of the welfare state concept are perceivable in many countries of Asia.

Factors that motivate legal changes in Asian countries are varied. One typical factor is the influence from international society. Globalization movements have accelerated China's participation in the WTO, and the number of bilateral and multilateral agreements in Asian region is on the increase as the regional cooperation develops among Asian countries. The introductions of ILO standards, environmental agreements and the establishment of human rights commissions in respective Asian countries, are some examples of such international influence. Developments of international law, and changes of the international environment, are an influential factor in developing domestic law in Asian countries. However, this poses us another question on how we can secure the establishment of new participatory process for developing countries in the existing international decision making mechanism.

Last relates to the characteristic of Asian law in its pluralistic nature, which means that different types of legal systems coexist in an orderly manner concurrently in a certain society. Legal tradition and customary law strongly persist as a basic part of the legal culture in many Asian countries. Asian legal values are closely knitted with the socio-economic values and traditions, which may vary from one place to another. It can be argued that universalism based on the European legal system went too far, and the historical background and the composition of society in Asia, are quite different from the European situations. However, there is also a fact that the integration of laws as well as the rule of law has not yet been fully established in many Asian countries.

Some of the above themes, such as interactions of law and society, labor law, consumer law, environmental law, and disability law are discussed in Part I of this book.

Governance and Judicial Review in Asia

At the end of the 20th Century, democratization movements began to mobilize in many Asian countries. Some Asian countries attained their democratization by overthrowing authoritarian political regimes through the democratization movements. As a result, past authoritarian regimes were changed to democratic political structures. In such countries as the Philippines, Thailand, and Indonesia, constitutional laws were drastically changed, and the legal reforms were extensively conducted.

Most Asian countries that went through such changes reorganized their governmental structure by means of decentralization. Major purposes are to deconcentrate powers and consolidate a basis for democracy, and to suspend the rebirth of centralization of political powers. In most cases, such legal change is accompanied by amending their constitutions. Major areas of legal reforms directed are: an introduction of civilian control (expulsion of army influence), curtailment of executive powers, democratization of election systems and political parties, empowerment of the parliament, establishment of impeachment procedure, prevention of corruption. Judicial Review is recognized as one of the important systems to increase the power of the judiciary. Decentralization process has also been implemented at a vertical level, namely the realization of local autonomy.

Further, legal developments to assure human rights protection through institutional reforms are observed in the process of democratization. Voices of the people demanding transparency, accountability, as well as the eradication of corruption in administrative procedures, are increasing. Participation in the political decision-making process is also a new phenomenon in Asia. As a result, specific human rights are guaranteed in a detailed manner in Asian constitutions, and the coverage of human rights tends to expand from the classic type of political freedom to the newly developed type of socio-economic human rights. Organization of ombudsmen and human rights commissions is a remarkable legal development in Asia. Another striking phenomenon is the establishment of constitutional courts in Asia such as in Thailand and Indonesia, which explicitly shows the increasing role of judiciary.

Judicial review in the Philippines and Malaysia, public interest litigation in India, and constitutional courts in Asia, are discussed in Part II of this book.

Judicial System and ADR in Asia

The role of the judiciary is also changing along with development and socio-

economic changes. In recent years, heated discussions concerning judicial reform have focused on the need to correspond to the progress of democratization and economic globalization. The judicial system in each country differs, as it depends on their respective historical backgrounds and political and economic situations; nevertheless, we can find a few common factors that motivate judicial reform, such as “democratization” and “marketization.”

One main factor promoting judicial reform in Asia is the change in political structure due to democratization. Since the second half of the 1980s, democratization in many Asian countries has progressed rapidly. Judicial reform was recognized as important regarding the destruction of former authoritarian systems and the reorganization of new governmental organizations. In the reforms, the “rule of law” was advocated to make further progress toward human rights and democratization. Also, the growing civil society by and large demanded a stable channel for relief to a court in case of infringement on citizens’ rights. Given such a greater importance to the court, the whole judicial system was urged to make necessary accommodations.

In the judicial reform regarding democratization, the focus was on judicial review or control through the court system, but the reform regarding marketization focuses more on settling disputes, as an infrastructure system. The Asian economic crisis in 1997 made the world recognize, again, the importance of the judicial system also as an economic infrastructure. The World Bank, IMF and other donors, recommended most of the Asian countries affected by the crisis, to build an effective dispute settlement system as part of economic structural reforms.

The rapid socio-economic changes in Asia bring about various disputes, which leads to an urgent need to establish a fair and effective mechanism to settle disputes. This should include not only litigation in courts but also various alternative routes, such as mediation and arbitration by administrative or non-governmental organizations. Court reform and the providing of various ADR are aimed at meeting actual needs to reduce the overload on courts, and to offer inexpensive and prompt settlement. To be effective, the dispute settlement system needs to increase the number of alternative options, and also to design and create a systematic combination of the court system and ADR.

Dispute settlement in court, and that out of court, are intimately related, and neither is independent of the other, and, in real life, the merits of the two are considered and utilized. In addition, there is another trend in establishing a dispute settlement system. Under the pressure of globalization and the

introduction of Western judicial systems, the indigenous dispute settlement mechanism is being reevaluated domestically, in Asian countries, and incorporated in their systems. Reconstruction of the dispute settlement systems based on traditional values is a noteworthy phenomenon.

Changing role of courts and the judicial reforms in China, Vietnam, and Uzbekistan, and the respective dispute resolution system in Singapore, Thailand and the Philippines, are studied in Part III of this book.

Finally, as stated earlier, this study was only possible with the collaboration of many Asian legal scholars from this area. To deepen our study, we need to develop a theoretical framework and further analyze the actual usage of law. It is noteworthy to reconfirm a few approaches to develop the coverage and quality of Asian law studies in the future, which were referred to in our previous discussions. First is the expansion of comparative law studies among Asian countries. Second is the need for a sociological study of law based on field surveys, through academic collaboration with local counterparts, to have deeper insights on the role of law in the respected countries. Third is the need to study case laws in Asian countries, to understand the gaps between written law and the actual situation, the legal developments by the judiciary, and the problems related to enforcement issues. Also, special attention should be given to social issues, and specific issues that are common to developing countries such as poverty and population.