

Legal Technical Assistance in Japan ' s ODA: An Implication for Law and Development

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Legal Technical Assistance in Japan's ODA: An Implication for Law and Development

Miwa Yamada*

Introduction

Legal technical assistance in Japan's Official Development Assistance (ODA) started in 1996.¹ The first assistance was provided to Vietnam in the area of drafting civil code. As ODA's funding priorities shift from 'hard' infrastructure to 'soft' infrastructure such as human resources and law and legal institutions, the number of recipient countries as well as Japanese lawyers and law scholars who engage in the assistance has gradually increased.²

The Asian financial crisis in 1997 is said to be attributable to malfunction of market principle and lack of transparent rules. Consequently the need for 'rule of law' is emphasized in transient economies as well as economies that suffered from the crisis. In order to create predictability in the conduct of economic transactions, legal reforms started in Asia, to which bilateral and multilateral development assistance has been provided.

While providing support to developing countries, Japan itself is in the midst of judicial reform. Japan has experienced a sluggish economy mainly due to the vulnerability of its financial sector suffering scandals and bankruptcy, and legal reform is called for to shape a transparent rule-based society. Discretion of administrative organs that exercised anterior regulating powers is curtailed and individuals are expected to act at their own risk. Supported by the business circles, the Judicial Reform

* Institute of Developing Economies, Japan

¹ Japan International Cooperation Agency (JICA), Presentation Paper at The International Symposium on "Legal Assistance Projects in Asia and International Cooperation" held on 13th-14th September, 2000 by Graduate School of Law, Nagoya University.

Japan's engagement in international legal training is traced back to the establishment of UNAFEI (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders) in Tokyo in 1962 pursuant to the agreement with UN. Apart from UNAFEI, this paper focuses on 'legal technical assistance' recently started as technical cooperation projects carried by an aid agency of the Japanese government.

² As of November 15 2000, from 1999 to 2000 the total number of legal experts who engage in legal technical assistance in JICA's projects is 75 and the number of recipient countries is three, namely Vietnam, Laos and Cambodia. <http://www.jica.go.jp>

Council was established under the Cabinet last year to strengthen judicial function as a system for resolving disputes arising from the rule-based society.³ Thus, Japan is facing the same challenge as that faced by other Asian countries.

All over the world, the number of lawyers engaging in legal technical assistance projects and the size thereof will be definitely increased. The field or sector where legal technical assistance is provided cannot be severed from the rest of the system and society. Legal technical assistance is the issue, not confined to only practitioners of projects, rather, all lawyers and law scholars inevitably need to discuss as an integral part of law and legal system that they are working on. The purpose of this paper is to raise questions about assumptions upon which legal technical assistance in Japan's ODA is based and to invite discussion on the role of law and legal institutions in developing Asia.

I. Definition of Legal Technical Assistance

The first question is whether it is adequate to categorize what is conducted by the name of 'legal technical assistance' as a technical cooperation project. Japan's ODA is classified into three categories: bilateral grants, bilateral loans and contributions to multilateral organizations. Japan International Cooperation Agency (JICA), a subordinate organization of the Ministry of Foreign Affairs, carries out the bilateral grants. This is further divided into grant aid cooperation and technical cooperation.⁴ The latter means all the projects that send experts and invite trainees for the purpose of technology transfer.⁵ Legal technical assistance is conducted in this technical cooperation scheme. JICA believes that it has succeeded in transfer of technology ranging from rice cropping to nuclear power, and legal technical assistance is necessary to provide the environment to effectuate and maintain the products resulting from past technical cooperation. JICA simply parallels between conventional technical cooperation and legal technical assistance.

Legal technical assistance is based on the premises that, firstly, what lawyers engage in as professionals (e.g. drafting, adjudication, prosecution, defending, counseling etc.) is categorized as 'technology,' and secondly, that it can be transferred.

³ <http://www.kantei.go.jp/jp/shihouseido>

⁴ The grant aid cooperation occupies around one fourth (US\$2,781 million) of Japan's ODA in FY 1998. <http://www.mofa.go.jp/policy/oda/summary/1999/>

⁵ The targeted technologies include administrative planning, public infrastructure building, agriculture and fishery, and public health and medical treatment. *An Introduction to JICA*, Japan International Cooperation Agency

In Japanese we call legal technical assistance *hou-seibi-shien*: ‘*hou*’ means law, ‘*shien*’ means assistance and ‘*seibi*’ means to equip. The term literally means to assist in equipping countries with laws. ‘*Seibi*’ is a word usually used in technical fields and coated with a neutral sound like ‘technical’ in English.

The name legal technical assistance seems to wipe out the social values and norms which laws entail in the society where the laws function. In other words, categorization as technical cooperation makes it possible for the Japanese government as well as other development assistance institutions to engage in legal technical assistance without raising the question of value concepts that their assistance may convey. Law is neither free of values or norms prevalent in society nor from its political structure. Regarding law as a technical instrument to bring about economic development, ODA makes inroads into the legal system of another nation, which might hitherto have been criticized for encroaching sovereignty.

Once it is agreed that legal technology is the same as scientific technology, the second question arises: Whether the technical skills and technology to be provided under the name of legal technical assistance are transferable to the recipients? It is useful to analyze legal technical assistance in comparison with conventional technology transfer projects. In a development theory the ‘appropriate technology’⁶ is the most effective technology in light of the technical level, the volume of resources, the size of market, and the social and cultural environment of the recipient country. Is the technology to be transferred under the name of legal technical assistance ‘appropriate’ in light of pre-existing, country-specific and non-legal factors of the recipient country? Donors tend to offer legal systems familiar thereto and recipient governments tend to desire state-of-the art laws, ignoring their preexisting conditions. They are not concerned about the appropriateness of the technology to be transferred.

It is argued that law is not transferable since non-legal constraints and resources differ in any two countries and different physical and institutional environment would not induce the same behavior in the people.⁷ What about ‘legal technology’? It seems that JICA and practitioners of legal technical assistance naively believe in transferability of legal technology. On the other hand, there are many critics

⁶ In the principle of optimization in economics, labor-intensive technology is appropriate for countries with abundant labor and scarce capital, and capital-intensive technology for countries rich in capital but with little labor. Michael P. Todaro, *Economics for A Developing World*, 1992, Longman Publishing

⁷ A Seidman & R Seidman, “State and Law in Third World Poverty and Underdevelopment” in Seidman & Seidman, *State and Law in Development Process*, 1994

who raise questions about the transfer of skills and techniques in legal work, without the conceptual understanding and analytical ability that develop from long-term experience in practice.

‘Ownership’ and ‘participation’ are other key words which development assistance institutions use in their projects. The idea is that the true ownership of development projects should belong to the people on site and that their participation in the projects is indispensable for their success and sustainability. This is the question whose and for whom developing assistance projects are. In most legal technical assistance, donors’ counterparts are ministries of justice. Drafting new laws may be in the hands of a small number of people of the ministry and done hastily due to the urgent need for economic liberalization without citizens’ knowledge. Lessons learned from conventional development assistance projects apply to legal technical assistance projects.

II. Relationship Between Law and Economic Development

After the original law and development movement retreated in the early 70’s,⁸ until recently the role of law and legal institutions were not the objects of development assistance projects. In conventional development assistance projects, lawyers’ roles were drafting contracts and making the projects fit into the existing legal framework. It was after the publication of North’s institution theory⁹ that legal reform and legal institutions became significant targets of development assistance. Lawyers turned out to be implementers of projects to assist in establishing laws and legal institutions that induce economic growth.

Legal technical assistance is based on the assumption that a rational legal system that is calculable is an essential factor to bring about economic development. Before conducting thorough empirical examination of the role of law in economic development, development assistance organizations proceeded to provide legal technical assistance. In order to vindicate its Law and Policy Reform Projects, the Asian Development Bank published the book titled “*The Role of Law and Legal Institutions in Asian Economic Development 1960-1995.*”¹⁰ The results of the study

⁸ David M. Trubek & Marc Galanter, “Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States”, 1974 *Wisconsin Law Review* 1062-1102

⁹ Douglass C. North, *Institutions, Institutional Change and Economic Performance*, 1990, Cambridge University Press

¹⁰ Katharina Pistor and Philip A. Wellons, 1999, Oxford University Press

suggest that law made an important contribution to Asia's economic development and was most effective when it was congruent with economic policies.¹¹ In the study economic change was assessed on the basis of economic growth rates and other structural features of economies, i.e. the extent of state control over allocation of financial resources, size of state-owned sector and control over cross-border trade. Since the study was confined to formal economic law, it does not examine informal legal systems, and social and political components embedded in the systems. Therefore, it falls short of proving a direct causal link between law and economic development.

Even if a direct causation between law and economic growth is proved in future studies, still remains a question: Is such a finding enough to justify legal technical assistance? In other words, is economic development the only achievement that lawyers seek in their legal technical assistance? It brings us back to the fundamental question: what is development? Lawyers should not be satisfied with the finding of a positive causation of law and economic development. We need to study, whether quantitatively or qualitatively, the role of law and legal institutions from all dimensions of development in society. Thus, lawyers and law scholars face a challenge to establish a new law and development theory.

III. Legal Technical Assistance in Japan's ODA

Legal technical assistance in Japan's ODA does not answer the question of causality between law and economic development, still less the relationship between law and other dimensions of development.

Japan's ODA Charter provides the following basic philosophy of Japan's ODA: "Japan will implement its ODA to help ensure the efficient and fair distribution of resources and good governance in developing countries, thereby promoting the sound economic development of the recipient countries." It further states that ODA shall be provided with full attention to the recipient countries' efforts for promoting democratization and introduction of a market-oriented economy, and the situation regarding securing basic human rights and freedoms.¹² The Japanese government explains that Japan's legal technical assistance originates from the notion of good governance.¹³ Although the Charter puts the introduction of a market-oriented economy

¹¹ *ibid*, p1

¹² The ODA Charter (ODA taikou), adopted as a cabinet decision in June 1992.

¹³ ODA Annual Report (1999), The Ministry of Foreign Affairs

and securing human basic rights in tandem, the legal technical assistance in Japan's ODA currently devotes its resources mainly to the area of civil and commercial laws and the recipient countries in transient economy.¹⁴ The Ministry of Foreign affairs states:

Most countries in transient economy such as in Central Asia, Caucasus countries and Mongolia are located in geopolitically significant places and if democratization in these areas is obstructed, it will threaten the regional peace and security. Also in socialist countries such as China and Vietnam, the trend towards market economy cannot be drawn back. Therefore, ODA charter emphasizes the importance of supporting countries in transient economy.¹⁵

What this statement fails to do is to explain the relationship between market economy and democratization and securing basic human rights. Is it axiomatic that transition to market economy leads to democratization and fulfilling basic human rights?

Japan's legal technical assistance aims at facilitating market economy and bases its rationale on the implicit assumption that economic development will have spillover effects to bring about social development without assessing its actual effects on the people's lives in social, cultural and civil and political contexts. It mainly targets countries in transition from controlled economy to market economy, based on the idea that it is necessary to establish legal systems in compliance with global economic rules so that the nation will benefit from the world economy. A leader of Japan's legal technical assistance expresses the opinion that democratization and human rights will follow economic growth, and the urgent need of countries in transient economy is to equip themselves with laws and legal systems ready for economic globalization. Obviously, Japan's ODA puts its funding priority on enacting laws in compliance with the WTO and other international standards to accommodate the world economic system. Practitioners of Japan's legal technical assistance avoid discussing what the market economy will ultimately bring to people's lives in the recipient country. Enacting laws to introduce a market economy becomes an aim itself to achieve. While accommodating such needs, the role of law should not be confined to facilitating

¹⁴ supra note 1. Legal technical assistance to Vietnam between 1996 to 1999 was advices to drafting the following laws: Property Registration, Civil Procedure, Bankruptcy, Maritime, Commercial Law, Company Law, Anti-trust Law, Competition Law, Intellectual Property, Investment Law and Stock Exchange Law. Assistance to Cambodia is to be provided between 1999 to 2002 in the area of Maritime Law, Civil Law and Civil Procedures. Other targeted countries are Laos, Mongolia and Central Asian countries.

¹⁵ ODA Annual Report (1998)

economic development, much less Japanese lawyers' role.

There is criticism against a recent rush to legal technical assistance. The question is not whether or how the assistance has the effects or impacts it aims for. Rather, it is whether Japan should engage in such assistance.¹⁶ It is said that Japan's legal technical assistance presents Japanese law as a model to drive market economy without reflecting problems, distortion and by-products of the market economy, such as pollution, poverty and disparity.¹⁷ The failures and limitations of law in industrialized systems tend to be masked. Legal technical assistance is only to pave the way for Japanese business in Asia, rather than to contribute to democracy and human rights in the recipient nation. On the other hand, advocates of legal technical assistance argue that Japan, with more than 100-year history since its reception of European laws, should contribute to Asian countries by showing them its experience and so forth requested by developing countries.

The argument depends on how we assess the Japanese history of modernization of law. This differentiates Japan from other donor countries in the West. Japan stands on an ambivalent position. While a member of the Western capitalism to promote market economy, Japan is still tormented by what she did in Asia before the end of World War II. Against such a background, Japan might intentionally refrain from directly touching human rights and democracy in its legal technical assistance.

The important difference between legal technical assistance and other intellectual support and technical cooperation is that it inevitably touches the notion of human rights, democratization and rule of law. In this respect, the name legal technical assistance does not express the great extent to which it reaches. Legal technical assistance provides a significant opportunity to discuss and exchange mutual ideas on those concepts that were avoided in conventional development assistance projects. Nevertheless, practitioners of the legal technical assistance in Japan's ODA seem to abandon the discussion itself.

We also need to realize that legal technical assistance is not a panacea. Since ODA is shaped by the relationship between Japan and recipient nations, there are limitations and risks in legal technical assistance in ODA. If legal technical assistance is ultimately for democracy and human rights as advocated in the ODA Charter,

¹⁶ For comprehensive discussion on Japan's legal technical assistance, see "On Legal Assistance to Developing Countries," Masanori Aikyo, *Societal System and Law*, No.1 June 2000.

¹⁷ Makoto Shimizu, PP2-3, "100 Year History of Japanese Civil Code," *Horitsu-jiho*, Volume 70-10, 1998

attorneys and citizens, not prosecutors and judges, should directly benefit from such assistance. ODA is, however, an embodiment of the relationship between governments and provided pursuant to the agreements concluded between the governments. As long as the assistance is provided by government to government, the technical training targets judges, prosecutors and legal officers who are organs of the nation's system. It cannot be denied that such training may result in the excessive concentration of power in the state.

Another fact that should be noted is that Japan has been known for its administrative power regulating industries and markets, leaving its legal system dysfunctional, where laws played a marginal role in economic transactions. It is not desirable if developing countries that open their markets under external pressure look to Japan for legal technical assistance because of Japan's experience of administrative control and guidance, which once worked to protect domestic industries.

Looking at the current judicial reform in Japan, the purpose of the reform inclines to build a legal system to facilitate market principles, rather than to promote respect of freedom and human rights. It is based on the assumption that individuals are supposed to be economic actors who behave rationally according to market principles, and if a dispute arises, it should be settled by judicial procedure. There is criticism that the current judicial reform emphasizes economic rationality and disregards human rights. The direction of its current judicial reform in Japan demonstrates what Japanese think of law and judiciary. What Japanese lawyers are able to provide in legal technical assistance to developing countries reflects the standard and quality of Japanese legal and judicial systems and Japanese lawyers who administer.¹⁸ Thus, the features of judicial reform currently in the process mould Japan's legal technical assistance in the future.

In providing ODA, Japan should consider how laws and legal systems function and are utilized by the people in recipient countries, as Japan should consider in its own judicial reform. In a rule of law state, law is consistent with social norms that embody citizens' sense of justice, and law is obeyed out of respect. Legal technical assistance should focus not on establishing new codes and regulations but on developing legal institutions and a community of judges, lawyers, and scholars that can shape law so that it conforms to reality. Further, it should be considered that the availability and accessibility of the judicial system be improved and that the opportunities to learn the

¹⁸ Supra note 16, p30.

law and choose legal professions be equally open to the public.

Japan's legal technical assistance in ODA has just started. Whether directly involved or not, lawyers and law scholars stand in the position to influence legal technical assistance projects. Our scholarly exchange will definitely shed light on the direction of legal technical assistance by Japan's ODA as well as other donor organizations.