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Kaneko, Yuka

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Catalistic Role of Legal Assistance between Formal Law and Social Norms: Hints from Japanese Assistance

KANEKO Yuka*

1. Introduction[1]

The purpose of this article is to review the phenomena of legal and judicial reforms in Asia from the ‘ inside .’ Japan has been almost the only active donor from the inside of Asia in this field, and, as such, has experienced more than a little friction with Western donors in the course of assisting draft-makings for Codes and other basic economic laws, as well as in such judicial reform projects as trainings for judges and/or ADR promotions[2]. The essence of such inter-donor friction has often been understood as a result of differences in legal policies reflected in respective legal designs. The author used to share the same understanding, and wrote several critical articles about the problematic outcomes of ‘ neo-classical ’ policy stance taken by majority of model laws promoted by development agencies especially in economic law areas[3]. Recently, however, the author is more inclined to review this kind of friction in the context of choice of distance from the local straggles for better harmonization between the imported formal law regime and the existing local regime.

Western donors led by such influential development agencies as the World Bank and the ADB have been eager to ‘ transplant ’ particular legal models, whether common law or civil law, and accordingly, numbers of academic works have been devoted to identify better choices of legal models, better paths for the convergence, and conditions for more successful transplantations. It is only recent that these influential donors have started to pay attention to the outcomes created in the local society as a result of the transplantation drive[4]. In contrast, Japan ś legal assistance, since its very beginning in the middle 1990s, has been quite far from the idea of transplanting any sort of legal models. Though Japan is often regarded as a typical

*Professor, Graduate School of International Cooperation Studies, Kobe University.

‘ developmental state ’ and its Asian neighbors have often expect it to export some kinds of knowhow for ‘ interventionist ’ economic development, the basic nature of Japan’s legal system has been, quite to the disappointment of these neighbors, much of a liberalist since the Meiji modernization, which is basically not much different from the Western models[5]. In this sense, a study of Japan’s legal assistance might cast nothing new to the current academic debate over the choice of legal models, since it does not carry any implication of a ‘ third ’ category to be added to the familiar choice between the common law and the civil law[6]. Nevertheless, we can still insist the Japan’s case offers one unique dimension to the studies on legal and judicial reforms: that is its highly respectful stance towards the local customary orders. This stance has been a long tradition ever since the colonial period before WWII when government-sponsored prominent scholars devoted a lot of energy to the “ Kankou-Chousa ” (survey of the customary laws) in the Korean peninsula and the northeastern part of China[7]. Though such a respectful stance taken by the colonialist government towards local customs might sound unnatural, it is considered to be a reflection of Japan’s own experience of having been making extreme efforts at harmonizing imported formal laws and existing local customary norms. It is well known that Japan experienced great difficulties in the process of transplantation of Western law, as is often illustrated in the popular episode that it took nine years before the final adaptation of the Civil Code in 1899 since its first version drafted by French professor Boissonarde was suspended at the national legislative body in 1890[8]. It has been a hard lesson for the Japanese government that the formal law cannot be accepted by the society without going through a thorough debate over the way of how to integrate newly transplanted norms into the existing order. This shocking lesson has continuously been remembered, which has brought about a strong habit of the Japanese to be overly reluctant to amend the fundamental codes, as well as its uniquely respectful attitudes towards the local customs in the other countries ’ law making processes. Such reluctance remained unchanged even after the WWII when the US occupation policy forced fundamental changes in the constitutional law as well as in the area of economic competition[9].

Thus, Japan has to be considered as a unique donor in Asia having had its own hard-learned lessons on the difficulty of ‘ transplantation .’ This makes us to become

curious enough about what is happening in the far front of legal assistance projects where this Japanese respectful habit toward the local customary norms meets formal law models being transplanted by Western donors. How is the Japan's assistance different from that of Western donors? How are these differences dealt with among donors under what logics or policy choices? This article tries to answer these inquiries based mainly on case studies: namely, the conflict in Cambodia between the draft Civil Code assistance by Japan and the Land Law reform directed by the World Bank and the ADB (section 2); and another conflict in Cambodia between the draft Civil Procedures Code assistance by Japan and the draft Law on Establishment of Commercial Court promoted by Canada and the World Bank (section 3); and finally the ADR assistance project by Japan for post-Tsunami disaster Acheh (section 4).

2. Cambodian Draft Civil Code vs. Land Law: Treatment of Customary System

2-1. Changed Objectives of the Land Reform

Land Law is the area where the friction between the formal law and the customary legal order emerges most frequently. It is a matter of natural course that the mode of land usage changes according to the shift of socio-economic structure. However, the risk of friction increases when a land policy aiming at a rapid economic growth is intentionally brought into a traditional agriculture-based society. The nature of friction can differ according to the development strategies and the respective norms behind them: When a ' structuralist ' development strategy brings about land policy to strengthen the agricultural productivity and to overcome a ' dual structure ' in the economy, Land Law is often chosen as a tool in realizing the policy goal via such legal designs as the land redistribution to create small landed farmers and/or the cooperative land usages, which never abandons the ultimate goal of sustaining an agriculture-based society, whatever the changes must be assumed by the traditional society. Whereas, the neo-classic development strategy denies the interventionist land controls by the State, while featuring instead the freedom of contracts based on the absolute ownership registration system which brings sophisticated market mechanisms into an agricultural society[10]. It is often the tendency in such neo-classic strategy that the promotion of the market mechanism in itself is regarded as the goal in land reforms, while the causal link between such market promotion and the

prosperity of an agriculture-based society is no more properly questioned[11]. Because of this replacement of the role of land reform from the means (for better agriculture-based society) to the goal (to promote capitalist transactions to produce higher profit than agriculture-based society), the tension can increase all the more between the reformist government and the local society. It is a natural course that such a simple neo-classic strategy has been directed various empirical or theoretical criticisms by the schools of communitarians and/or sociologists insisting the need of full preservation of local customary tenures[12].

This tension between the two extremes, namely the neo-classic land reform and the communitarian, school seems to have been addressed to some extent by a dualistic approach recently taken by leading donor agencies head by the World Bank. It is an interesting fact that increasing campaigns have been led to appeal the importance of paying attentions to local customary orders in the context of poverty reduction and sustainable development, while the most sophisticated neo-classic Land Law reforms are continued in an unchanged rigorous way[13]. This dualistic strategy is often materialized in the actual project levels as an enactment of twin land laws to separately cover the highly sophisticated formal land transaction system for urban areas and the preserved customary system for rural areas, respectively. However, the question of how to regulate the increasing intercourses between both systems is left without any answer, as if these donors deem it a natural course that the latter customary system will ultimately be swallowed into the former[14]. Though this fate of customary orders is trying to be justified by the neo-classic belief that the market will bring about the final way to reduce the poverty[15], but so far there seems no empirical sign that such an assumption has been proven beyond the expectation of believers[16].

Thus, the leading donors' campaign for more considerations on local customary orders turns out to be a mere tentative measure meant for mitigating local hostilities against drastic land reforms. Their basic neo-classic stance is found unchanged even in the era of PRSP (Table-1).

2-2. Neo-Classic Nature of the Cambodian Land Law

The Cambodia's Land Law enacted in 2001 is a typical product of such a dualistic approach of leading donor agencies to appeal tentative considerations for local

Table-1: Land Law Policies according to the Development Strategies

	Structuralist	Neo-classics	PRSP
Land Policy	State-based: Land Reallocation as The agricultural policy	Market-based: Land Transaction as The agricultural policy	Market-based: Land Transaction for the poverty reduction
Land Law	Land Registration to confirm the Land Reallocation	Land Registration to promote the land transaction	Urban Area: Land Registration to promote the land transaction; Rural Area: tentative collective ownership.

customs. The law was primarily a product of ADB's assistance[17], which ambitiously aimed at the full completion of a land ownership registration system to cover the whole country within 5 years after the promulgation, as well as the promotion of redistribution or concession of the state-owned lands. Though such an impressive slogan as "Land of Their Own" sounded like a progressive reform to involve drastic land redistributions to the poor, the actual reform was not meant for any intervention into the status quo. Rather, the land ownership registration was designed to follow the Australian-style Torrens System which gives an absolute perfection effect to the registered ownership, and thus considered as a rigorous means to confirm and strengthen the legality of existing order of land ownership and with that to create firm enough bases of sophisticated land transactions in the market.

At the same time, what attracts our eyes is the redistribution of state-owned lands to the local community as a 'collective ownership.' This redistribution is actually not at all involving any new distribution of state-owned lands, but is actually the reverse: just a unilateral transformation of the status of what has been under the traditional customary usages by local communities into the new state-owned land status, followed by formal state approvals for the continued collective usage under the new status as a 'collective ownership' (Land Law, Art. 26). Moreover, most surprisingly, if a single member of the community asks for the distribution of his own portion as an individual ownership, the already approved collective ownership can be divided into parcels, with the justification such that "for the purpose of facilitating the cultural, economic and social evolution of members of the community" and "to allow such members to be relieved from the constraints of the community" (Art.27). Thus, the true nature of 'state-owned land redistribution' here is nothing but a hidden confiscation of traditional community lands, disguised as a tentative confirmation of continued

collective usages while preparing a secret path to the ultimate integration into the sophisticated land transactions in the market.

The same Land Law includes provisions for the ' state land concession ' for living and agricultural purposes (Art. 49), which again do not match the slogan of poverty reduction, since its basic goal is set on a promotion of large scale agricultural businesses as shown, for example, in such a vast concession area restriction up to 100,000 hectors (Art.59).

In summary, the Land Law of Cambodia, prepared in the context of poverty reduction under the auspice of the World Bank and the ADB, gives almost no concrete proposition for the future of agriculture-based socio-economy in Cambodia beyond the implication on large scale agri-businesses, but instead reveals a typical neo-classic policy to trust the destiny of traditional society on to the market, while preparing a hidden path to admit gradual divisions of customary land usages into the parcels which are sooner or later to be integrated into the absolute land ownership regime.

2-3. Inter-Donor Conflict on the Cambodian Land Law

This very neo-classic policy choice of the Land Law was the issue in the inter-donor conflict between the Japan's draft Civil Code assistance team and the World Bank/ ADB. Though the friction was never officially made open to the public by such agencies, it has been much debated in the Japanese academic circle mostly by the civil law specialists[18]. Among various technical aspects involved in the friction, the author will especially discuss the dimension of the treatment of local customary orders.

The fact is as follows: Japan's ODA project to assist the Cambodian draft Civil Code officially started in 1999. By the time the final draft was completed and handed over to the Cambodian government in 2003, the Japanese team (involving the most respected civil law specialists head by Professor Akio Morishima) tried several coordination meetings with the Land Law drafting team made up of practitioners working for the World Bank and the ADB. However, these practitioners often neglected this coordination sought by the Japanese side, and went on to the final adaptation of the Land Law in 2001. After the adaptation, these Land Law promoters insisted that the Japanese team should amend the draft Civil Code so as to conform to the substance of the Land Law. The Japanese team did not easily surrender, while empathizing the

superior position of the Civil Code in the holistic consistency of total private law system in Cambodia to set basic principles for all subsidiary areas including the land law.

The core issue of conflict was the legal effect of the land ownership registration system: the international agencies insisted the transplantation of the Torrens System which vest a landowner with an absolute ' perfection effect ' upon the registration, while the Japanese team, based on the result of a survey on local customs conducted by the team prior to the drafting, intended to assign only a ' notification and priority effect ' to the registration, while separating the substantial question of ownership to be decided outside the registration system. Under the former system, an ownership, once registered, cannot be repealed even if any customary right holder insists on his original right, which should have been claimed only at a special dispute resolution mechanism in the process of registration (Land Law Art. 65-69). Also, such an absolute effect of registration will keep away the notion of ' prescription ' to override the once registered ownership (Art. 30-31). In contrast, under the draft Civil Code, customary right holders can seek chances to continue their accusation even after the registration, since the transfer of the ownership is valid only upon the true intention of the parties (draft Civil Code Art.133-134). Prescription is also permitted (Art.162), which represents the draft's basic respectful stance toward the intention of actual utilization, rather than the abstract venue of registration as a sophisticated transaction base.

This difference on the effect of registration should not be considered as a mere technical issue, but rather a quite substantial question to decide the destiny of local customs. Since the Land Law has chosen a typical dualistic approach to divide the formal system for sophisticated land market and the customary system of collective ownership, it is extremely difficult to find the standards to be applied in the intermediary dimension where the both systems interact. When, for example, any land developer attempts to penetrate into the customary land area and somehow successfully obtains formal land ownership registration, the local society might have less of a legal basis to fight against this invader, since the customary rights are isolated from the formal system and not given any equivalent definitions under the formal law's logic (Land Law Art.26). Though this separated treatment for

community ownership under the dual structure seems as if a special protective way to preserve the local customs, in fact, it tends to result in the deprivation of the access for local people to the chances of formal resolutions.

On the other hand, the draft Civil Code is, as well, silent on the legal substance of customary rights（draft CC Art.306). However, it also designs the substance of formal ownership to be far more plastic than the absolute strength envisaged under the Land Law. Given the mere notification and priority effect of the land registration, the legal substance of an ownership, either registered or unregistered, is to be sorted out in the individual process of disputes, which allows chances for customary rights to fight against the formal ownership regime, even with certain chances to rewrite them in return. It should be noted here that the relation between formal law and customary law is not considered as a separated one which never interact, but rather understood as mutually relevant, and equally open to the possibility of changes according to the social choice to be developed in the accumulation of actual cases. This flexibility of the draft Civil Code would imply an alternative path in the destiny of the local customary order: apart from the anticipation that the traditional agriculture-based society is sooner or later to be integrated into a sophisticated capitalist market, there must be some chance that the local society will seek out a third way of their own: With a certain social control over the extreme type of freedom of neo-classic transactions, the society might be able to sustain the bases of living while continuing some agriculture-based development.

This flexibility of the draft Civil Code is understood as stemming from Japan's own experience since the Meiji modernization. The law on lands or immovable properties is one of the areas where the society experienced the most frequent disputes in the midst of rapid socio-economic changes, which had actual effects to force certain reviews of formal policies, laws, and/or judicial interpretations[19]. First of such was the change of the legal effect of the land ownership registration system, which was once envisaged with the perfection effect but later changed to the mere notification and priority effect to follow the French law, partly because of increasing abuses of the former choice. Then, in order to respond to the nationwide burst of land related disputes, a special court-annexed conciliation system was initiated, which became actively used. Further, as a result of accumulated resolutions at courts and/or

conciliations, important rewritings were made by legal interpretations of formal law provisions, which ultimately resulted in enactments of several special laws to amend Code provisions, especially in the context of giving more respects to the usage rights (e.g. leasehold, including the long-term leasehold considered as a major category in the formal law corresponding to the customary rights of tenant farmers) while in contrast limiting the absolute nature of the ownership[20].

This historical experience of Japan where social initiatives led the formation of normative order in the course of interaction between the imported formal law and the existing local customs must have been reflected in the flexible nature of the Cambodian draft Civil Code. The Japanese assistance team had a natural trust on the initiatives to be taken by Cambodian society in bringing up their own norms just as the Japanese had been doing[21].

Accordingly, in terms of the treatment of local customary orders, a clear contrast is observed between the rigorous stance of international agencies to force the absolute ownership regime under a tentative dual structure, and the flexible stance of Japan's assistance to admit chances of local initiatives in finding the their own way. This contrast, however, was often disregarded, without enough constructive discussions, in a political process where the international agencies finally succeeded in persuading the Japanese assistance team to amend the draft Civil Code according to the provisions of the Land Law[22]. Questions still remains: whether this political result was the best choice for the Cambodian society; or whether the Land Law (Art.27)'s simple modernist assumption to deem a ultimate collapse of traditional society as a "social evolution" or a "relief from the constraints" come together with such advanced development norms as sustainable development and/or poverty reduction; or whether the Land Law's simple neo-classic belief in the extreme freedom of land transactions can be actually proven to be the most effective way to achieve the economic growth, especially in an agriculture-based society in need of solid bases for better agricultural development. How can the same Neo-classic Land Law be supported when the empirical facts in many advanced countries show much milder alternatives to control land usages and/or transactions from the viewpoints of social needs?

Among all these questions, the most fundamental one must be who is to decide all these policy choices. While international agencies believe they are best suited to

decide, Japan's flexible legal design implies that the local society is the master of these decisions. Perhaps, the most serious conceptual gap between two donors must be laid around this fundamental question of ' ownership ' in the legal development.

3. Cambodian Draft Civil Procedure Code vs. Commercial Court: Procedural Rules for Local Law Development

3-1. Problems of Exclusive Jurisdiction

The equally serious friction between the international agencies and the Japanese assistance was observed in a procedural law area in Cambodia. Namely, the draft Civil Procedure Code assisted by Japan since 1999 and handed over to the Ministry of Justice in 2003, experienced another hard political scene with the draft Law on Establishment of Commercial Court prepared by the Ministry of Commerce under the auspice of Canadian aid and the World Bank. The fundamental gap was in their respective goals: while the Japanese assistance aimed at the creation of judicial access for ordinary Cambodian people in achieving their individual civil rights[23], the Canadian/ World Bank assistance was directed at the promotion of foreign investment[24]. Perhaps, this gap might not have been an apparent question if there had not been an extremely wide exclusive jurisdiction set by the draft Law on Establishment of the Commercial Court (Art.26)[25]. Because of this wideness of exclusive jurisdiction to cover almost all market-side disputes regardless of the involvement of non-merchants in weaker bargaining positions, the other problematic provision meant for exempting the commercial court from the Civil Procedure Code's application (Art.31) came under a keen notice by the Japanese team.

The reasons for this exemption were understood, for one thing, to secure the freedom of choosing internationally popular procedural rules meant for the quickest way of contract enforcements, and, for the other, to expand the chances of direct application of foreign laws chosen as the governing law in the contracts[26]. Assuming that such intentions to guarantee the freedom of contract were acceptable for the purpose of foreign investment promotion, however, the Japanese team warned a hazardous side effect that might be caused on local citizens in economically weaker positions, who could be compelled out of the reach of local law protection, as a result of such an extremely wide exclusive jurisdiction. The Japanese team insisted that local

citizens were intrinsically vested with the constitutional right to sue under the Civil Procedure Code, before almost automatically being captured into the quickest enforcement mechanism of commercial contracts which could contain unfair provisions forced in asymmetrical bargaining positions.

3-2. Aversion vs. Promotion of the Local Form

Though this conflict among donors is still pending as of 2007 without much progress other than some occasional political responses, the case is still casting meaningful lessons, especially when it is reviewed in the context of treatment of customary rights. Reflecting the interests of foreign investors, the basic stance of the draft Law on Establishment of Commercial Court is apparently aversive toward the local norms, either formal or customary. In order to secure the applicability of international standards, it attempts to abate the local litigation which basically applies local norms.

Conversely, the Japanese team set the ultimate goal of the draft Civil Procedure Code assistance in the establishment of " the civil law regime to be trusted and enforced by the whole Cambodian society "[27]. It is recognized a consistent stance of Japanese assistance, just as in the case of the above mentioned land law area, to pay respect to the social ownership in the local law development process, while securing the local citizens ' access to the local forum in the expectation of local initiatives in the formation of their own norms.

In this context of social ownership, two aspects deserve discussion: First, the Civil Procedure Code was considered as an essential way for local citizens to enforce the individual rights declared in their own law.[28] This constitutes the reason why the Civil Procedure Code assistance had to be closely coupled with the drafting of the Civil Code. Second, the role of civil procedure was envisaged as something beyond a mere static application of the formal law. Japanese assistance to the Code drafting has been closely coupled with the judicial training projects which feature such special curriculums as ' fact-finding methods ' and ' ultimate facts application methods ' developed in the tradition of the official judicial training institute in Japan[29], all directed for the training of skills of judges beyond a mere literal application of formal provisions. It is implied that the judicial process is a forum where the deepening of social norms takes place amid the dynamic interaction of imported formal law and the

existing local customs. Judges are expected to act as catalysts in such deepening process of laws through actual dispute resolution processes.

3-3. Legal Interpretation

An indispensable tool for this catalyst's role of judges must be the 'legal interpretation,' which is a technique to control the meaning of formal legal provisions beyond their literally natural understanding, while applying normative deductions from the most fundamental principles in the Code's logical regime. Such special curriculums as 'fact-findings' and/or 'ultimate legal facts' are very trainings for judges to improve skills of legal interpretation beyond a literal application of formal provisions.

Japan's own experience must contribute to this special concern on the interpretation by judges. It is a known fact that Japanese Civil of Code has never experienced meaningful changes for more than a hundred years since its initial adoption in 1898. It is also true that Japanese society has been through the most dramatic changes during the same period. There must be something to bridge this unchanged Code and the changing society, which is considered, to a large extent, to be the role of judges in filling in the gap between the Code and the reality, while applying the technique of 'legal interpretation' to draw out flexible conclusions to match the social need. Though the legal interpretation is a more or less common place phenomenon in every advanced county having the Codes[30], it should be noted that the technique plays all the more importance roles in the process of 'transplantation' where the local society needs to go through with a hard process in the interface with the transplanted law models[31]. Empirical evidence from Japan would tell that, not only for catching up with social changes in a natural course, but also for filling the gap between the formal law and the local traditional norms, local society needs the flexible role of judges[32]. The author believes that, in the law and development studies, more attentions should be directed to this important role of 'legal interpretation' in the long-term deepening process of local laws, where the imported foreign models are gradually accepted and internalized into the local existing order. Such a long-term observation must be needed in order to see the factors to divide successful and unsuccessful reforms, rather than sticking to such over-simplified frameworks as 'legal origin' or 'receptiveness' only

dealing with beginning short-period of transplantations.

The outcome of the pending inter-donor conflict in Cambodia is still unseen. If the conflict is to end up with the full admission of the Commercial Court's unreasonably wide exclusive jurisdiction and the avoidance of the Civil Procedure Code, then the consequence will be that the variety of economic disputes to come in the process of development must be resolved based primarily on the international standards, which is beyond the reach of legal interpretation by civil court judges who are going to be trained for the technique of forming their own norms. The question looks as simple as whether the foreign investment policy should be placed over the formation of the local normative regime, which will be handled in the politics among the relevant Ministries. However, the author believes that the true question behind this is, again, who is the master of the decision-making. Whatever benefit is to be brought by the foreign investors, they can never step into the central position to decide the direction of the local law development, unless they stop adhering to the international standards and take part in the midst of dynamic formation process of the new local norms.

4. ADR Promotion in Post-Tsunami Ache: Alternative Forums for Norm Interactions

4-1. Classification of ADRs

Alternative Dispute Resolution (ADR) has been one of the central menus in the rule of law projects, given the often unfavorable reputation of the quality of the formal judicial system[33]. Also in the above case of Cambodian Land Law reform, a special conciliation forum was envisaged in every local administrative level to be managed by central officials sent from the Ministry of Land Management, which was provided as strictly compulsory before filing at the court. The role of ADR in this case was apparently aversive to the formal judicial process, and expected as an enforcement mechanism to assure quicker resolutions to various complicated conflicts involving local customary issues, in order to help prompt settlements of ownership at the registration office[34].

However, before generally concluding that ADR is always a superior choice to the judicial system, it must be worthwhile to reconsider the nature of different types of ADRs. Table-2 below is an attempt to classify the ADRs according to the major concern of this article, namely, the treatment of customary rights.

Table-2: Treatment of Customary Rights in the Dispute Resolution

	Commercial ADR	Administrative ADR	Civil Litigation	Intermediary ADR	Community ADR
Formal Norms	International Standards	Applicable	Applicable	Applicable	Non-applicable
Customary Norms	Non-applicable	Non-applicable	Possible	Applicable	Applicable

Among others, the ‘ commercial ADR ’ refers to such a sophisticated forum as the commercial arbitration where international standards are primarily selected to govern the merit of disputes, while less respects are being paid to either formal or customary local norms. In contrast, the ‘ administrative ADR ’ is an important means for the government to enforce the administrative laws, and accordingly obedient to the local formal law regime, but usually closed to the local customary norms which could often contradict the formal law. For example, the above mentioned conciliation mechanism promoted in the Cambodian Land Law is considered in this category. In this contrast, the role of civil litigation at court is described as a catalyst between the formal and customary norms provided that judges are trained well enough for the flexible applications of legal interpretation techniques.

Within these contrasts, the ‘ community ADR ’ refers to a variety of traditional dispute resolution mechanisms found somehow in almost every indigenous community, where local customary norms exclusively govern their internal affairs without consideration for the trend of formal laws prevailing outside the community. There is an apparent gap between this closed ‘ community ADR ’ where only customary norms are applied and the other forums where formal laws are primarily applied. Probably, there must be some third category ADR to fill this gap, especially when the society is in a rapid change amid the pressure of economic development.

Then, what are the characteristics expected for such intermediary-typed ADRs? Among all possible intermediary options, the author will especially empathize a positive catalyst role to be taken by a ‘ judicial ADR ’ for one part, and a ‘ community-based judicial ADR ’ for another[35].

A ‘ judicial ADR ’ here is referring to an ADR closely connected to the court and, in that sense, backed by a trustful image that they must finally be sanctioned by the authority, but at the same time assuring a more flexible resolution than a litigation. Apart from a settlement in the course of litigation and/or a court-annexed conciliation

frequently observed in many jurisdictions, the Japanese ' civil conciliation system ' developed since the Meiji modernization era is unique in its special closeness to the community, such that a lay judge selected among practicing lawyers having merely 5 years experience or so can hear a case at the summary court together with two civil conciliators recruited from the community. Given the fact that this ' civil conciliation ' has been continuously popular in Japanese society with around 500,000 number of cases being filed each year, just as many as the filing for litigations, it is obvious that the society has a choice for this special combination of the supportive involvement by the court (preservation of evidence, investigation, enforcement, etc.) and the friendliness to the community.

A ' community-based judicial ADR ' is meant for an adjusted type of ' community ADR ' having more capacities for making use of formal law's logics, instead of avoiding them. For example, the Barangai judicial system in the Philippines is known as a unique trial to strengthen the role of local community leaders to solve the increasing number of local disputes with a balanced knowledge of both the formal laws and the local customary norms.

4-2. Nature of ADRs Intended by International Donors

Among these varieties of ADRs, international donor agencies have been empathizing several different types of ADRs. In their major policy papers, ADR is often explained in the context of ' community ADR ' in the above sense as a mean to ensure access to justice for the sake of entitlement, human development and poverty reduction.[36] However, when it comes to actual reform projects in Asia, these donors often promote either the ' administrative ADR ' as seen in the case of Cambodian Land Law, or the ' commercial ADR ' for the purpose of foreign investment promotion. How should we understand this gap between the agenda and the actual projects? It is unclear whether these donor agencies simply lack coordination among different divisions[37], or whether they are intentionally making use of an idealistic communitarian notion of ADR to conceal their true purpose of promoting special ADRs meant for better enforcing the transplanted models. One thing clear is, when viewed from the treatments of local customary orders, that all of ' community ADRs ,' ' administrative ADRs ' and ' commercial ADRs ' are more or less depending on merely one of

normative regimes: they are equally indifferent and even aversive to the irrelevant regimes, either of the customary norms, the formal laws, or the international standards. There is almost no implication that any of these ADRs can act as a catalyst to bridge dynamic interactions among these different regimes.

4-3. Need of Intermediary-typed ADRs

In contrast, Japanese legal assistance is often directed to promote some ‘ intermediary-typed ADR ’ as referred to in the above classification. Reference is made here to the ADR promotion project in post-Tsunami-disaster Acheh, having been assisted by the Japanese team since 2005 in response to the request from the Indonesian government[38]. According to the local custom in Acheh of avoiding disputes for a one-year period of mourning, a burst of disputes relating to land demarcation, inheritance, adaptation, etc. was anticipated in around the end of year 2005, and therefore, special training programs were arranged by Japanese assistance in order to facilitate the conciliation.

Interestingly, the targeted group for the training was not judges or lawyers belonging to the formal law regime, but the representatives from the customary law (Adat) regime such as Sharia Court judges and/or local community leaders. The primary reason for this was that the local community seemed to lack a trust on the formal dispute resolution mechanisms since the judges there often had limited knowledge on the local customary law. Also, the eagerness of Sharia judges and community leaders in contributing to the urgent social needs was apparent, and accordingly, the assistance was naturally directed to those who would bring about the most effective outcomes. The project was designed so as to form a best structure to support the leaders of the local customary regime, which helped them tackle the most complicated disputes involving the interaction between the formal law and the local customary order. These enthusiastic leaders were expected to act as a catalyst in the dynamic process of formation of new norms to be emerged out of such interactions[39].

This must be a good example of assistance to the ‘ community-based judicial ADR ’ in the above mentioned classification. What the donor attempted in the substance of this assistance was nothing more than providing a bit of knowhow of conciliation techniques, such as being applied in the post Osaka-Kobe Earthquake disaster in

Japan. Rather than such substance of assistance, what had more important implications was the selection of a counterpart from among the local customary society. The donor in this case did not intend any sort of ADR to enforce given norms, but simply tried to assist and stimulate those who showed their will to lead the alternative forums of their own. This self-restraint stance of accompanist must stem from an instinctive understanding of Japanese team that the master of the law development is always the local society, which must be a constant belief only held by a donor who has its own experience to be a recipient of forced law reforms.

5. Implications from the Cases

In this article, several cases taken from recent Japanese legal assistance projects in Asia were reviewed, especially from the viewpoint of interaction between the transplanted law and the local existing orders. One highlighted question was ' who ' is to take the leading role in this interactive process. The assistance provided by such leading donor agencies as the World Bank and the ADB revealed a tendency that the donor is to decide the fate of law development, as typically shown in the case of Land Law reform in Cambodia. These international agencies also make much of dispute resolution mechanisms meant for the better enforcement of given formal law. In the area of commercial disputes, for example, the establishment of the Commercial Courts enabling international standards directly applicable both procedurally and substantially, have been envisaged so as to establish superior jurisdiction over local judicial system. Also promoted are the administrative ADRs, often placed before the local judiciary, and promoted for better enforcement of the given formal law, as shown in the Cambodian Land Law case. These dispute resolution mechanisms share a common nature that they are all meant for a quick realization of the transplanted formal law, without allowing enough chances for the local community to respond against the imported norms.

In contrast, Japan ś assistance was uniquely formed with respectful considerations to the local society in taking initiative in their own law development. The draft Cambodian Civil Code designed the ' ownership ' as a unique plastic right which can be further defined in the accumulation of actual disputes. The draft Civil Procedure Code assistance was coupled with the judicial training curriculum to help local judges

master the techniques to apply legal provisions so as to meet the social needs. The ADR assistance in Acheh was especially directed to the local leaders who represented the customary regime but volunteered for the challenging task to solve disputes in the very front of interaction between formal law and the local order. All these cases showed a common stance of carefully refraining from substantive decision-making, while creating chances for the local society's own choices, trying to continuously accompany this social initiative. The formal law, regardless of to what extent it is a 'transplantation,' is considered only as an optional proposal to begin with, and the society is expected to own the whole internal brewing process of the law to come. This respectful, self-restrained stance of Japanese assistance seemed largely stemming from its own experience of hardship in the initial 'transplantation' phase forced under the Westernization pressure, followed by one-hundred-year's internal endeavor to deepen its own legal regime.

Treatment of customary norms has long been an issue in academia since the 'Law and Development Movement' criticism in 1970s. Even the scholars supporting the current legal and judicial reform boom have been showing much concerns on conditions to realize 'receptive' minds in the recipient societies for successful 'transplantations'[40]. Nevertheless, when it comes to the reality of individual projects, there is an unchanged gap between the ideal and what is actually going on. The neo-classic theory, featuring the freedom of contract and the absolute ownership, is still dominating the basic contents of law models, which are often evaluated in positive in terms of the maximization of profits or the contribution to the GDP growth. Probably, some better frameworks for the evaluation are needed in order to reflect the higher goals in the legal and judicial reform. Such higher goals, whether or not named either 'rule of law,' poverty reduction, or empowerment, etc. are going to be defined by the very people who own the process of law development.

Notes

1 The first version of this article was presented at The Law and Society Association, Paper Session CRN24 Role of Law Defined, Received and Resisted 4303 on July 28, 2007. The author is thankful to all valuable comments given by colleagues attended the session, which are extremely helpful in improving and completing this article.

2 For the details of Japan's legal assistance projects, see *ICD News*, each issue by the International Cooperation Department of the Legal Research Institute, Ministry of Justice of Japan. Also for the case analyses, see Kagawa, K. and Kaneko, Y. (2007) *Houseibi-Shien-Ron (Studies on Legal Assistance)*,

Minerva-Shobo, Kyoto (in Japanese).

3 Kaneko, Y. (2004) *Asian Crisis and the Financial Law Reform*, Shinzansya (in Japanese).; Kaneko, Y. (2006) " Consideration of Law Models in the Law and Judicial Assistance Programs, " *Journal of International Development Studies*, Vol.15, No.2 (in Japanese); Kaneko, Y. (2006) *A Study of Planning and Evaluation Method in the Legal Assistance Projects in the Result-based Approach*, Visiting Researchers ' Report Series JR-, Japan International Cooperation Agency (JICA) (in Japanese).

4 See the discussion of the ' second stage ' of the law and judicial reform by Trubek, D. M. (2006) " The Rule of Law in Development Assistance: Past, Present, and Future, " in Trubek & Santos, *The New Law and Development: A Critical Appraisal*, Cambridge University Press, 2006.

5 See Oda, H. (2001) *Japanese Law*, Kluwer International, at Chapter 1, for example.

6 There is no debate that Japan's basic legal system belongs to the tradition of Civil Law system. Even the Constitution as well as American standards introduced in the major economic law area after the WWII, were cautiously integrated into the basic hierarchy of the existing legal system. See Mikaduki, A. (1982) Introduction to the Legal Study, Koubundo (in Japanese), at p.66 for example.

7 For the details of Kanko-Chousa, see, for example Fukushima Masao (1996) *Fukushima Masao Chosaku-Shu (Collection of Works by Fukushima Masao) VI: Comparative Law*, Keisou-syobou, Tokyo.

8 It was not at all such a ' receptive ' process as understood in Berkowit, Pistor, & Richard (2003) " The Transplant Effect. " *Am. J. Comp. L.* 163 at Table-3 at p.194.

9 See Mikaduki, A. supra, at p.89-98. A cautious or compromised gradualism seems to have been a choice of Japanese law-makers and judges in harmonizing the application of transplanted norms.

10 See, for example, World Bank (1975) *Land Reform Policy Paper*: World Bank Development Series, World Bank; Posnor, R. A. (1977) *Economic Analysis of Law*, Little Brown and Company, Boston at p.52; USAID (1986) Policy Determination Land Tenure, USAID.

11 See Atwood, D.A. (1999) " Land Tenure in Africa: the Impact on Agricultural Production, " 18(5), *World Development*, at 660.

12 See, for example, Atwood, D.A. supra, note 12; Platteau, J. P. (2000) " Does Africa Need Land Reform,? " in Toulmin, C. & Quan, J. ed. (2000) *Evolving Land Rights, Policy and Tenure in Africa*, DFID/IIED/NRI.

13 See World Bank & Deininger, K. (2003) *Land Policies for Growth and Poverty Reduction: World Bank Policy Research Paper*, World Bank & Oxford University Press.

14 See World Bank/ Bruce, J. W. et al., (2006) *Land Law Reform: Achieving Development Policy Objectives*. World Bank, at p.13.

15 See for example Rolfes, L. Jr. (2006) " A Framework for Land Market Law with the Poor in Mind. " in World Bank/ Bruce, J. W. et al., *Land Law Reform: Achieving Development Policy Objectives,* 2006, World Bank.

16 See World Bank/ Bruce, J. W. et al., (2006) supra, note 14, at p.13 on such remarks as " conclusion is yet to be sought " or " a more healthy market would ultimately benefit the poor ".

17 ADB No. TA2591-CAM for the agricultural policy reform, and succeeding assistance projects.

18 Morishima, A. (2004) " Inter-Donor Conflicts and the Need of Reformation of Japan's Assistance, " *ICD News*, No.14 (in Japanese); Sakata, I. (2007) " Cambodian Civil Code and the Land Law, " in supra Kagawa, K. and Kaneko, Y. (2007) *Houseibi-Shien-Ron (Studies on Legal Assistance)* (in Japanese).

19 For a review of the dynamism of Japan's law development since Meiji era, among all, see a great compile of works by professor Masao Fukushima: see Fukushima, Masao (1996) *Fukushima Masao Chosaku-Shu (Collection of Works by Fukushima Masao)*, Keisou-syobou, Tokyo.

20 See for example, Hironaka, Toshio and Hoshino, Eiichi (1998) *Minpouten-no-Hyakunen (A Hundred Years of the Civil Code)*, Yuhikaku, Tokyo (in Japanese).

21 See the ultimate goal set in the " Project Design Matrix (PDM) for the Legal Assistance to Cambodia, Phase 2 " prepared by the JICA in 2004, stating that ' having the civil law system trusted and utilized by the Cambodian people .'

22 See supra Sakata, I. (2007) at p.127-129.

23 See Takeshita, Morio (2004) " Issues for Donor Coordination in Cambodia, " *ICD News*, No.14 (in Japanese); also Misawa, Asumi (2004) " Outlook of the Japan's Legal and Judicial Assistance in Cambodia, " *ICD News*, No.16 (in Japanese).

24 See Yasuda, Yoshiko (2007) " Cambodian Civil Procedure Code vs. the Commercial Court, " in supra Kagawa, K. and Kaneko, Y. (2007) *Houseibi-Shien-Ron (Studies on Legal Assistance)* (in Japanese).

25 All the disputes relating to inter merchant transactions, and mixed transactions between the merchant and non-merchant as long as the latter admits, as well as all the disputes relating to negotiable securities, company law, insolvency law, financial law, foreign exchange law, product liability law, maritime law,

competition law, antidumping law, and intellectual properties (Art.26).
26 See for example the same flexible nature of the Intellectual Property and Foreign Trade Court in Thailand operating since 1999.
27 See the ultimate goal shown in the "Project Design Matrix (PDM) for the Legal Assistance to Cambodia, Phase 2", supra at note 19.
28 See supra Takeshita, M. (2004) "Issues for Donor Coordination in Cambodia"; Also, Uehara, Toshio et al. (2003) "Issues and Problems of the Legal Assistance: Lessons from the Cambodian Civil Procedure Code Drafting," *Jurist*, No.1243, Yuhikaku, Tokyo (in Japanese).
29 See Misawa, Asumi (2004) "Japan's Assistance to the Trainings of Judges and Prosecutors in Cambodia," *ICD News*, No.18 (in Japanese).
30 See Merryman (1977) *The Civil Code Tradition*, Stanford University Press.
31 See Oda, supra at p. .
32 See Segawa, Nobuhisa (1990) "Interpretation of the Civil Code," in Hoshino, Eiichi ed. *Minpou Kouza (Lecture on the Civil Law), Extra Volume I*, 1990, Yuhikaku, Tokyo; Also, Yoshida, Katsumi (1999) *Civil Society and the Civil Law Studies*, Nihon-Hyoron-sya, Tokyo (in Japanese).
33 See, for example, World Bank (2003) *Legal and Judicial Reform: Strategic Direction*, p.5.
34 See "Land of Their Own", an explanatory note of the Cambodian Land Law reform project appeared in *ADB Review*, May 2005 version.
35 See Ikeda Tatsuo (2002) *ADR in Asian and Pacific Countries: Now and in the Future*, Ministry of Justice of Japan, which summarized the result of the Comparative Study Group on ADR in Asia and Pacific conducted during 1999-2002 under the auspice of the Ministry of Justice of Japan.
36 See for example, World Bank (2001) *Initiatives in Legal and Judicial Reform*, p.6.; Also supra World Bank (2003) p.5.
37 See Santos, A. 2006. "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development." in Trubek, D. and Santos, A. ed. *The New Law and Development: A Critical Appraisal*, Cambridge University Press, 2006.
38 As for the detail, see Kawada, Sozaburo (1997) "ADR Assistance to Indonesia after the Tsunami Disaster in Ache," in supra Kagawa, K. and Kaneko, Y. (2007) *Houseibi-Shien-Ron (Studies on Legal Assistance)* (in Japanese) at p.148-159.
39 See Kawada supra at p.155.
40 See supra Berkowit, Pistor, & Richard (2003) "The Transplant Effect."