Law and Legal Assistance in Uzbekistan[1]

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Introduction

I worked as a short-term Japan International Cooperation Agency (JICA) expert in the field of legal assistance to the Tashkent State Institute of Law in Tashkent, Uzbekistan for seven months from March to early October 2002.

My main task was to conceptualize the amendment of the Civil Code and enactment of a Commercial Code in the Republic of Uzbekistan, both of which are important subjects of ongoing legal reform in Uzbekistan. Meanwhile, I also translated into Russian the Japanese Civil and Commercial Codes which will likely be used as reference during the process.

In this paper, based on my former experiences with JICA, I am going to raise some issues which deserve attention while conducting legal reform or legal assistance projects.

1. What is Uzbek Law?

In order to assist Uzbekistan in its legal reform, one must learn first of all about the target of the reforms, Uzbek law. When asking what Uzbek law is, one needs first to clarify which law the question is actually directed to. As an answer to this question, I was told that one should base his/her knowledge of Uzbek law on two main features.

First, Uzbekistan was part of the former Soviet Union. Even though changes have taken place as a result of its independence and marketization, Uzbek law is basically considered Soviet law. The second line of thinking suggests that since Uzbekistan is a country made up of a majority of Uzbeks, who are primarily Muslim, Uzbek law is Islamic (Shariat) in nature.

Although one can claim that these two ways of understanding Uzbek law result in different interpretation of its contents, both of them are based on what can be called a "common sense" view approach. Both of them are half "truths". However, it will be a mistake if either view is employed exclusively on its own premises when approaching Uzbek law. For the people of Uzbekistan, especially the majority Uzbek ethnic group, this way of approaching Uzbek law would not be considered as based on "common sense" (Saidov 1999: p.438).

(1) Parallel Existence of Statutory and Traditional Laws – Legal Pluralism

Let's now look into the first "common sense" view that Uzbek law is Soviet law. Uzbekistan was under Soviet rule for 70 years until it became independent just over ten years ago. If we include the time when this country was under the rule of the Russian Empire, we see that it was a part of Russia and the Soviet Union for a total period of 150 years. In this region, known

[1] This paper is translated from the Japanese by Teilee Kuong (Associate Professor, Center for Asian Legal Exchange), with the assistance of Matthew Linley (Researcher, Center for Asian Legal Exchange)

by the Russians as "Turkistan", a history in which countries and empires develop, flourish and are destroyed continuously repeats itself. The one-and-a-half century of Russian and Soviet rule is the longest of such episode in the history of Turkistan. Therefore, from the perspective of law – including basic and other statutory laws, the judicial system to operate these laws and the legal consciousness of legal professionals – the country is obviously heavily influenced by the Soviet and post-Soviet Russian laws (Saidov 1999: pp.449–454).

However, to understand the law of Uzbekistan only at the level of Soviet laws as the statutory laws of a nation state is one-sided.

L. Levitan, a constitutional lawyer from Kyrgyzstan, has said that the people of Uzbekistan conduct their life not only based on norms set by the former Soviet Union, but also norms formed throughout the long history of many centuries. According to Z. Kh. Arifkhanova, an ethnologist in Uzbekistan, the former Soviet system sought to implement a concentrated policy towards dismantling traditional systems. However, the local communities (*sosedskaja obshchina; makhallja*) showed their firmness and prevented alienation of the traditional norms. The Soviet regime had to consider the interests of these local communities so as to hold them under control. The regime used these communities for its own interests (Arifkhanova 1998: p.25). This is the other aspect which one should not neglect when trying to understand the law of Uzbekistan (Brusina 2000: pp.148–149).

For example, let's look at the citizen's general assembly (*skhod grazhdan*), its chair (*aksakal*) and the makhallja committee (*kengashi*) of the local community/makhallja[2] . These organizations hold the authority to approve urbanization plans, sales and purchases of houses, development and construction activities. They can also reject or prevent the establishment of places which are not approved by the local people (such as the establishment of nightclubs, for instance). In addition, the conciliation committee of makhallja handles almost all local cases of conciliation related to family disputes such as divorce or succession, and other disputes among residents of the local community. It seeks to settle disputes by means of compromise before they are brought to the court. These regulatory and dispute settlement functions of makhallja are not based on written family or civil codes. Conduct is not based on the law of the State but on local traditional law known as *shariat* or *adat*. Any party dissatisfied by or unwilling to accept the regulatory or dispute settlement work of the makhallja may seek adjudication at the court according to the statutory law of the State. However, the reality is that the number of such adjudication cases is very small (Tashkentskii gosudarstvennyi luridicheskii institute 2003: Chast'2 Interv'iuirovanie Predsedatelia I predstavitelei makhalli po opredelennym napravleniiam).

On the one hand, Uzbek society maintains a system of State law formulated under strong Soviet influence and a parallel system of unwritten traditional law called *shariat* or *adat* on the other. The traditional system co-exists with the statutory law and continues to play a practical and, in fact, more important role (Dzhabbarov 1996: pp.49–65). In this context, a phenomenon of so-called "legal pluralism" (*puravovoj pururalizm*) or "acceptation" or "convergence" (*retseptsija/ konvergentsija*) between the systems has emerged (Bobrovnikov, V.O. 2002: pp.98–110).

[2] This acquired an official local entity status after independence and the trend is that the former autonomous organizations of local residents or makhallja are now changed to administrative entities (Sievers 2002: pp.118–123).

(2) Secular Islamist Law

In Uzbekistan, in the conditions of "legal pluralism", traditional law, which includes Shariat and Adat, is still practically operational in many parts of the country. However, can we classify the Shariat and Adat of this society as "Islamic Law" following the second category of the "common sense" view?

After the collapse of the Soviet Union, we can see the development of what has been called an "Islamic Boom" in newly independent states of the Islamic regions of the former Soviet Union (Bobrovnikov 2002: p.264). In countries like Uzbekistan, the nationalist authority adopted policies of "reviving and strengthening Shariat and Adat" and "strengthening makhallja" (brushina 2000b: pp.72–73). Further, for Muslims in this region, economic hardships accompanying the transition to a market economy have become very serious, and the number of people who are convinced that "only Shariat and Adat can suppress the increase in crime and social instability" is on the increase (Tsipko 1997).

However, the Russian Legal Ethnologist V.O. Bobrovnikov correctly points out the following:

"In the second half of the 19th Century, and especially in the 20th Century, due to the massive movements of people and the resulting changes, the customary law and the other elements of pluralistic legal conditions suffered irreversible changes. 'The revival of Islamic Law and Adat' means formation of an absolutely new post-Soviet tradition in the region" (Bobrovnikov 2002: p.107).

This revival and strengthening of traditional law is not retrogression to the Islamic law which once existed in the society. Although the law can be called traditional due to its deep-rooted existence in Uzbek national history, it is better to look into it as an attempt to form a new and indigenous informal legal system for the contemporary Uzbek people.

Namely, in order to understand the Shariat and Adat of Uzbekistan, we cannot overlook the secularization (*seklijarizatsija*) of Shariat and Adat as a result of the massive changes that occurred in the Soviet era. In the case of Uzbekistan, the neighbourhood communities ruled by the traditional law of Shariat and Adat are no longer communities (*mechetnaja obshchina*) centering on the institution of the mosque. While in the past, the mosque was the essential center of the community, it has been replaced by the secularized tea drinking places known as *chajkhana*. Further, regarding the person administering traditional law, now, it is not the imam (Muslim religious leader), nor is it the *kadi* (Islamic judge). It is the elder (*starejshina*) of the neighborhood community, including the person known as the *aksakal*, who administers the traditional law.

Revival of the traditional legal system in Uzbekistan is based on the Uzbek comparative law specialist A Kh. Saidov's "secular islamism" motif (Saidov 1995: p.43). We must note the distinction between a revival of Islamic law and the so-called "traditional system" in which fundamentalist Wahabbism refers to the reinstatement of Islamic courts (shariatskij sud), religious police (politsija nravov), and a theocratic Islamic state (Bobrovnikov 2002: p.266).

(3) What is Uzbek Law?

As we can see up to this point, Uzbek law thus goes beyond our "common sense" or "comprehension", and should not be considered as merely Soviet law or Islamic law.

When we view the history of Uzbek law, we see that the peculiar conditions of "legal

pluralism" have existed for a long period.

First, when Islam was introduced, the Adat of the various ethnic groups living in Turkistan accepted Shariat and the two co-existed, resulting in Islamization (Geiss 2001: pp.100–103).

Next, with the creation of the Soviet Union, Adat and Shariat survived the acceptation of Soviet law and secularization. The accepted Soviet law acknowledged the existence of, and coexisted with, the traditional law and was therefore able to remain functional in this region.

Currently, we are witnessing the beginning of the third wave of formation and acceptation of law.

These days, a new "legal pluralism" is making an appearance. First, the secularized Adat and Shariat that we saw in the Soviet era are retaining their secularized characteristics and beginning to develop into the current informal legal system. Second, for the development of a framework to secure the establishment of a market economy, at the level of statutory law, the legal system built on the former Soviet law is now beginning to accept the European and Anglo-American legal systems (Saidov 1999: p.473).

In the future, how will these newly introduced European and Anglo-American legal systems react to a diversified legal system of Shariat, Adat and Soviet law, etc, which have coexisted in mutual interactions, influences and acceptation throughout the history of the region? Are they intended to be another new legal system derived from the European and Anglo-American law, to coexist with the other systems in the existing "legal pluralism"? Or, are they unwilling to tolerate and instead abolish the state of legal pluralism existing so far, just to lead the country towards formation of a unified legal system based on the European and Anglo-American law model? A long journey of legal reforms has just begun, but its direction is yet to be decided.

2. Statutory "Legal Failure" and the Rule of Informal Laws

Currently, in Uzbekistan, legal reforms are occurring in a new condition of legal pluralism in which the informal legal system of the secularized Adat and Shariat traditional law developed and, at the level of statutory law, the European and Anglo-American legal systems are being accepted.

The statutory law system based on Soviet law, the traditional legal system, and the new Western legal system will surely influence, accept and coexist with one another. However, this does not mean a non-contradictory harmonious "intricacy". If we want to promote a stable process of legal reforms in Uzbekistan, in which the different legal systems grasp with their respective major problems while remaining strongly and closely intertwined, we must pursue a gradually progressive path towards legal reforms in the long run, aiming at "symbiosis" of these systems while remaining alert to its "pathology".

(1) Trust in Informal Law and Distrust of the State Law – Legal Nihilism

As already point out, in Uzbekistan where most daily disputes among local residents are settled by resorting to traditional law, the main areas of social life are not regulated by statutory laws of the State but practically by the traditional or informal law. In this sense, informal laws are becoming strong "social norms", faithfully reflecting the public interests and belief devoted to by makhallja or local communities (North 1990: p.36). It is therefore discernible that local residents being members of the community respect and put their faith in the informal law

(Sievers 2003: pp.109–115).

This does not merely indicate that the informal law dominates or rules. It is also said that because people consider that statutory laws enacted by the State do not identify public interests, they have no faith in and do not respect these laws (Galligan 2003: p.6). Legal experts in Uzbekistan call this the pathological "legal nihilism" (*pravovoj nigilizm*) phenomenon.

This is becoming excessive in Uzbekistan. People feel alienated by and unfamiliar with statutory laws of the State as a barely acceptable imposition. Resistance and opposition to statutory laws are a frequent occurrence. Although ordinary people cannot ignore the existence of statutory laws, they do what they can to get away from it, to respond to it by means of evasion or to cheat their way out of the influence of these laws. Further, statutory laws are also used arbitrarily for the sake of private interests. They are considered a "tool" for private interests, utilized as a bargaining chip in pursuit of a favorable deal (Galligan 2003: pp.7-8). Unfortunately, this is the typical behavioral pattern of a great number of civil servants who are given power and authority under the provisions of statutory laws.

(2) Pathological Informal Law Resulting from "Legal Nihilism"

In Uzbek society, "legal nihilism" has become a hotbed of pathological informal law different from the traditional one.

From the legal consciousness of "legal nihilists", informal law is created as a kind of social norm to regulate the network of informal distribution and acquisition of "wealth", namely personality (qualifications and status), goods, money, service and information, etc. Since such informal law becomes a guide for people's daily life, it constitutes a kind of "social norm". However, it is not like makhallja or other traditional law which mainly reflects the public interests of the local community. Rather, it does just the opposite, perhaps by distorting the public interest.

By exploiting people's strong tendency towards "legal nihilism", those (the hitherto group of civil servants) who are in a position to manage distribution and acquisition of wealth create "social norms" for "wealth" management in their own interests, through a common "social practice" among themselves. One typical case of pathological informal law is represented by the "social norms" in regulation of the universal and structural "corruption network" in Uzbekistan. At any level of the bureaucracy, one can find some kind of "bribery" demanded by civil servants whenever and wherever any "wealth" distribution takes place.

Without mentioning the case of pathological informal laws, public administration in general is not receptive to influence by any statutory law beyond the field. Its relationship with statutory laws of other fields may in some cases be competitive. Public administration embraces a wide range of closed self-regulatory administrative norms and operates on that basis (free discretion) (Galligan 2001: pp.88–89). Just like any ordinary individuals, administrative institutions and public servants certainly cannot ignore statutory laws. They take into consideration the existence of these laws. However, this does not lead to "administration in compliance with law". Due to its characteristic of being "closed administration", it mostly ends up in a situation of "administration in management of law" which allows laws to be distorted by means of informal administrative norms that fulfill only selected legal requirements and seek to redefine them (Galligan 2001: pp.92–93). Therefore, one must take heed of the existence of a closed administrative world which is governed by informal administrative norms and encourages the

growth of "legal nihilism", in parallel with local communities which are ruled by non-state informal laws called the traditional law (Galligan, polianskii, starilov 2002: pp.54–55). This is also the issues of inconsistency and formalism which F. W. Riggs mentions in his "Prism Theory" arguing that "(A) dministrators called upon to carry out the law then resort to literalism, sometimes to deliberate nullification. This is advantageous to the legal adepts and the bureaucrats, for they can fabricate interpretations which permit them to do what they wish or what their clients and protégés find profitable" (Riggs 1964: pp.183).

(3) "The Pathological Triangle" and the Vicious Circle

The pathological informal law as "social norms" is also making statutory law pathological.

At places where "legal nihilism" and the resulting pathological informal law rules, neither the citizens nor the civil servants would give legitimacy to the statutory law, nor would they respect it and handle it seriously, even if the statutory law existed with appropriate objectives and contents, and an implementation system were already established. At the end of the day, no matter how healthy the statutory law or its general framework can be in form and in substance, it still suffers the influence of informal law born out of "legal nihilism". There are many cases of statutory law heading towards failure as a result of this.

Statutory law has to compete with the conflicting informal law and finally loses in the struggle. It fails in its attempt to regulate social relations and to settle disputes emerged thereupon. In other words, statutory law malfunctions in what is known as "legal failure" (Galligan 2003: pp. 2–5). Following the malfunction of statutory law, "legal nihilism" becomes even stronger among the citizens and the civil servants. This results in further development of the pathological informal law of which "legal nihilism" works to replace the statutory law. In this way, "legal nihilism", pathological informal law and the malfunctioning statutory law together form a "pathological triangle". A vicious circle emerges.

(4) The Way to "Rule of Law" and "Overlapping Challenges"

When considering legal reforms in countries where a strong "pathological triangle" and the vicious circle exist, one must do something to sever this triangle, overcome "legal nihilism", dispose of the pathological informal law, make statutory law functional and realize the "rule of law". One must identify the necessary conditions for statutory law to run parallel with traditional and other healthy informal law, as "social norms" acceptable to the society.

Legal reform has to progress towards realization of the "rule of law", after changes have been introduced to reverse the rule of pathological informal law and the statutory law becomes well accepted. In order for this to happen, the precondition is to have a system that enables the making and functioning of statutory laws which incorporate appropriate objectives, contents and due process, reflecting the interests of the public (Hendley 2001).

However, as already mentioned earlier, another indispensable precondition for statutory laws to function is to ensure that those who were influenced by and who observed the pathological informal law, by utilizing it and being under its rule, will opt for changes and turn themselves into people who respect and accept the rule of statutory laws (Hendley 2002: p. 137, pp. 144–145). Therefore, if legal assistance activities, offered in building up a system to make and to promote the functioning of statutory law, and in training of human resources to handle and to facilitate acceptance of the statutory law, are intended for severing the

"pathological triangle" and give rise to the "rule of law", we are then facing "overlapping challenges" in legal reform which requires that these two activities be handled in parallel.

In the "overlapping challenges", we need to deal with not only "system building" but also "human development" which will surely take a long time. However, after some progress has been made, we will see that the citizens and civil servants will acknowledge and have confidence in some, if not all, of the statutory laws as "social norms" to follow, and they will take these laws more seriously. Once the citizens and civil servants start the step by step process of assimilating and internalizing the statutory law, the society will be moving towards "acceptation of statutory law" in its genuine sense (Galligan 2001: pp. 95–96).

(5) Making of an Appropriate "Life-sized Statutory Law" (*zakon v natural'nuju velichinu*)

Unfortunately, if we look at the present situation of law in Uzbekistan, we find that it is yet to reach this step of "acceptation of statutory law". If the direction is already aimed at future completion of that step, the current situation may be referred to as a long "transitional period" towards acceptation of the statutory law. In this transitional period, we must also start legal assistance activities and the training of legal professionals by preparing the appropriate conditions which take into consideration the special feature of this "transitional period".

First, in making statutory law, for instance, if European and Anglo-American statutory law, with its developed content and structural framework, has been imported as a tool for realization of radical social objectives, no matter how excellent the superficial "transplant" is, the new statutory law will be caught in the "pathological triangle". It will not be able to function in the triangle, but treated as "irrelevant" and will therefore become dysfunctional (Hendley 1996: pp. 239–240). If one takes into consideration the special characteristics of this "transitional period", the statutory law to be prepared in this phase should not be the kind of tool for social change which is aimed at achieving objectives of a future society. Rather, it is important to start first of all with the preparation of a "life-sized statutory law" appropriate for Uzbekistan. This statutory law should first be accepted by the current society, albeit with pathology, become familiar with the social environment, be supported by society and be able to present itself as a means of social coordination.

In this regard, assertions made by Denis J. Galligan, the British sociologist of law and administrative law expert, are worth mentioning. According to him, for statutory law to exercise its social coordination function in practice, it needs to possess "certain qualities" that ensure interaction and reciprocity (Fuller 1969: p. 27) among individuals and between individuals and the state (Galligan 2003: p. 19).

This is because we believe that only when the statutory law possesses such "certain qualities" will it be possible to predict how people behave and how the behaviors will be responded to. Only then will statutory law be observed by the society. The society will find more fairness with better certainty, benefits and resorts to remedy, in this "life-sized statutory law" which ensures interaction and reciprocity, than it could find in the hitherto pathological informal law. This will lead to the beginning of trust.

What is important here is that the newly introduced "life-sized statutory law" does not destroy and replace the framework created by the old statutory and informal laws. The old framework remains. By means of filling this framework with basic substance of the new "life-

sized statutory law" or designing new "life-sized statutory law" on the periphery of the old framework, assistance to legal reforms will increase the importance of the statutory law as time gradually passes by. Such legal reform will bear some special characteristics. That is to say, by developing the new "life-sized statutory law" and by obtaining people's trust in it, the reform will gradually pose influences on, and bring changes to, the existing framework, and will thus create an environment favorable to the ultimate reform of the framework itself.

(6) Reform of Legal Education

Second, legal education for the sake of training legal professionals must also take into consideration the special characteristics of this transitional period. In Uzbekistan today, the Soviet legacy of legal education continues. Most of the education on contemporary statutory law is either fully marked with commentary notes and illustrated as harmonious and equitable, or identified as a tool for achieving social goals complete with an introduction to the most advanced European and Anglo-American laws. The legal education which pays no attention to the contradictions actually taking place in the transitional society or which constitutes of only "imported disciplines" having no root in the real society will not be able to grasp the pathology particular to the society, nor will it be able to show the way to recovery. Therefore, not only will such legal education fail to gain people's confidence, but it may even contribute to strengthening "legal nihilism" against statutory law.

Legal studies in the transitional society should not end up with commentaries and introductions only. It needs to adopt a "sociology of law approach" to expand its vision, and to discover the social environment which seriously impacts upon the function of statutory law and the different social conditions necessary to ensure this function.

Conclusion

To engage in assistance in law making and training of human resources by taking into consideration the characteristics of a "transitional period" towards acceptance of statutory law will likely take much time until the country really reaches the phase of "accepting statutory law". The first job to do is to consider keeping appropriate balance between the statutory law which needs to be made and the informal law which has been saved from pathology, while considerations have to be made of the social environment during the transitional period. It has to start from preparation of statutory laws which promote social coordination in limited areas. It should not be the kind of statutory law that seeks to pursue responsibilities by threats of force and sanctions or to promote radical social reform. Albeit time-consuming, the assistance must start with the help to make statutory laws which ensure interaction and reciprocity between individuals and to train legal professionals whose support is needed for the making of these statutory laws.

References

Arifkhanova, Z. Kh. (1998), *Rol' makhalli v vozrozhdenii natsional'nykh traditsii uzbekskogo naroda*, 7 Obshchestvennye nauki v Uzbekistane 24-31.

Bobrovnikov, V. O. (2002), Musul'mane severnogo kavkaza, obychai, pravo, nasilie, Vostochnaia literature.

Brussina, O. I. (2000a), *Sotsial'no-pravovye sistemy novykh sredneaziatskkikh gosudarstv v kontekste teorii pravovogo pliuralizma*, in: N. I. Novikova, V. A. Tishkov eds., Zakon i Zhizn', Strategiia.

Brussina, O. I. (2000b), *Fork Law in the System of Power of Central Asian States and the Legal Status of Russian-Speaking Population*, 45 Journal of Legal Pluralism and Unofficial Law 71-76.

Dzhabbarov, S. (1996), Shariat, semeinoe i obychnoe pravo v Uzbekistane: Istoriia i sovremennost' (opyt sotsial'no-pravovogo issledovaniia), Fan.

Fuller, L. L. (1969), *Human Interaction and the Law*, 14 The American Journal of Jurisprudence 1-36.

Galligan, D. J. (2001), *Authoritarianism in Government and Administration: The Promise of Administrative Justice*, 54 Current Legal Problems 79-102.

Galligan, D. J., Polianskii, V. V., Starilov, Iu. N. (2002), Administrativnoe pravo: Istoriia razvitiia i osnovnye sovremennye kontseptsii, Iurist'.

Galligan, D. J. (2003), *Legal Failure: Law and Social Norms in Post-Communst Europe*, in: D. J. Galligan, Marina Kurkchiyan eds., Law and Informal Practices The Post-Communist Experience, Oxford University Press.

Geiss, P. G. (2002), *Mahallah and Kinship Relations. A Study on Residential Commumal Commitment Structures in Central Asia of 19th century*, 20(1) Central Asia Survey 97-107.

Hendley, K. (1996), *Law and Development in Russia: A Misguided Enterprise?*, 90 Proceedings of the American Society of International Law 237-240.

Hendley, K. (2001), "*Demand" for Law in Russia – A Mixed Picture*, 10(4) East European Constitutional Review, http://www.law.nyu.edu/eecr/vol10num4/special/hendley.html

Hendley, K. (2002), *Suing the State in Russia*, 18(2) Post-Soviet Affairs 122-147.

North, D. C. (1990), Institutions, Institutional Change and Economic Performance, Cambridge University Press.

Riggs, F. W. (1964), Administration in Developing Countries The Theory of Prismatic Society, Houghton Mifflin Company.

Saidov, A. Kh. (1995), Islamskoe pravovoe nasledie uzbekistana: Istoriia i sovremennost', Natsional'nyi tsentr Respubliki Uzbekist po pravam cheloveka.

Saidov, A. Kh. (1999), Sravnitel'noe pravovedenie: Uchebnoe posobie, Adolat.

Sievers, E. W. (2002), *Uzbekistan's Mahalla: From Soviet to Absolutist Residential Community Associations*, 2 Chicago-Kent Journal of International and Comparative Law 91-158.

Sievers, E. W. (2003), The Post-Soviet Decline of Central Asia Sustainable Dvelopment and Comprehensive Capital, Routledge Curzon.

Tashkentskii gosudarstvennyi iuridicheskii institut (2003), Otchet ob issledovaniiakh organov mestnogo samoupravleniia – makhalli v gorodakh tashkentskoi, samarkandskoi, bkharskoi, ferganskoi, namanganskoi oblastei i respubliki karakalpakstan Nauchnoe issledovanie na temu "traditsionnoe pravo i sudebnaia reforma".

Tsipko, A. S. (1997), *Nado smotret' na veshi trezvo*, Nezavisimaia gazeta Feb. 13.