Human Rights and Democracy in Vietnam: Some Thoughts on the Philosophy of Legal Assistance[1]

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1. Human Rights and Democracy in Vietnam

The current Constitution of Vietnam (enacted in 1992 and amended in 2001) states in Arts.50 and 51 on "Human Rights" and "The Rights of Citizens" as follows:

> "Article 50: In the Socialist Republic of Vietnam human rights in the political, civic, economic, cultural and social fields are respected. They are embodied in the citizen's rights and are determined by the Constitution and the law."
> "Article 51: The citizen's rights are inseparable from his duties.
> The State guarantees the rights of citizens; the citizen must fulfill his duties to the State and society.
> The citizen's rights and duties are determined by the Constitution and the law."

Spiritual freedom in the forms of physical liberty and freedom of expression have been guaranteed under the provisions of the current constitution of 1992. However, under the present denial of multi-party rule, the exercise of citizen's rights, with political freedom in particular, has been restricted. The 1992 Constitution erased the concept of a "State of proletarian dictatorship" and changes it into the "State of the people, from the people and for the people". Furthermore, the word "human rights" (quyen con nguoi), which had been rejected before, was provided for in the Constitution. The following questions emerge with regard to the introduction of the category of "human rights" in the Constitution:

The first question is why "human rights" was introduced into the 1992 Constitution. The reason for Vietnam to adopt a "human rights" category in the early 1990s has not been clear. However, one may mention that at that time Vietnam had already ratified the two International Covenants. Another reason may have been the rise of radical reformists who advocated pluralism on the occasion of the collapse of socialist countries in 1989, and another group of reformists who received influence from the first group. They may have demanded that the draft constitution include provisions on a "human rights" category. In fact, during the last phase of the drafting process, the conservatives attacked the attempt to introduce a "human rights" category into the Constitution. As a result, the provisions on "human rights" were adopted in a way quite different from the earlier drafts. The conservatives managed to remove any trace of "human rights" as "natural rights" from the provisions by integrating "human rights" into "citizen's rights". They

[1] Translated from the Japanese by Teilee Kuong (Associate Professor, Center for Asian Legal Exchange, Nagoya University). Further assistance was provided by Matthew Linley (Researcher, Center for Asian Legal Exchange, Nagoya University).

succeeded in inserting the category of "human rights" into the chapter on the conventional socialist fundamental citizen's rights under the title of "citizen's rights".

The second question is why general provisions on "human rights" and "citizen's rights" were provided for separately in Art.50 and Art.51. The previous Vietnamese constitutions only contained provisions on "citizen's rights". There was only one single article on this issue. In contrast, the first three drafts of the new Constitution separately mentioned "human rights" and "citizen's rights" in different provisions, resulting in the final separation of the two articles. However, since the 1992 Constitution considers "human rights" as being included in the chapter on "citizen's rights", there is logically little significance in separating the two articles. Yet, based on requests by the reformists, the word "human rights" remains and two articles were left separate as before. Therefore, the position of "human rights" provisions in Art.50 of the current Vietnamese Constitution of 1992 is extremely unclear.

As we have observed so far, when the Constitution was adopted in 1992, the contents of the "human rights" provision were a major retreat from what had been in the earlier drafts. However, new theories about "human rights" in Vietnam took shape within the subsequent environment surrounding the country.

When one considers human rights theory in Vietnam, one needs to pay attention to the trends and views of the Human Rights Center of the Ho Chi Minh National Political Academy. As one can tell from its name, the Ho Chi Minh National Political Academy has been serving as a school of the political party. But based on a proposal by the Deputy Prime Minister, a "Human Rights Center" was established in 1995 inside this traditionally Marxist- Leninist institution.

The Human Rights Center has the following mandate:

(1) To conduct studies on human rights theories and history of the world;
(2) To conduct studies on how to implement human rights provisions;
(3) To cooperate with national and international research centers on human rights;
(4) To organize seminars and conferences on human rights research and education;
(5) To develop books and materials for human rights awareness; &
(6) To conduct post-graduate education.

As a result of the establishment of this Center, there has been stronger engagement in human rights research. One of the examples is that the Institute of State and Law, which is the largest law research institute in Vietnam, also followed suit and established a new human rights department.

Human rights theories in contemporary Vietnam are generally explained in the following way. I will introduce these arguments based on a publication issued by the Human Rights Center. According to that publication, Ho Chi Minh emphasized the close conceptual linkage between "the sacred national right (quyen dan toc)" and the "fundamental human rights (quyen co ban cua con nguoi)". It is pointed out that this view was later developed into the "fundamental national rights (quyen dan toc co ban)". The publication also puts emphasis on "the right to life", and introduces the viewpoints expressed by Singaporean politicians that "the right to development is a fundamental right" given the condition of poverty in Asia. In addition, it states that while "human rights" is a universal term for all human beings, it is at the same time a term for the whole of Vietnamese nationals in their long struggle for independence, freedom and happiness".

Characteristics of human rights terminology in Vietnam today imply the following:

(1) Revival of the concept of "fundamental national rights" used during their wars of national liberation against the United States, placing it in the center of human rights theory;
(2) Emphasis on the argument that "human rights is an internal matter";
(3) Reference to the "right to development" of the "nation".

Furthermore, with regard to democracy, there emerged controversies concerning the concept of the "State based on law". At around the time of the 7th Party Congress in Vietnam in 1991, Do Muoi, then Secretary-General of the Communist Party, and people around him started using the concept of "State based on law" as a slogan in parallel with the notion of "socialist legality". Although the phrase "socialist State based on law" (nha nuoc phap quyen xa hoi chu nghia) had already been used together with the concept of "State based on law" in Vietnamese legal literature for a while, its official use only started to emerge in the papers of the 8th Party Congress in 1996. It was used to emphasize the "socialist" factor. Together with "socialist democracy" (dan chu xa hoi chu nghia) and "socialist legality" (phap che xa hoi chu nghia), it helps stress the way of a "unified" State authority based on the socialist theory of State-building.

2. The Position of "Human Rights" and "Democracy" in Legal Assistance Activities

(1) Debates About "Asian Democracy" and "Asian Human Rights"

This report looks into human rights as "norms" and seeks to understand them as something having "objective characteristics".

Discussions about the issue of "Asian human rights" have close theoretical links with the way one understands "the third generation of human rights", in particular the "right to development". Research on these questions finally takes on a serious dimension in Japan. Okada Nobuhiro's work on the third generation of human rights is significant as a review of the "third generation of human rights" from the constitutional law perspective.

In his essay, Okada reviews both critical theories (by Donnelly, Sudre, Rivero) against the "third generation of human rights" and complimentary theories (by Vasak, Rousseau). He emphasizes the importance of clarifying the subject of rights, the targets and the bearer of responsibilities, stating that since human rights are "rights of the human being" as an individual, the existence of groups or communities must be considered a tool to ensure fulfillment of these human rights, as pointed out in these critical theories. This argument is closely relevant to the themes of constitutional studies, which focus on reviews of concrete cases of infringement on individual's rights as may in fact occur under the name of "the right to development".

Aoki Tamotsu questions the persuasiveness of a kind of comparative study which pitches Japanese "communitarianism" and a "culture of shame" against the Western "individualism" and "culture of punishment". He reviews the work of Ruth Benedict, Kato Shuichi, Umesao Tadao, and states that, for instance, "individualism" is also detectable in Thai society, as a country in Asia. He thus points out the problematic nature of this formula.

The claim of "Asian human rights" is conditioned by the concept of "Asian values". However, Aoki also points out that "Asian human rights" in this context includes the "Japanese way of business management", its "family-oriented social system", the "Asian system of decision-

making based on consensus without votes", "the Japanese spirit", and "communitarianism". In other words, this line of thinking attempts to draw an active interpretation of something called "the Asian way", and it seeks to approach "human rights" on this basis. In concrete terms, it maintains the stance that, for the sake of development, the imposition of restrictions on "human rights", particularly spiritual and political freedoms, is inevitable. The special feature of this approach is to explicitly advocate the concept of "overall national interests" or "national polity" embodied in the "Achievements of the Revolution" (in the case of Vietnam) and "*Panchasila*" (in the case of Indonesia). This principle for restricting the exercise of human rights is mainly for the purpose of realizing a policy of "development first". In addition, this theory on democracy is based on the understanding that governance by an outstanding leader is itself important, and anything that ends up with good results is in and of itself good. In terms of relations with the outside world, human rights issues are claimed to be internal matters of the "State" concerned, featuring the tendency to protest against "interference in domestic matters" for the cause of human rights. This argument also embraces the understanding that the guarantee of the right to life is the first priority whereas respect for civil and political freedoms is only guaranteed after this a priori right has been protected. In general, by conceptualizing "Asian human rights" based on contents which are in contrast to "Western human rights", this argument even leads to cases of attacks and complaints against the Universal Declaration on Human Rights and other international human rights instruments. However, apart from some leaders like Lee Kuan Yew and Mahathir Mohammad, not many leaders of Asian countries resort to the use of phrases like "Asian human rights", "Chinese human rights", "Vietnamese human rights", etc.

Behind the claims of "Asian human rights" lies the need to move towards modernization and to overcome poverty in the process of fighting for decolonization and independence. For some Asian countries, there exists also a history of serving as the counter-revolutionary "front" during the "Cold War".

However, things really began to change with the advent of China and Vietnam calling for "reforms and openness" and their adoption of the policy of "developmentalism" after 1989. At this time, the need to maintain socialism and the occurrence of various problems thereof became obvious in Asian socialist countries. Worries were exacerbated by the beginning of the process that eventually led to the collapse of socialist countries in East Europe and the Soviet Union. Further, mainly after the 1990s, assistance received from the West had complicated influences, for instance, upon the way human rights arguments were formed in Vietnam. These facts are linked to the controversial questions of why Vietnam introduced a "human rights" category into the Constitution of 1992, and, notwithstanding this, why it then tried to theoretically play down the significance of this "human right" category.

The theory on "a Confucianist cultural area" arose after the 1980s as an argument to "seek a suitable explanation" for the phenomenon of rapid economic development in the Asian NIES and to respond to the "age of Japamerica[2] ". This suggested an approach to the theory of Asia within the framework of civilization. Through the use of such keywords as "communitarianism" and "learning-based society", and as alternatives to "Western individualism", emphases were made on Asian "communitarianism" and on responsibility rather than rights in the "rights vs

[2] The thinking that Japan is economically catching up and overtaking the US hegemony.

responsibility" dichotomy. It was even claimed that this very type of society itself is most suitable for capitalist development. However, after the "Asian crisis", such views lost their practical grounds. In their place were arguments that "these theories stood on their own head" or that "Asia is diverse". Yet, there remain a number of theorists who support the theory of "a Confucianist cultural area". Nevertheless, the important thing which we should pay attention to is that, more than anything else, the theory of "Confucianist cultural area" was brought up just to re-focus "Japan" studies and the study of the "Japanese Constitution". Therefore, one can also say that the Japanese theory of a contemporary Asia is a miniature of the theory on contemporary Japan.

(2) Governance

Realization of "good governance" is an objective condition for moving towards realizing the "rule of law" premises in Asian countries in transition. Legal assistance projects in the field of governance, such as reform of the civil service institutions and administrative reform, etc, are to take place in some Central Asian countries like the Kyrgyz Republic. In Vietnam, in cooperation with the National Academy of Public Administration, we are planning to organize an international symposium on "Administrative Reform and Law" at the end of December 2004. These and other instances show that engagement in this field is increasing.

3. What Do "Human Rights" and "Democracy" Contribute to Legal Assistance Studies?

In an international symposium on "International Cooperation in the Field of Legal Studies and an Agenda for Comparative Law Studies - Experiences of Legal Assistance to Countries in Transition" held in Japan in May 2004, some issues related to legal assistance and comparative law studies were identified in the reports presented by foreign speakers. The topics presented at the Symposium were as follows:

(1) Robert K. Goldman (American University, USA), "Some Reflections on Lessons learned from U.S. and International Financial Institutions' Efforts Promoting Legal Reform in Countries in Transition";
(2) Martin Lau (London University, UK), "The Role of Islam in the Reconstruction of Afghanistan's Legal System";
(3) Penelope Nicholson (University of Melbourne, Australia), "Distinguishing Law and Development: Legal Assistance in Asia and the Vietnamese Courts";
(4) Herwig Roggemann (Free University of Berlin), "Differences in Legal Tradition and Legal Culture in Post Socialist Eastern and Western Europe as a Problem of Comparative Law";
(5) Gábor HAMZA (Eötvös Loránd University), "New Trends of Codification of Civil (Private) Law in Central and Eastern Europe".

The objective of holding the International Symposium in May was to clarify the following questions, based on the Japanese experience of theorization and practice with regard to the legal assistance studies:

(1) What are the implications of building a legal system, training legal professionals and developing legal education, etc?

(2) Are there any new implications in the debates about "traditional law", "reception of law" and "transplantation of law" in the present context of globalization and regionalization?
(3) What do legal assistance activities have to contribute to comparative law studies in general?

Foreign guest speakers reported on the situation of the following countries: Latin American countries, Russia, Germany, Hungary, Bulgaria, Croatia, Italy, Afghanistan, Cambodia and Vietnam, etc. Subjects targeted in these reports included legal assistance, and legal harmonization, etc. Speakers from Europe and the United States were deeply involved in researching and practicing legal assistance activities in these diversified regions.

Many issues were brought up for discussions at the Symposium. It is not possible to mention all the details here, but I would like to touch upon some important points as follows:

First, as stated by Professor Goldman from the United States, one should learn from the "past" of legal assistance activities, including the past track record of the "law and development movement" in the United States. This is also related to the issues pointed out by Professor Nicholson from Australia, posing the question of whether legal assistance projects developed at present by different bilateral and multilateral aid organizations at the global level are different, to any significant extent, from the nature of the "law and development movement" from the 1960s to the 1970s. Although I hold a different view from that of Nicholson, her critical view on the possibility of implementing legal reforms without following political reforms poses an important question to the agenda of legal assistance studies.

Second, Professor Lau from the United Kingdom presented his report based on his practical experiences in conducting legal assistance activities in Afghanistan. He pointed out the gap and differences between urban and rural areas and the existence of informal law. Furthermore, the question of whether it is good to launch legal reform only to satisfy international society, or the suggestion that what is longed for now in Afghanistan is not human rights but security, brings up the core issue in legal assistance studies. In other words, it involves the argument that donors must familiarize themselves well in the local realities of the recipient countries before making judgment on what should be assisted.

Third, based on the historical experience of German unification, Professor Roggemann from Germany pointed out the question of how to consider the law of the former East Germany which used to exist as socialist law. Touching on the issue of legal tradition in Eastern and Central Europe, the tradition of democracy and the role of the Constitutional Courts, etc, he also emphasized the importance of comparative law studies to be applied in reviewing the unification of law in Germany. Professor Hamza from Hungary reviewed the phenomenon of the "reception of law" from an empirical and comparative approach, focusing on the field of private law. He discussed the mutual influences which different countries have on each other through law and pointed out that law has a significant impact upon the political and economic spheres. This view is extremely interesting, given its relevance to that of Professor Nicholson mentioned above posing the issue of whether or not legal reforms are possible without political reforms.

Then from the floor, a number of issues were raised which led to rich discussions.

(1) A question was asked about Nicholson's report on whether or not one may conceive of an Asian version of "judicial independence" in Vietnam where an "independent judiciary" does not in fact exist.

(2) From the view of legal assistance and the resulting phenomenon of legal inflation, what is the legitimacy of legal assistance activities? Will the US-styled "rule of law" survive?
(3) The need to study the Islamic system of dispute settlement.
(4) How does one consider legal assistance in environmental protection, given the present reality of land problems of developing countries in Asia?

Discussion on problems of "human rights" and "democracy" should start from their relevance to those concrete questions of legal assistance activities mentioned above.

4. What is Legal Assistance? – Reviewing the Philosophy Behind It

The Japanese government started its legal assistance to countries in Asia in December 1996. The first country to receive this assistance was Vietnam, where Japanese legal assistance was focused on the field of civil and commercial laws. Legal assistance then started in Cambodia in March 1999. As will be discussed later, the initial activities there were to draft the Civil and Civil Procedural Codes. Legal assistance was formally launched in Laos in 2003. In addition, assistance has recently been provided to Uzbekistan in the field of legal education and Mongolia in the field of land law.

I am going to examine how these legal assistance activities have been conducted so far, by focusing on a comparative study of the assistance provided by three donor countries - Sweden, Korea and Japan.

Sweden started providing legal assistance to Vietnam in the late 1980s and has become vigorously engaged since 1992. The most systematic presentation of the essence of this assistance can be found in a book edited by Par Sevastik in 1997 entitled "Legal Assistance to Developing Countries – Swedish Perspectives on the Rule of Law", Kluwer Law International. However, since it was published 7 years ago in 1997, we may need to contact the Sida field office or researchers from Lund University for more updated information. The Swedish aid agency has been developing a consistent project to promote the "rule of law" in Vietnam for the last 10 years. It was stated in the project that the idea of the assistance was to promote "democracy", "human rights", "rule of law", and "due process". Swedish Sida has been engaged in this project since 1992 and Omeo University, and later Lund University, has been the key agency in implementing this project. The project puts tremendous emphasis on strengthening legal education. Assistance is provided to legal education based on the philosophy mentioned above, focusing in particular on the revision of the curriculum and teaching methodology. Statements made by persons involved in Swedish aid activities, as cited by the book above, is very suggestive. "(M)arket economy is a necessary albeit not sufficient condition for the development of democracy and the formation of a *Rule of Law/Due Process*"[3] , i.e., it is important to acknowledge that democracy, rule of law and due process need be set as separate subjects of their own right. Furthermore, it is also stated that "Sweden does not have any interest in exporting its own legal system to Vietnam or in writing the laws of the country"[4] .

[3] Par Sevastik ed., *Legal Assistance to Developing Countries – Swedish Perspectives on the Rule of Law*, KLUWER LAW INTERNATIONAL, 1997, at 6.
[4] *Id*. at 10.

I think that the Swedish way of providing assistance is a typical one in the field of legal assistance.

The second case to present here is that of the Korea International Cooperation Agency (KOICA). KOICA explicitly locates legal assistance activities in the framework of "national strategic projects". KOICA started its legal assistance program in 2002. An International Conference on Reconstruction Assistance to Afghanistan was held in Tokyo in January 2002. Korea took that opportunity to commit assistance to the judicial sector of Afghanistan, when the agenda was presented to the Conference. What I am going to present here was first brought to my attention by Professor Suh Won Woo, Professor Emeritus of Seoul National University. According to the Korean law newspaper (dated December 16, 2002), export of legal culture is a national strategic project which costs little but is highly efficient. In addition, legal assistance to countries in Asia is said to be an accumulation of experiences in preparation for effective transformation of the legal system of North Korea after unification. Its target countries are those in the former Soviet Union and in Asia. It intends to provide assistance to all legal target areas, ranging from the Constitution to the Criminal Law.

The third case is related to Japanese assistance. Japan also has had experiences in providing legal assistance to Vietnam or other regions. However, here I wish to briefly mention the Japanese assistance to Cambodia in drafting the Cambodian Civil Procedural Code. In a round table talk on the "Current Situation and Future Challenges of Legal Assistance – Assistance in Drafting the Cambodian Civil Procedural Law" reported in the *Jurist* (*in Japanese* no.1243, 2003), moderated by Uehara Toshio, participants convey an extremely interesting message for legal assistance studies. The question posed in this round table talk was how we should evaluate the experience of Japan providing concrete drafting assistance to a Civil Procedural Code, one of the specific fields belonging to the legal system of another country, while keeping good cooperation with local judicial officers. Since the talk was extremely long, I will only raise some points which are relevant to my matter of interest. First, concerns the question concerning the relationship between legal assistance on the one hand, and a "democratic and law-based State" and the "rule of law" on the other. Views were expressed at the talk that we should not approach *legal assistance* only from a narrow view of economic transition[5] , but should also approach it in the context of pursuing for a higher achievement aimed at promoting a democratic State based on law[6] . My understanding is that the talk reveals the need for a clearer philosophy of legal assistance.

The second issue relates to the background of legal assistance. This focuses on the belated development of the social infrastructure which is needed to back up the legal system. It was stated that assistance should be for the building of this infrastructure.

The third issue discussed at the talk concerned the question of legal transplantation, i.e., what country the drafting of Cambodia's new Civil Procedural Code should be modeled on. Since Japan implements this project, participants at the talk agreed that there was no other choice than using Japanese law as the basis for the assistance. However, emphasis was put on the need to conduct the assistance by taking into consideration the local legal situation. Japan

[5] Emphasis by the author.

[6] See JURIST, *id.* summary by Professor Uehara after listening to the statement made by Professor Takeshita Morio.

should disseminate the information from Japan in conformity with the reality of the recipient country. For example, a jury system was proposed for the draft but was later dropped. Another example is the introduction of a provision to retain the existing incidental civil litigation attached to the criminal procedure[7] .

To sum up, I want to make the two following points:

First, after finishing a comparison of the three countries, we may say that different countries or international aid agencies base their assistance on different philosophies and measures of gravity.

Second, I think that a new trend of thought is emerging inside Japan. So far, Japanese legal assistance has been directed towards promoting a market economy in the recipient countries, focusing mainly on the civil and commercial areas of law. But as we have seen above, some researchers who led the project on drafting the Civil Procedural Code in Cambodia are now talking about the need to further clarify the purpose of the assistance by including the topics of "democratic State based on law" and the "rule of law". It is within such a context that I characterize this as a new trend of thought. However, we need to observe more carefully and in more details before we can judge whether the new trend will lead Japanese assistance to becoming comparatively similar to that of Sweden. Undoubtedly, the Swedish approach is a full presentation of the issues of "human rights", "democracy", or "gender". This is exactly what makes the two cases so different.

This in fact begs the question of what information Japan can really disseminate when it chooses to provide legal assistance to a foreign country, and what area of law Japan can target for this information dissemination work.

[7] *Id*. at 74.