

**CAPACITY DEVELOPMENT
FOR LEGAL AND JUDICIAL SECTORS
IN DEVELOPING COUNTRIES
- JICA's Cooperation for “Rule of Law” Promotion -**

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Japan International Cooperation Agency (JICA) ¹

Since the middle of the 1990s, Japan International Cooperation Agency (JICA) has been supporting the efforts of developing countries in their pursuit of the rule of law. Technical cooperation projects have been conducted relating to the drafting of civil and commercial laws, training and educating of legal professionals, and improving of organizational capacity for the implementation of laws within countries including Viet Nam, Cambodia, Laos, Mongolia, China and Uzbekistan.

This paper is the executive summary of the JICA study report reviewing JICA’s experiences in assisting developing countries' initiatives concerning capacity development in legal and judicial sectors. This review begins with an analysis of features and approaches of JICA’s technical cooperation in this field, which stresses the development of the partner’s capacity in undertaking the “rule of law” promotion on their own, as well as Japan’s own development experience in customizing and adapting foreign laws to its culture and society. The study then examines the effectiveness of JICA’s support mechanism wherein resident long-term experts, backed by the Japanese advisory committees, attempt to provide practical and in-depth advice to local counterparts in a timely manner by utilizing a wide-range of resources including experienced academics, legal practitioners and development specialists. Finally, this paper puts forth possible paths to achieving more coherent and coordinated international cooperation by establishing commonly agreeable cooperation frameworks which lead to the development of sound legal systems in developing countries.

¹ This report provides an analysis of information collected by the consultant with additional technical, independent reviews of JICA’s legal assistance arrangements provided by research group intellectuals. The research group chairman is Professor Hiroshi Matsuo of Keio University Law School. The members of the research group are Mr Kimitoshi Yabuki, Attorney at Law, Deputy Chair, Committee on International Relations, the Japan Federation of Bar Associations, Mr Taro Morinaga, Lecturer and Government Attorney, International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan, Mr Masaki Nakamura, Assistant Professor, Centre for Asian Legal Exchange, Nagoya University, Mr Naoshi Sato, JICA Senior Advisors, Ms Miha Isoi, JICA Guest Senior Advisor and Ms Kyoko Kuwajima, Executive Advisor to the Director General/ Deputy Director General (Governance Group), Public Policy Department, JICA.

1. Support for Capacity Development in Legal and Judicial Sectors in Developing Countries:

Definition, Aims and its Objectives

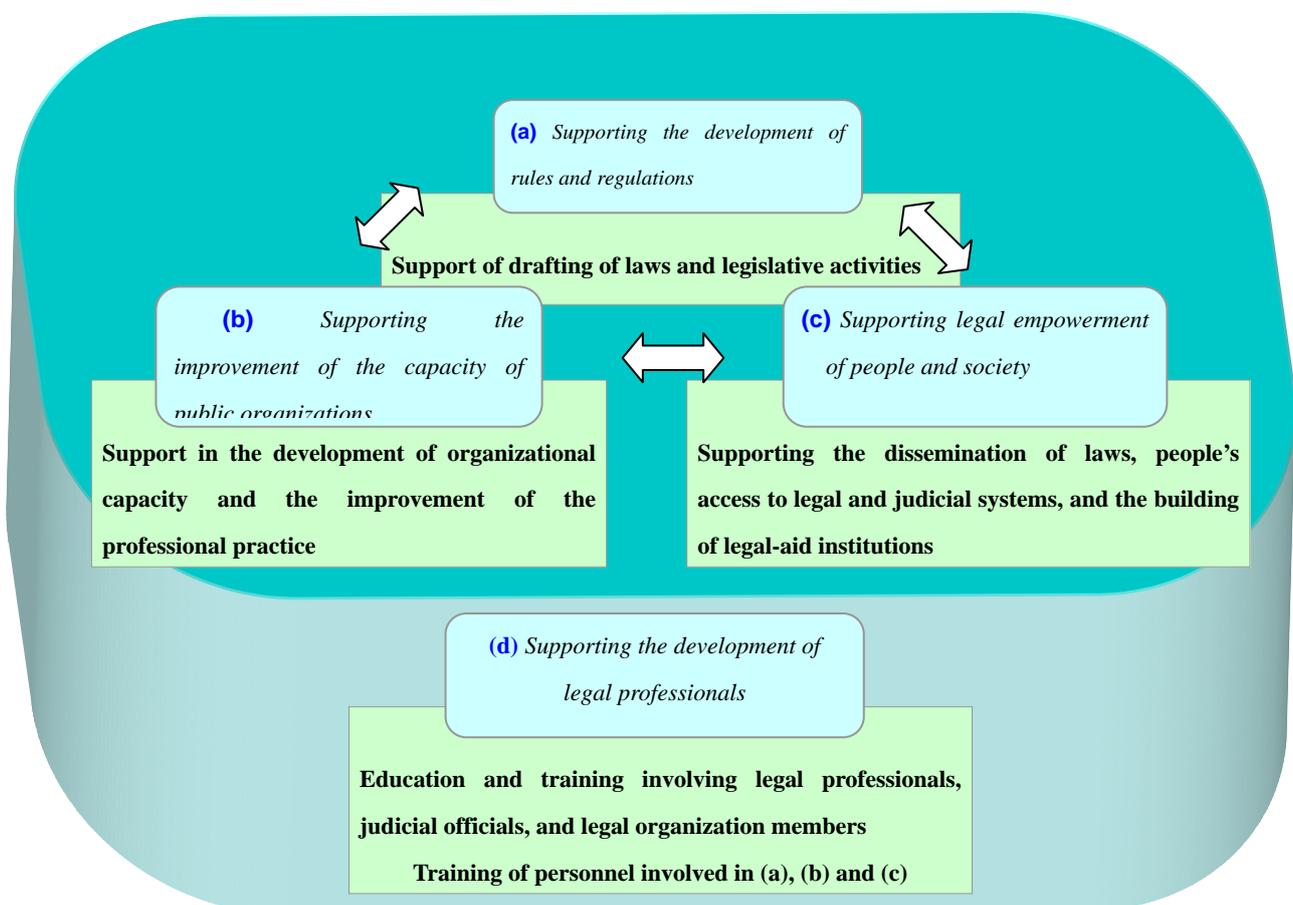
1-1 Definition

Providing support for capacity development in legal and judicial sectors relates to the support of efforts undertaken by developing countries to improve their legal and judicial systems.

JICA's support rests on the following three core elements: (a) *Supporting the development of rules and regulations* including the drafting of specific bills and their promulgation; (b) *Supporting the improvement of the capacity of public organizations* (the improvement of the capacity of the organizations that implement laws or apply laws to dispute resolution); and (c) *Supporting the legal empowerment of people and society* (the improvement of people's access to legal and judicial systems). As a foundation for these three elements, JICA's approach also stresses: (d) *Supporting the development of legal professionals*, including legal and judicial affairs officers, in order for them to independently promote legal and judicial development in the long-term.

JICA implements its support activities through the appropriate utilization of these elements according to the needs, developmental issues and situation of each individual country.

Figure 1 *The Three Pillars of Legal Assistance and Human Resource Development*



1-2 Aims and Objectives

Legal assistance relates to supporting the efforts of developing countries in their pursuit of "rule of law" promotion, and the development of corresponding rules and regulations. Japan's *Official Development Assistance Charter* regards legal assistance as a means of realizing good governance and states that the support of developing countries' self-help efforts is "the most important philosophy of Japan's ODA."

In pursuing good governance, new rules and regulations must be created and the government must possess the capacity to implement such rules, while also precluding abuse of and deviance from governmental authority. In order to fulfill these two seemingly contradictory goals, the legal system must reflect the people's will, and must be appropriately developed and enforced. In order to achieve these outcomes, government, civil society and the private sector must form a soundly balanced partnership. As such, there is a general demand for the "rule of law" in so much that the created rules and systems are legitimate, that a neutral dispute resolution system is developed, and a structure which assures access to this system is formulated.

2. The Japanese Experience of Legal Development and its Characteristics

Beginning from the Meiji Restoration in the late 19th century, Japan, which had previously sought the development of legal systems in order to maintain of the existing social order and to facilitate national development during its history by both abolishing the closed-door policy and promoting industrial growth, has achieved the gradual formation of a "rule of law" through trial and error.

The comprehensive legal reforms preceding the modernization of the state and society in the post-Meiji Restoration period, and the legal reforms conducted under the indirect rule of the Allies with the aim of democratization and peace building following the Second World War were fundamental, full-fledged reforms which involved the revision of basic legal principles and systems. The Japanese experience has contained much useful knowledge that can contribute positively to the "rule of law" promotion processes, which many developing countries are undertaking today. These experiences include those of drafting, promulgating and revising laws and systems in accordance with the conditions and changes particular to the development of the nation (and at times conducted with the assistance of the international community) during such historical processes, and which has led to the upgrading of the legal systems in line with international standards and the realization of social stability and economic growth.

Moreover, while Japan has incorporated the advanced legal systems of other states, borrowing basic concepts from Continental Law centered around French and German legal traditions following the Meiji Restoration then becoming more heavily influenced by the American legal tradition during the period of indirect control by the Allies following the Second World War, it has customized and adapted those laws to the cultural, and societal factors present within the

existing system as opposed to simply ‘importing’ the foreign legal traditions. Such a process can be very informative for developing countries seeking to establish and/or improve existing legal systems so as to tailor them to the circumstances of a particular country while simultaneously receiving aid from donor countries/agencies.

This process in Japan has further nurtured a tradition among Japanese academics of conducting comparative studies regarding foreign laws that have contributed to the development of the Japanese legal system, which has in turn produced a significant number of legal professionals with seasoned knowledge of other legal systems in addition to Japanese Law. As a result, despite the fact that developing countries are receiving assistance from Japan, they are able to obtain knowledge on other legal systems in addition to those of Japan, which provides a comparative perspective of different legal systems and enables countries to choose legal systems that best suit their state. This is a distinctive quality of Japanese support.

3. JICA’s Support for Capacity Development in Legal and Judicial Sectors in Developing Countries: Basic Policy and its Strengths

3-1 Respecting Developing Countries’ Ownership of the “Rule of Law” Promotion Process

In order to promote the establishment of the rule of law in order to achieve stability and development in developing countries, JICA respects each country’s ownership over the process and supports their self-help activities. The choice of legal systems and the path to “rule of law” promotion are matters of state sovereignty, and the appropriateness of various options is the sole purview of the state itself. Efforts directed toward the realization of the “rule of law” must be based on the individual situations of the respective countries. Thus, the ownership and efforts of the people who have deep understanding of their own culture and existing systems are crucial to the effective use of external support.

Accordingly, JICA facilitates the development of legal systems that suit the cultural, and societal factors present within the existing system of each developing country by providing knowledge of other countries’ systems and ideologies as points of reference, rather than imposing any specific system or idea of Japan or any other nation. Concisely put, JICA presents various ‘policy options’ via dialogue with the state in ways, such as introducing paradigm legislation from other systems, that allow each country to select those options best suited to its individual circumstances. Throughout this process the ownership of the developing countries remains highly valued.

3-2 Modalities of Support Utilizing Diverse Assistance Resources

With JICA’s legal cooperation approach, people with various backgrounds are involved in order to comprehensively cover the multitude of elements necessary for the realization of the “rule of law.” In order to provide effective and efficient support, using these various resources, JICA

supports the following six modalities.

First, JICA begins by dispatching long-term advisors (judges, prosecutors, lawyers, etc.) with extensive experience in Japanese legal practice who are able to comprehend the needs and actual conditions within the developing country. These advisors provide necessary advice based on their experience, and function as intermediaries between the developing countries and JICA. JICA is able to offer support that precisely corresponds to the needs of the developing country by drawing upon the opinions of the long-term advisors.

Secondly, JICA establishes advisory committees in Japan comprised of academics and practitioners in the field (judges, prosecutors, lawyers, etc.) to back-up the long-term advisors and provide appropriate advice to the developing country. In many cases, members of the advisory committees continue their support over an extended duration of time and across different phases of the projects, contributing to the achievement of support objectives via the accumulation of experience and knowledge, while also building mutual trust.

Thirdly, JICA dispatches experienced academics and legal practitioners, such as members of the advisory committee, on a short-term basis to the developing countries in order to hold onsite seminars. This provides a larger number of stakeholders with the opportunity to obtain knowledge directly from Japanese professionals, while at the same time allowing Japanese professionals to obtain an understanding of the on-the-ground situation in the developing country, which is necessary for providing proper advice.

Fourthly, JICA organizes a series of workshops in Japan and invites concerned counterpart personnel from developing countries. These workshops provide opportunities for participants to engage in intensive discussions with a wide-range of Japanese academics and legal practitioners, and to study multiple aspects of Japanese practice within related organizations.

Finally, JICA-net Conferences provided through the JICA-net System (a TV Conference System set up at JICA HQ, local offices and related organizations) facilitate smooth communication between concerned counterpart personnel in developing countries and advisory committee members in Japan by allowing direct face-to-face meetings. Additionally, this enables resident long-term advisors to attend advisory committee meetings held in Japan, and to work as a bridge providing information on existing systems, practices and the legal professionals' way of thinking in the developing country.

Sixthly, schemes such as "Long-term Training" and the "Japanese Grant Aid for Human Resource Development Scholarship" have been implemented as means for training personnel in developing countries in the medium to long-term. "Long-term Training" entails personnel from developing countries coming to Japan as foreign students in Japanese graduate institutions, and residing in Japan for 2-3 years while seeking to obtain a doctorate or master's degree in a particular field. For projects relating to the support of legal development, individuals from Laos have been accepted as long-term trainees. The "Japanese Grant Aid for Human Resource Development Scholarship" scheme (also referred to as "JDS Students"), which is one of the Grant Aid Projects, has numerous students partaking in undergraduate law and graduate level legal studies programs. In

addition to this, there is the "Training Program for Young Leaders" which is a program nurturing individuals who will lead future national development by inviting young candidates from selected countries to participate in training programs to develop technical knowledge and expertise, and which also includes a "Legal and Judicial System" course. In addition to the "Training Program for Young Leaders", JICA provides legal sector training programs through the "International Training and Dialogue (Group Training Course)," a training program covering a standard set of issues for all participants, and the "Region Focused Training and Dialogue," a training program for individuals from a specific region providing instruction in specific fields relating to that region.

By combining these methods as support tools, JICA is able to provide effective and efficient support.

Box 1: Comments from Other Donor Countries/Agencies and Counterparts Regarding the Method of Support

- Every long-term professional from Japan has expertise and provides in-depth advice in addition to being available for various follow-ups when necessary.
- The caliber of Japanese projects is derived from the long-term residence of the legal professionals, creating a state in which legal professionals possess a profound knowledge of the society and culture of Viet Nam and are able to respond to the needs of Viet Nam at all times.
- The Japanese advisors and their Vietnamese counterparts have discussions on a biweekly basis. This is a result of their continuously providing excellent knowledge and winning the trust of their Vietnamese counterparts.
- JICA fully utilizes its organizational network to support both short-term and long-term professionals.
- It is indeed amazing that over one hundred professionals work in a support structure that allows for assistance from Japan on a continuous, long-term basis. The coming and going of short-term professionals, enables to provide practical capacity development in legal and judicial sectors in developing countries.

Onsite interview survey conducted in Viet Nam by JICA (March 2009)

3-3 Formulation of the Project Framework According to the Level of Development and Policy Issues of the Respective Countries

The three of core elements of JICA's legal cooperation in developing countries [(a) *Development of rules and regulations*; (b) *Improvement of the capacity of public organizations*; and (c) *Legal empowerment of people and society*] compliment one another, and the establishment of the "rule of law" would not be possible should any of these elements be missing. Therefore, these core elements must be viewed in a holistic and cross-relational manner, being adequately selected or combined so as to guarantee the effective implementation of the support. This process should be based on sufficient consultations with and agreement of the respective developing country in accordance with their capacity, needs, and major policy issues.

3-4 Focus on Long-term Development of Human Resources for Enhancing Sustainable "Rule of Law" Promotion

The development of human resources so as to be able to engage in each of the core elements (a), (b) or (c), set forth in 3-3 above, is indispensable to the pursuit of establishing and/or improving legal systems while simultaneously addressing their harmonization with the cultural and societal factors present within the existing systems of each developing country. Such development should be considered the cornerstone of (a), (b), and (c).

Hence, JICA places importance on the support process and the enhancing of the capacity development activities of the counterpart personnel by encouraging the creation of specific working groups in the developing country which are able to engage in joint operations with Japanese long-term advisors and the advisory committee in Japan, as opposed to unilaterally disseminating knowledge. For instance, in supporting the drafting laws, the drafted articles were reviewed one by one by the working group members in the developing country, Japanese long-term advisors and advisory committee members in Japan.

Box 2: Changes in the capacity of counterpart personnel observed in the drafting of the Cambodian Civil Code and Code of Civil Procedure

The most unfortunate issue for judges is that they are unable to obtain experience in considering what existing written statutes mean in their current form. That is to say, that they are in a situation wherein there are few written statutes. They have rarely had any training in written interpretation. In drafting specific articles, we reviewed the articles together, one by one. Through this work, they have come to think about what is written --- I think that is a big change. ...Moreover, in the process of reviewing each article, they have learned cross-referencing, looking at other uncited articles and finding relationships between the articles, and even went so far as to point out that when you change this article, you need to change that one as well. By continuing in this review work, I believe it has improved the legal thinking ability of the judges and enhanced their thought processes.

I. Sakano (2003), "From the Experience of Supporting the Drafting of Cambodian Civil Code and Code of Civil Procedure" *ICD NEWS*, Vol.7, pp.97-98

3-5 A Focus on the Cooperation for "Rule of Law" Promotion with Roots in the Society of the Developing Country

A legal system that is inconsistent with the cultural and societal aspects of the existing systems in a developing country, however conceptually ideal, would not satisfy its objectives. As such, a legal system must be built gradually with the actual social situation of the state as its starting point.

For this reason, JICA attempts to cooperation for "rule of law" promotion which have firmly taken root within the existing society of the developing country and approaches this through the mutual understanding achieved by way of joint surveys and issue resolution via dialogue in manners consistent with the on-the-ground circumstances.

Box3: Joint Review of Existing Laws

We conducted a social survey on how the Vietnamese Civil Code was functioning within Vietnamese society. Although the Civil Code has been enacted, it was not certain whether it was actually being utilized. What came to our attention was that the Civil Code was being implemented in a manner completely different from what was expected. For instance, in real property registration, circumstances differed from what was stipulated in the Civil Code. Given these circumstances, we conducted a social survey, although one quite small in scale. The Vietnamese Legal Science Institute of the Ministry of Justice conducted a local survey with the cooperation of universities and other organizations, and Japanese socio-legal researchers and long-term advisors provided advice on the planning of the survey. The intention was to have the people in Viet Nam understand that if law does not function within society, it has no meaning as law. The level of the social survey itself and its result were not the primary concern --- we wanted Vietnamese people to recognize how law functions in the actual society.

A. Morishima (2003), keynote speech “Support for the Development of Legal Systems in Viet Nam”, *ICD NEWS*, Vol.9, p.39

3-6 Using Japan’s Own Experience and Knowledge

By drawing upon Japan’s own experience in customizing foreign legal systems to accommodate the cultural and societal elements of the existing Japanese systems in their diverse forms, JICA’s support for capacity development in legal and judicial sectors in developing countries seeks out a method optimally suited to the needs and conditions of the developing country itself. Advice on the legal systems of other nations should not be limited to technical aspects, but should also provide a “systematized knowledge” which includes the background of the Japanese legal system. This necessitates that such advice be provided in line with Japan’s own experience.

Box 4: Support Policy for the Drafting of the Cambodian Code of Civil Procedure

First, the work of supporting the drafting of a fundamental code such as the Code of Civil Procedure is not completed by simply writing up the articles, it also involves providing the big “systematized knowledge” encompassing the legal skills and theories (judicial precedents and doctrines) behind the articles as well as the experience of importing foreign laws. What we, the Japanese academics and practitioners, can responsibly propose to another state is only the laws we are familiar with through our daily research, practice and education. Secondly, the Japanese Code of Civil Procedure is quite new and it was subject to a broad revision based on international standards and upon consideration from an advanced and wide-ranging comparative law perspective and a full understanding of the situation of legal practice in Japan. Thirdly, although the previous Cambodian system was attributable to Continental Law, heavily influenced by its former colonial master, France, and therefore making the adoption of ideas from Continental Law in drafting the new code appear easier, the legal society was left with very few professionals who could pass on the knowledge and experience of the former system due to the gross destruction of the legal system and the mass execution of intellectuals during the genocide throughout the period of civil war and confusion. As such, it was considered unnecessary to adhere to French Law.

T. Uehara (2008), *Enactment of the Cambodian Civil Procedure Code – Looking back to the drafting support*, *Jurist*, No.1358, pp.26-33

4. Towards More Coherent and Coordinated Cooperation

4-1 To the Realization of a Global Benefit

Capacity development in legal and judicial sectors in developing countries should be offered through a commonly agreeable framework and should be conducted with the aim of constructing the most desirable legal system for the developing country via the sharing of experiences and knowledge between the donor countries/agencies and the developing country. With the establishment of the “rule of law” through such support, good governance within the developing countries will come closer to being realized leading not only to social stability and economic growth within developing countries, but would also contribute to the stability and prosperity of the international society as a whole. Capacity development in legal and judicial sectors in developing countries will benefit all relevant parties including donor countries/agencies, not to mention the developing countries themselves.

In the near future, a common understanding of the shared benefits should be created among all relevant parties including developing countries and donor countries/agencies, and the network that makes enhanced and efficient development of legal systems possible through the mutual cooperation established by such an agreement should be promoted.

4-2 Pursuing Meta-rules (rule to create rules) for Cooperation for “Rule of Law” Promotion

In promoting “rule of law” of a developing country, the donor countries/agencies should develop the capacity of relevant governmental organizations and establish forums with donor countries/agencies under the ownership of the developing country government (or by using an existing coordination framework) for the purpose of creating rules to support the development of the relevant legal systems.

This process begins with the creation of “a rule to create rules” (aka meta-rule), which will help the developing country’s government grasp the entirety of the “rule of law” promotion picture. This process will help to avoid unnecessary redundancies and enhance synergies among multiple actors.

4-3 Sharing of Experiences and Knowledge among Donor Countries/Agencies

It is important for donor countries/agencies to exchange information and share experiences through forums (thematic donor meetings, etc.) as well as by deepening the understanding of the importance of meta-rules mentioned in 4-2 above. It is expected that synergies will be realized from widely publicizing and sharing the fruits of donor assistance projects, such as in the form of textbooks, practical guides, and manuals.