

NEW MARKETS, NEW COMMODITY: JAPANESE LEGAL TECHNICAL ASSISTANCE

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I. INTRODUCTION

In telling the story of law and development, there is a tendency to write large our own national endeavors, regardless of their political color. So it is hardly surprising that many law and development scholars assume a uniformity of approach to donor-assisted law reform projects, or that many development consultants in the U.S. use the American legal system as their benchmark in assessing legal reform in transition economies. Assuming the U.S. to be a central catalyst and model for legal reform has some basis in geographic reality: the World Bank and the IMF, the State Department and the U.S. Agency for International Development (USAID), private foundations such as Carnegie and Rockefeller and the beltway bandits, (the lawyers, lobbyists and consultants who cluster around them), are physically close to one another. Realpolitik also suggests that the role of the U.S. in modeling, influencing or coercing legal reforms abroad is significant.² Thus when we see references to “the law and development community,” it is worth asking whose community is being celebrated. The “law and development” community can be understood as an imagined community of the kind described by

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² This can manifest directly, through bilateral projects targeting democracy and governance or legal reforms aimed at economic growth and trade. It is the U.S. government, for example, that bilaterally determines whether it will support World Trade Organization (WTO) membership of countries such as China and Vietnam, and on the basis of what changes to their laws and legal institutions. This is de facto a major hurdle to accession. At the same time the influence may be mediated through U.S. dominance of international financial institutions or pursuit of the commercial interests of U.S. based global corporations. It also may be voluntarily sought by transition economies, for example, through the personal ties engendered by generations of foreign elites educated in U.S. law schools. GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002).

Anderson;³ as a temporal, epistemic community within the U.S. where elite insiders share information, personal ties and a worldview; and as part of a broader “new legal orthodoxy” of law and development.⁴ To what extent does it include the many non-U.S. players in law and development? Among these are the national development agencies of Australia, Canada, Denmark, Germany, Japan, Sweden, the UK, the regional programs of the EU, and those of multilateral agencies such as the United Nations Development Program (UNDP).⁵ The global development industry is also crowded with corporate, nonprofit and charitable organizations that design and deliver a vast array of legal reform projects in the developing world.⁶

The full political economy of law and development in the early twenty-first century and the vast body of critique relating to its purposes and projects are both beyond the scope of this essay. Instead, I explore the emergence of one bilateral donor’s legal technical assistance program as an example that seems to call into question the “orthodoxy”, uniformity and convergence of contemporary law and development projects. In this case the bilateral donor is Japan and I focus on the emergence of legal technical assistance between 1996 and 2006. Japan’s role in funding law reform abroad is an understudied aspect of what is otherwise a formidable program of official development assistance (ODA).⁷ In this essay I attempt a very preliminary assessment of some of the political priorities and practices that may be discerned in contemporary Japanese law and development projects.

³ See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983).

⁴ GLOBAL PRESCRIPTIONS, *supra* note 2.

⁵ See, e.g., AUSAID, www.ausaid.gov.au; CIDA, www.acdi-cida.gc.ca; DANIDA, www.um.dk; GTZ, www.gtz.de/en; JICA, www.jica.go.jp/english; the UK Department of International Development, www.dfid.gov.uk; a cluster of development programs funded by the EU and indexed as Europeaid, <http://europa.eu.int/com/europeaid/cgi/frame12.pl>; and the United Nations Development Program, www.undp.org.

⁶ A particularly successful example of the latter is George Soros’ Open Society Institute and its local counterparts across Europe and Eurasia. More information is available at Open Society Institute, <http://www.soros.org>.

⁷ Japanese legal scholars recognize this gap in the literature themselves. See generally Center for Asian Legal Exchange, (CALE) Nagoya University, at <http://cale.nomolog.nagoya-u.ac.jp>. Japan’s use of overseas development assistance budgets in its national interest, on the other hand, is a well-developed field of study. For a recent critique, see Masahiro Kawai & Shinji Takagi, *JAPAN’S OFFICIAL DEVELOPMENT ASSISTANCE: RECENT ISSUES AND FUTURE DIRECTIONS 4* (World Bank Pol’y Research, Working Paper No. 2722, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634433.

In place of “law and development” in this essay I use “legal technical assistance” as a direct translation of the Japanese term “*hōseibishien*.” Although both “law and development” and “rule of law” have clear Japanese linguistic equivalents, most Japanese documents use legal technical assistance to denote the project work of the last decade. As we will see, this resonates with both the nature of the projects and how they are perceived by Japanese lawyers, scholars and policymakers.

In this essay, I ask four broad questions. First, how and why did Japan, a major national provider of official development assistance (ODA), become a legal technical assistance provider? Second, is there anything distinctive about Japanese practice in comparison with the law and development agendas of other donors, particularly the United States? Third, what kinds of discourse do Japanese government officials, lawyers and legal scholars employ to understand and project Japan’s legal technical assistance efforts? Finally, what is the significance of Japan’s law and development project for scholarship and practice beyond Japan?

By framing this as Japan’s (re)entry into a global market for law reform, I assume contemporary law and development to be a cluster of markets for commodified national or supranational law, purchased with ODA money or philanthropic financing in various forms. We should note at the outset, however, that Japanese lawyers and government officials currently neither conceive of, nor implement their legal technical assistance projects as explicitly commercial endeavors – nor is this work generally pieced out to private-sector consultants.⁸ Instead, Japan’s ODA, of which legal technical assistance is a subset, remains a public sector project, comprising a diplomatic stream and an economic or commercial stream. The diplomatic stream focuses on peace and security, as an important adjunct to the very limited mandate for Japan’s military peacekeeping efforts.⁹ The second stream of

⁸ Following the decisive electoral victory by Japan’s Liberal Democratic Party in the October 2005 general election under Prime Minister Koizumi, new legislation relating to outsourcing (or contracting out) government services to the private sector is expected to be introduced in this new electoral term.

⁹ Article 9 of the Constitution of Japan 1945 currently prohibits any armed engagement other than for the purpose of self-defense (and this is debated): Article 9:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

ODA is aimed at fostering markets for Japanese export and investment,¹⁰ although in a fairly abstracted way. Japan's legal technical assistance, in this first phase (1996-2006) as we will see, has tended to support the creation of basic building blocks for transitional legal systems, such as codification of civil and procedural laws. This can be contrasted with the more narrowly-framed technical legal interventions in areas such as intellectual property law, bankruptcy or collateral laws that are more typical of donor programs emphasizing, for example, conditionality in the wake of the Asian financial crisis, market access for foreign investors, or WTO compliance.

II. JAPAN REENTERS THE EXPORT MARKET FOR LAW

Japan has been the world's largest ODA donor since 1991, even although its ODA budget has been reduced in successive budgets in 2001 to the present, and trade friction with China has led to political calls for the elimination of ODA to China altogether.¹¹ Although Japan's outright ranking as the world's largest bilateral provider of ODA has fallen, it remains a dominant source of development funding in Asia and Central Asia, the

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

KENPO [Japanese Const.], art. 9, para. 2. The Liberal Democratic Party of Japan is in the process of refining its proposal to seek a formal amendment of the Constitution, a project that centers on revising Article 9. Liberal Democratic Party of Japan, http://www.jimin.jp/jimin/shin_kenpou/index.html. The English language section of the LDP website, <http://www.jimin.jp/jimin/english>, appears to make no mention of this.

Peacekeeping operations under the United Nations command require separate and specific authorization by the Diet (Parliament) under the Peace Keeping Operations Law (the PKO). *Kokusairengō heiwajichikatsudōtō ni taisuru kyōryōku ni kansuru hōritsu (PKO hō)* (Peace Keeping Operations Law) [hereinafter PKO Law], Law No. 79 of 1992, amended by Law No. 157 of 2001, 36 Japanese Annual of International Law 272 (1993); and KAWAI & TAKAGI, *supra* note 7, at 4.

¹⁰ Kawai & Takagi, *supra* note 7, at 5.

¹¹ *Id.* at 10; see also Kazuo Sunaga, *The Reshaping of Japan's Official Development Assistance (ODA) Charter 5* (FASID Discussion Paper on Development Assistance No. 3, 2004) (pinpointing this as Liberal Democratic Party policy. Sunaga is Minister, Permanent Mission of Japan to the United Nations; FASID is the Foundation for Advanced Studies on International Development in Tokyo.), available at <http://www.mofa.go.jp/policy/oda/reform/paper0411.pdf>.

primary shareholder in the Asian Development Bank, and the second largest shareholder in the World Bank after the U.S.¹²

A. JAPAN'S ODA MANDATE

From the 1990s onward, we see a new emphasis in Japan's ODA flows and in JICA activities relating to security and nation-building. The nation-building element is well illustrated by peacekeeping and democracy strengthening initiatives in developing and fragile states, for example assistance with the elections in East Timor. This new trend is consistent with the gradual increase in operational scope and geographical reach for Japan's Self-Defence Forces (SDF) under the auspices of the *Peace-Keeping Operations Law*.¹³ An expanded peacekeeping mission for the SDF is a key plank in Japan's ongoing campaign for a permanent seat on the UN Security Council. It is also consistent with aspirations that Japan takes its place as a lead economy in the world and more actively shape international public policy. It is not coincidental that Sadako Ogata was appointed President of the Japan International Cooperation Agency (JICA) in October 2003, lending it the prestige of her prior tenure as the UN High Commissioner for Refugees.¹⁴ Her appointment coincided with JICA's transformation into an "independent administrative institution", a financially independent quasi-governmental entity.¹⁵

A second theme in Japan's ODA flows during the 1990s was the shift to soft infrastructure such as education and law. Since 1996 Japan has implemented an active, explicit program of legal technical assistance [*hōseibishien*] to developing economies that are strategically important to its national interests.¹⁶ These are concentrated in, although not exclusive to, Asia.

¹² China, of course, remains a client of the World Bank and receives interest-bearing loans from the Bank, despite some criticisms that as a donor country itself it no longer qualifies for developing nation status.

¹³ PKO Law, *supra* note 9.

¹⁴ A New JICA Appearing October 2003, <http://www.jica.go.jp/english/about/newjica.html> (last visited Feb. 25, 2005). The change in JICA's status to quasi-governmental entity [*dokuristu gyōseihōjin*, (lit. independent administrative legal person but also rendered as independent administrative institution or IAI)] is part of a wave of controversial deregulatory moves that include spinning off a number of government-funded entities and giving public universities an independent legal status.

¹⁵ Sunaga, *supra* note 11, at 27

¹⁶ China, Korea and Singapore are also donor countries. China, through Macau, is actively seeking to advance its influence on the Portuguese-speaking legal world.

The domestic mandate for Japan's legal technical assistance derives from Japan's ODA Charter, first approved as a Cabinet policy directive in 1992 and then significantly revised in 2003.¹⁷ The revision aims to deliver better "strategic value, flexibility, transparency and efficiency" in Japan's ODA spending, as well as "encouraging wider public participation and . . . deepening the understanding of Japan's ODA policies both within Japan and abroad."¹⁸

A defining characteristic of Japanese ODA policy since 1992 that is retained as guiding policy in the 2003 amendments to the Charter is the stress on supporting self-help efforts of developing countries. This is consistent with Japanese understandings of their own trajectory of development and I discuss the application of this idea to legal technical assistance later in this essay. What is new in the 2003 Charter is an explicit reference to requiring recipient countries to exercise good governance, and in this context, providing cooperation "for institution building including development of legal systems."¹⁹ The other guiding principles of the Charter are human security, fairness including gender equity, utilization of Japan's own experience of economic and social development and partnership and collaboration with the international community.²⁰

The policy priority areas identified in the 2003 Charter are poverty reduction, sustainable growth (explicitly defined to include protection of intellectual property rights and standardization); global issues such as terrorism and international organized crime; and peace-building.²¹ The priority geographical regions for ODA flows from Japan are defined as Asia (then South Asia, Central Asia and the Caucasus); Africa, the Middle East, Latin America and Oceania.²²

Thailand continues to be a legal model and reference point for the Lao PDR and for Cambodia, while the same is true for Singapore in relation to Indonesia.

¹⁷ See Revision of Japan's Official Development Assistance Charter (Unofficial Translation) [hereinafter ODA Charter Revision], <http://www.mofa.go.jp/policy/oda/reform/revision0308.pdf>.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3-4.

²¹ *Id.* at 5-6.

²² *Id.* at 6-7.

Sunaga points out the original Charter was developed in line with OECD guidelines on ODA²³, but that the 2003 overhaul was driven by rapid geo-political shifts in the 1990s, a policy switch among multilateral institutions from Washington-consensus style policies to poverty reduction and, most importantly, a dramatic shift in public opinion within Japan against the size of the ODA budget and the manner of its expenditure.²⁴ A survey by the Japanese Cabinet Office in 2003 showed a precipitous drop in public support for ODA from 43.2% in 1990 to 19% while nationalist views within the ruling Liberal Democratic Party began to push for an ODA policy emphasizing national interest. NGOs, on the other hand, remained strongly in favor of both continuing and increasing the value of untied ODA that would not be harnessed for “national interest” purposes.²⁵

The result was a Ministry of Foreign Affairs-led process of public consultation—an unprecedented step in the postwar history of ODA policy—and the formulation of the revised 2003 Charter, which attempts to strike a compromise between what are now articulated and conflicting views. Sunaga concedes, however that the ruling parties’ views are privileged in the 2003 Charter, even although the untied nature of Japan’s ODA means that procurement does not favor the Japanese private sector.²⁶

The four key principles of Japanese ODA under the revised Charter reflect the mixed nature of both the ODA policy constituencies in Japan and the operational objectives:

1. Environmental conservation and development should be pursued in tandem;
2. Any use of ODA for military purposes or for aggravation of international conflicts should be avoided;
3. Full attention should be paid to trends in recipient countries’ military expenditures, their development and production of weapons of mass destruction and missiles, their export and import of arms etc., so as to maintain and strengthen international peace and stability, including the prevention of terrorism and the proliferation of

²³ Sunaga, *supra* note 11, at 8.

²⁴ *Id.* at 3-4.

²⁵ *Id.* at 4.

²⁶ *Id.* at 6.

weapons of mass destruction, and the form the viewpoint that developing countries should place appropriate priorities in the allocation of their resources on their own economic and social development;

4. Full attention should be given to efforts for promoting democratization and the introduction of a market-oriented economy and the situation regarding the protection of basic human rights and freedoms in the recipient country.²⁷

What is significant for our purposes is that, in the 2003 Charter, law is written in as priority field cooperation. “Legal technical assistance”, of course, is not a precise term. To date within Japanese projects it embraces legal education, short-term training, legislative drafting assistance, dispatch of legal advisors and technical support such as libraries and computerization. This policy shift in favor of law is not reflected as separate line item in published Japanese ODA budgets and so it is difficult to break out the value of Japan’s legal technical assistance-related projects as a proportion of total ODA spending on technical assistance.²⁸

What has impelled Japan toward an institutional (re)launch of its law reform efforts in Asia? At a public policy level, Japan’s legal technical assistance can be seen as a subset of a broader turn to law as part of re-regulating the economy.²⁹ The use of law in this broad policy sense has at least four dimensions. At the meta-level, we see policy initiatives that emphasize Japan’s desire to reposition itself as a world power, particularly vis à vis China. Japan’s ongoing campaign to secure a seat on the UN Security Council is an example. At the industry level, Saadia Pekkanen labels Japan’s turn to formal legal measures in order to enhance its trade competitiveness “aggressive legalism.”³⁰ The use of legal technical assistance as a form of exporting legal services and technical know-how is not *per se* “aggressive” but it is an example of harnessing law as a technology to advance policy goals. At

²⁷ ODA Charter Revision, *supra* note 17, at 7-8.

²⁸ See, e.g., The Ministry of Foreign Affairs (MOFA) ODA budget for 2005, <http://www.mofa.go.jp/policy/oda/budget/2005-6.html>.

²⁹ See, e.g., Veronica Taylor, *Regulating Japanese Transactions: the Competition Dimension* (Austl. Nat’l Univ., Pacific Econ. Paper No. 302, 2000), available at <http://apseg.anu.edu.au/pdf/pep/pep-302.pdf>.

³⁰ Such as the WTO dispute resolution processes and anti-dumping actions strategies. See Saadia M. Pekkanen, *Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy*, 24 *WORLD ECON.* 707 (2001).

the transactional level, we also see policy concern about the legal environment for Japanese companies doing business in Asia and in emerging markets. Where once Japan's trading companies were seasoned players with ample commercial intelligence about the prevailing regulatory and customary norms of developing countries, Japan's small and medium sized manufacturers now have had to engage more robustly with Asia, either for outsourcing or for capital inflows. At the same time, Japan is a major intellectual property producer with concerns about piracy and parallel imports. Japan's new national intellectual property policy is explicitly geared toward promoting technology and economic growth and providing support for developing countries is, in turn, part of that policy.³¹ Enhanced global regulation and domestic compliance in areas such as bribery also mean that Japanese companies are—in theory at least—more constrained at home in the way they can do business abroad.

Although I will suggest below that Japan's turn to legal technical assistance in the mid-1990s was somewhat opportunistic, by 2001 we see it written into the Justice System Reform agenda [*shihô seidô kaikaku*].³² The Justice System Reform agenda involves the re-making of all major legal institutions in Japan and has been described as the pivot (or *kaname*) of administrative reform. Within this policy framework, which is currently being enacted, legal technical assistance emerges as a programmatic objective, both to enhance Japan's national standing and to strengthen markets in which Japanese businesses operate. The formal recommendation in the Justice System Reform Council final report in 2001 was:

Legal technical assistance for developing countries should be promoted.

It is essential for developing countries to coordinate the law as the basis of economic and social activities in order to achieve economic development and to build rich and stable societies based on democracy.

³¹ Toshiko Takenaka & Ichiro Nakayama, *Will Intellectual Property Policy Save Japan from Recession? Japan's Basic Intellectual Property Law and its Implementation Through the Strategic Program*, 35 INT'L REV. INTELL. PROP. & COMP. L. 877, 877-1006 (2004).

³² See Office of Promotion Justice System Reform, http://www.kantei.go.jp/foreign/policy/sihou/index_e.html.

Utilizing its own experience in having adopted modern legal systems from other countries and having established the legal system as well as the administration of that system in conformity with the circumstances of the country, Japan has been providing legal technical assistance by accepting trainees from Asian and other developing countries, dispatching professionals and conducting on-site seminars in the fields of civil law, commercial law and criminal justice. Such assistance is important in order for Japan to play a positive role as a member of the international society and also to contribute to the development of smooth economic activities in private sectors in the advancing globalization of society and the economy.

Therefore, the government, lawyers and bar associations should cooperate as appropriate and continue to actively promote support for legal technical assistance for developing countries.

It is also recommended to provide information abroad on the justice system and other matters even more actively and to share such information.³³

The practical result has been, at least since 2001, ongoing government funding for legal technical assistance to developing, particularly Asian, countries and the embrace of this new field of professional activity by the Ministry of Foreign Affairs, the Ministry of Trade Economy and Industry, the Ministry of Justice, the Japan Federation of Bar Associations and a range of other key players, described below.³⁴

³³ JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL – FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY [hereinafter FINAL REPORT], ch. II, part 3.3 (Responses to Internationalization), June 12, 2001, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

³⁴ See, for example, the Government submission by the Japan Federation of Bar Associations, chronicling their entry into the field as an NGO from the mid-1990s, with projects in Vietnam, Lao PDR and the establishment of a roster of lawyers for “international justice system assistance projects.” Nichibenren, Nichibenren ni okeru hôseibishien [Japan Federation of Bar Associations, Legal Technical Assistance by the Japan Federation of Bar Associations], Unpublished Submission to the 14th Session of the Internationalization Sub Committee, Justice System Reform Secretariat, Prime Minister’s Office, May 14, 2002, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/kokusaika/dai14/14gijiroku.html>.

B. KEY PLAYERS IN JAPANESE TECHNICAL LEGAL ASSISTANCE

In common with the law and development projects of other national donors, Japan's legal technical assistance is a national project supported through taxpayer funds. As with other donor nations, Japan's funds for legal projects in developing countries are not seamlessly coordinated at the national level. The Ministry of Foreign Affairs administers more than half of the total ODA budget, but its agency, the Japan International Cooperation Agency (JICA) is but one of multiple direct recipients of the national ODA budget.³⁵ In the field of technical assistance for law reform, many competing agencies and Ministries are involved in channeling ODA and designing projects. Key institutional players include the Ministry of Justice,³⁶ its satellite organization the International Civil and Commercial Law Centre (ICCLC);³⁷ the Japanese Federation of Industries (Keidanren);³⁸ the Ministry of Economy, Technology and Industry (METI);³⁹ the Japan Federation of Bar Associations (Nichibenren); and Japanese university law faculties, particularly Nagoya and Kyushu.⁴⁰ Japanese corporations have also benefited greatly from the national ODA budget, particularly the construction industry when aid was targeted at hard infrastructure.⁴¹ They are much less visible at present in the legal technical assistance field and so I omit them from this discussion.

Legal technical assistance in Japan is predominantly a public sector-led enterprise. In relation to legal work, JICA is disadvantaged by having little internal capacity in law. While it has begun to hire law graduates who specifically seek to work in development, for legislative drafting or for practice expertise it must co-

³⁵ See JICA, <http://www.jica.go.jp/english>.

³⁶ For an overview by the MOJ prosecutors most directly involved with legal technical assistance, see Yamashita Terutoshi & Tanaka Kazuko, *Brief Introduction of Japan's Legal Assistance and the ICD, RTI*, March 2003, available at <http://www.moj.go.jp/ENGLISH/RATI/ICD/icd-02.pdf>.

³⁷ See generally ICCLC, <http://www.icclc.or.jp/english/index.html>.

³⁸ See generally Keidanren, <http://www.keidanren.or.jp>.

³⁹ See generally METI, <http://www.meti.go.jp/english/index.html>.

⁴⁰ See generally Japan Federation of Bar Associates, <http://www.nichibenren.or.jp/en>.

⁴¹ By 1999, however, more than 96% of Japan's bilateral assistance was untied, meaning no formal preferential treatment of Japanese corporations as suppliers. See, e.g., KAWAI & TAKAGI, *supra* note 7, at 10.

opt academics, prosecutors, judges or attorneys (*bengoshi*). Despite the relatively small size of the Japanese Bar, this has not proved difficult. There is a strong volunteer element in Japanese legal technical assistance work, which taps into the self-perception of lawyers, judges and prosecutors as being part of a national elite charged with the support and advancement of the Japanese state. The Japanese *Attorneys' Law*, for example, explicitly frames the mission of Japanese *bengoshi* as including public service and the upholding of human rights.⁴² The field has also attracted powerful champions with direct personal experience of legal technical assistance, including Professor Akira Mikazuki, a former Minister of Justice. For practising lawyers, prosecutors and judges, the legal technical assistance wave is exciting because it is an opportunity to be internationally engaged and important without the heavy capital expense of increasing the size of the legal profession or establishing global legal practices.

At this point a relatively high degree of coordination within Japan among key players is evident. JICA convenes several coordination committees with outside membership; the universities sponsor frequent seminar series and symposia on law and development with broad participation from key players. The Ministry of Justice publishes *ICD News: Law For Development*, a journal in Japanese with English supplements that collates primary and secondary source documents in the field.

The cultivation of a public sector-led “national legal development mindset” has also made it possible for government to solicit financial support from corporations for projects such as the creation of the International Civil and Commercial Law Center (now Foundation), a nonprofit entity.⁴³ Business in turn is able to call for project priorities, so that in 2004 we have for the first time, a Keidanren-backed proposal to create official translations of Japanese legislation, first in English then in Chinese and Korean.⁴⁴ This is ostensibly to assist in legal technical assistance work but is also touted as being able to ease new transactional

⁴² See Practicing Attorney Law (or Lawyers' Law), art. 1(1), available at www.nichibenren.or.jp/eng/about/pdf/practicing_attorney_law.pdf.

⁴³ See International Civil and Commercial Law Centre Foundation, <http://www.ic-clc.or.jp/english/index.html>.

⁴⁴ Sub-committee on Corporate Law, Committee on Economic Law, Nippon Keidanren (Japan Business Federation), *The Benefits of Translating Japanese Laws into Foreign Languages*, June 14, 2004, available at <http://www.keidanren.or.jp/english/policy/2004/051.html>.

and regulatory problems experienced by Japanese business abroad.⁴⁵

What we have not seen yet in Japan is the privatization of legal development work of the kind that we observe in the United States and Australia where both major projects and personnel positions are tendered publicly to companies, non-profits or the commercial arms of universities and an agency such as USAID or AUSAID then remains in a rotating embrace with a small number of private consulting entities that develop the agency's training, documentation, project specifications and delivery relating to legal technical assistance. In private, Japanese legal professionals engaged in legal technical assistance are dismissive of the Anglo-American corporatized model, believing their organizational model to be more altruistic. While this may be accurate, the choice of model is also structurally induced—the recent deregulation of public universities lifts the ban on public sector academics engaging in paid work, while legislation concerning the contracting out of government functions to the private sector is still pending.

Japan is criticized internationally for not pursuing more active coordination with international partners in the field.⁴⁶ This is a criticism that can be leveled at virtually every bilateral and multilateral entity dispensing development aid; in law reform particularly, donor coordination is typically weak because the competition for political influence and positional advantage through adoption of one legal model rather than another strong. Yet Japan is not disengaged from international cooperative obligations. The origins of the Ministry of Justice involvement in legal technical assistance lay in hosting United Nations Far East Agency for the Prevention of Crime and Treatment of Offenders (UNAFEI) criminal enforcement cooperation since 1962.⁴⁷ If Japan is indeed out of step with other donor initiatives in a particular location, there are probably multiple drivers. Among them we can identify latecomer status and relatively small scale, leading to

⁴⁵ The project is chaired by Professor Noboru Kashiwagi, Chuo University Law School.

⁴⁶ KAWAI & TAKAGI, *supra* note 7, at 2.

⁴⁷ Toichi Fujiwara (1998) Keiji shihô bunya ni okeru kokusai kyôryoku: kokuren ajia kyokutô hanzai bôshi kenshûjo no katusdô to kadai [International Cooperation in the Criminal Field: Activities and Tasks of the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders] Hô no shihai [Rule of Law] No. 109 pp 14-28.

the belief that Japan has little to contribute in a coordination forum; wariness of being identified with other donors such as the U.S.;⁴⁸ language barriers and personal attributes of Japanese representatives; or perhaps an unwillingness to sign up for some of the overtly ideological components of the global law and development orthodoxy, discussed further below.

C. INITIAL STEPS

Japan's formal entry into contemporary legal technical assistance commenced with the work of Emeritus Professor Akio Morishima, former Dean of the Law Faculty of Nagoya University. In 1992 he was asked by the Minister of Justice in Vietnam, a personal friend, to provide advice on legislative drafting, which he did under the auspices of cultural exchange.⁴⁹ This was followed by training courses for Vietnamese officials in Japan from 1994 and the formal commencement of legal technical assistance to Vietnam as ODA in 1996. The core of the Vietnam project in its first phase was a ten member Japanese team on Civil Code drafting chaired by Professor Akio Morishima and their Vietnamese counterparts. The project was extended twice at three-yearly intervals and is now scheduled to conclude in 2006. The National Assembly of Vietnam adopted the Final Draft of the Civil Code in May 2005, replacing the previously promulgated Civil Code of 1995.

The Vietnam legislative drafting project was followed by further requests from recipient countries, to the Japan Federation of Bar Associations from Cambodia; from Mongolia for expert advice in 1994; from the Ministry of Justice in the Lao PDR in 1996. In 1999 the Japanese and Cambodian governments agreed on a project to draft a new Civil Code and Code of Civil Procedure for Cambodia. The Japanese Taskforce on the Civil Code was chaired by Professor Morishima; the Japanese Taskforce on the Civil Procedure Code drafting was chaired by Professor

⁴⁸ In Vietnam, for example, Japan belongs to a UN Coordination group. Interview with DANIDA development officer, Hanoi, October 2005. Interview notes on file with author. This is consistent with its ODA Charter mandate of international (neutral) cooperation.

⁴⁹ Akio Morishima (2000) *Hōseibishien to nihon no hōritsugaku* [Legal Technical Assistance and Law Studies in Japan] *Hikakuhō kenkyū* No. 62, 120-136 in Yoichi Shio, *Japanese Legal Technical Assistance: Basic Codes Drafting assistance and the Discourse of Japanese Legal Modernization* (unpublished, on file with author).

Takeshita, distinguished scholar and President, Surugadai University.⁵⁰

In scale and significance, the Code drafting projects in Vietnam and Cambodia are perceived by Japanese participants as the most important legal technical assistance projects carried out by Japan to date. Other projects have included a joint seminar in Comparative Civil and Commercial Law between Japan and China in 1996; a 1998 Seminar on Economic Law in Indonesia; and a 2000 Nagoya University Seminar in Uzbekistan.⁵¹ ODA-funded Japanese law centers are now scheduled to open in Tashkent and Hanoi.⁵²

III. DISTINCTIVE JAPANESE CHARACTERISTICS AND PRACTICE?

Japanese legal technical assistance at the operational project level seems to draw on a similar menu of activity to that used by other multilateral and bilateral donors. For example, we have: (i) legislative drafting, such as the Civil Code and Code of Civil Procedure in Vietnam and Cambodia; (ii) economic policy strengthening, such as direct assistance to the (then) nascent Competition authority in Indonesia; (iii) support for the judiciary, for example training judges in decision-writing and the selection and publication of case decisions in Vietnam; (iv) law enforcement, especially in relation to intellectual property rights, such as support for training customs officials in piracy detection and; (v) computerization, such as installing digital systems in the Indonesian Patent Office; (vi) legal education, including short-course training in-country for legal professions; (vii) project based skills transfer, such as in the Code-drafting projects in Vietnam and Cambodia; and (viii) scholarship support for advanced legal study in Japan, as in the funding base for LLM programs at Kyushu and Nagoya university faculties of law.⁵³

⁵⁰ *Id.* at 10. As Shio points out, Takeshita was also acting chairman of the Council on Justice System Reform [Shihō seidō kaikaku shingikai] and a chairman of the Legislative Council [Hōsei shingikai] of the Ministry of Justice. *Id.*

⁵¹ See Yamashita & Tanaka, *supra* note 36.

⁵² Personal communications from Professor Aikyo, Nagoya University and Professor Le Hong Hahn, Hanoi Law University, 2005.

⁵³ These examples are drawn from my direct observations in the field in Vietnam, Indonesia and Japan and discussions with both Japanese providers and local recipients.

A. LOCAL AUTONOMY AND JAPANESE PERCEPTIONS OF NEED

What these project approaches share in common is a strong emphasis on recipient autonomy in selecting and requesting the form of assistance. This has been particularly evident in the Code-drafting projects in Vietnam and Cambodia, which took several years of round-table collaborative discussion and knowledge transfer before the partners were satisfied that the local counterparts had acquired sufficient understanding of the laws elsewhere and the drafting issues to make informed choices about what their Code provisions should contain.⁵⁴ This emphasis on local priorities also reflects the understanding of many Japanese lawyers of the Meiji legacy of legal modernization. Because Japan's legal modernization was induced by outside pressures in the form of U.S. gunboats, but conducted autonomously, it is understood chiefly as a legacy of self-reliance and the freedom to fashion a national legal identity.

A second core feature of the Japanese projects is their sequencing. Morishima and Takeshita, project leaders in the Code-drafting projects in Vietnam and Cambodia, placed great weight on the orderly development of law in both countries, beginning with the Code framework for private and commercial law. Critical of other donors who have encouraged patchwork development of specific legislation aimed at attracting foreign investment, the Japanese approach maintained that specific laws on security interests in property, or on insolvency, could only make sense once the Code framework was established.⁵⁵ An unstated, but obvious premise in this stance is that this is the sequencing that Japan followed in its own economic development. Japan's 19th century experience was that exhaustive study of Codes worldwide and careful drafting resulted in a Code framework that served the country well, at least until the Allied Occupation and then until the current round of Code revisions commencing with the Code of Civil Procedure re-write in 1996.

A common criticism from within Japan is that its legal technical assistance lacks clear objectives and measurable outcomes. By this, commentators often mean a clear normative statement of priorities, such as the emphasis in U.S. funded projects on

⁵⁴ Separate informal discussions with JICA attorney Yoichi Shio, Professor Morishima and Professor Koichi Miki, 2003-05.

⁵⁵ *Id.*

market-strengthening or democracy and governance,⁵⁶ or the Scandinavian design elements of gender equity and human rights.⁵⁷ Certainly Japanese projects to date do not exhibit the same focus on metrics for measuring outcomes that we see in some World Bank or USAID-funded projects⁵⁸ or the elaborate design of project evaluation typified by Swedish funded projects.⁵⁹ In Japan's methodological approach to projects so far, there has been an emphasis on evaluation, but not on strict quantitative or numeric outcomes. A project at Nagoya University Law School is now attempting to develop a paradigm for project assessment for Japan.⁶⁰ Again, this may not be so much a normative preference as a design consequence. If the ODA budget is as diffuse as critics charge, it would be challenging to track projects, let alone evaluate them quantitatively when the incentives are skewed toward each Ministry or actor capturing the largest piece of the pie possible. As one Tokyo University law professor put it, "The problem with the Ministry of Justice [legal technical assistance] projects is that the money appeared so suddenly and in such quantity that they have no idea how to spend it effectively."⁶¹

B. POLITICAL PRIORITIES AND IDEOLOGY

Japan's legal technical assistance, like the hard infrastructure ODA that preceded it (agricultural technology, roads, bridges, hospitals, water supplies and power plants) is predominantly loan-based, in line with Japan's policy-based belief in the need

⁵⁶ Mirroring the binary administrative divide within USAID as an agency between democracy and governance (DG) and economic growth and trade (EGAT).

⁵⁷ The more general ODA environment in Japan is clearly tracking international trends and concepts, but these have yet to emerge strongly in legal technical assistance descriptions. See, e.g., INSTITUTE FOR INTERNATIONAL COOPERATION & JAPAN INTERNATIONAL COOPERATION AGENCY, *ROADS TO DEMOCRACY AND GOVERNANCE* 15 (Mar. 2003), available at <http://www.jica.go.jp/english/publication/studyreport/topical/roads/roads.pdf>; JAPAN INTERNATIONAL COOPERATION AGENCY ANNUAL REPORT 2003, available at <http://www.jica.go.jp/english/publication/annual/2003/index.html>.

⁵⁸ Veronica Taylor, *The Law Reform Olympics*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming).

⁵⁹ See, e.g., SIDA's Department of Democratic Governance, http://www.sida.se/sida/jsp/sida.jsp?d=130&language=EN_US.

⁶⁰ Legal Assistance in Asia - Structuring a Paradigm for Countries in Transition, available at <http://tla.nomolog.nagoya-u.ac.jp>.

⁶¹ Private communication from University of Tokyo professor who is not directly involved in legal technical assistance projects.

for recipient self-reliance. Japan's ODA continues to be overwhelmingly untied aid⁶² and is predominantly focused on Asia, both originally as a form of wartime reparation and then in order to track Japan's contemporary trading patterns.

A claim that was sometimes made informally prior to the Charter revision of 2003 was that JICA's ODA could be distinguished from that of other countries because it had no instrumental political motive; it was simply a response to a genuine request from recipients. As an expression of what many Japanese involved in the field believe, this may well be true, in the same way that many Australian development practitioners may believe their work to be a friendly third-party alternative to U.S. hegemony. But in a broader sense these kinds of claims strain credulity. As elsewhere, Japan's ODA funded legal technical assistance projects are undeniably political in the sense that they advance national interests at various levels and are supported by elite lawyer-bureaucrats. Moreover, Japanese project language is not at all hostile to government and is thus consistent with Japan's own developmental state legacy. Nevertheless, discussions of legal technical assistance within Japan to date have been notable for the absence of rule of law rhetoric. Japan's legal technical assistance projects seem to be just that: they do not promise to deliver democracy through law reform, nor do they prescribe commercial law reform that promises quick-fix economic growth or dramatic surges in foreign investment. Japan's development policy documents seem to lack the strident invocations of rule of law, governance and anti-corruption that characterize many of the official explanations for donor-assisted legal reform projects in the United States and elsewhere.

Allied with the muted and pragmatic tenor of Japanese projects is their agnosticism in relation to economics, particularly New Institutional Economics (NIE) and neo-liberal political thought. This means that the market economy is accepted as a meaningful concept but not interpreted as projecting a particular market type. Nor is the evolution of Japanese commercial law presented as a causal factor in Japan's rise as an economic superpower. Japanese lawyers are fully cognizant of the way in which the Japanese economy exhibits hybrid features of U.S., European and Japanese capitalisms⁶³ and of the ways in which law and legal

⁶² In stark contrast to bilateral aid from the United States, which is believed to be overwhelmingly tied.

⁶³ See *VARIETIES OF CAPITALISM* (Peter A. Hall & David Soskice eds., 2001).

institutions in Japan were historically molded to the political and economic priorities of the day.⁶⁴

The absence of a strong overlay of economic theory is not simply a normative preference. Legal studies in Japan remain, by and large, a single-discipline education. In practical terms this means that there are few lawyers trained in economics and few economists who work on legal issues. The projects themselves may draw on business experience, particularly in-country, and utilize the local presence of entities such as the Japan External Trade Organization (JETRO). The bifurcation of economics and law may have been one of the drivers for the Institute of Developing Economies (IDE or in Japanese abbreviation, *Ajiken*) being folded in under the JETRO umbrella within the Ministry of Economy Trade and Industry (METI) in July 1998.⁶⁵ The previously independent, government funded IDE has been a source of consistently strong research on Asian legal systems, often in collaboration with scholars from target countries.⁶⁶ What had formerly been an interdisciplinary research focus on Asia was being nudged closer to instrumentalist research on the economy and legal reform.⁶⁷

Absence of ideology, of course, can be useful. Being able to engage with Myanmar and undertake a study of market-strengthening legal reforms is easier if you do not have complicating normative constraints such as a focus on human rights or democratic reform. It can also be felt as a void. The team of academics at Nagoya University who seek to explore a new “paradigm” for legal assistance in Asia are at least partially attracted to the clear articulation of the Swedish model, where human rights and civil society are unambiguously placed front and center of the enterprise.⁶⁸ Japan’s approach is also vulnerable to the charge that

⁶⁴ For discussion of the instrumentalist use of law outside Japan see, e.g., *LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS* (Kanishka Jayasuriya ed., 1999).

⁶⁵ JAPAN INTERNATIONAL COOPERATION AGENCY ANNUAL REPORT 2003, *supra* note 57; author’s conversations with IDE staff during 1996-2005.

⁶⁶ See, e.g., *LAW, DEVELOPMENT AND SOCIO-ECONOMIC CHANGES IN ASIA* (Naoyuki Sakamoto et al. eds., 2003); *AJIASHOKOKU NO SHIJOKEIZAIIKA TO SHAKAIHÔ [MARKET TRANSITIONS IN ASIAN COUNTRIES AND SOCIAL LAW]* (Masayuki Kobayashi ed., 2001). See generally Institute of Developing Economies – Japan External Trade Organization, <http://www.ide.go.jp/English/index4.html>.

⁶⁷ Private communications, IDE researchers, 2004 (notes on file with author).

⁶⁸ Legal Assistance in Asia, *supra* note 60.

there is insufficient attention given to partnering with NGOs, both at home and abroad and that this is a consequence of the recipient government-request, loan funding model. This is one of the broad criticisms of Japanese ODA advanced by Kawai and Takagi.⁶⁹ A further domestic criticism by both Japanese business and taxpayers is that the ODA efforts are invisible and lack direct, tangible benefits for Japan. Such critique has increased in recent years, in part because recipients—particularly China—are perceived as competitors to an economically stagnant Japan.⁷⁰

C. EDUCATIONAL EMPHASIS

A core element of Japanese legal technical assistance to date has been education. The foundations of this approach lie in the 1980s policy outlined by the then Prime Minister Nakasone, which emphasized development of human resources for Japan within its strategically important markets. This led to a marked increase in number of overseas students studying engineering and technical fields in Japan under the banner of internationalization of Japan (“*kokusaika*”). The 1990s then saw an increased demand from students wishing to study law (and presumably universities wanting to host them). As U.S. law schools were focused to a large degree on developments in post-socialist Europe during the 1990s, the Japanese focus was on Asia.

Student scholarships for study at Japanese universities continue to be allocated strategically by government to Asian countries in which Japan either has significant economic or political interests. The targeting of Central Asian republics such as Mongolia and Uzbekistan is significant in this regard. Increasingly, student demand has shifted toward law and Nagoya University and Kyushu University have emerged as institutional leaders that made an affirmative commitment to legal education focused on Asia. Both are national universities that are regionally located and had been historically under-funded. These new initiatives, using ODA budget funding, have allowed them to reinvent themselves institutionally and in the case of Nagoya, to attract some corporate funding.⁷¹

It is not a coincidence that “Asian law” emerged as a formal field of research and teaching in Japanese universities during the

⁶⁹ KAWAI & TAKAGI, *supra* note 7, at 13.

⁷⁰ *Id.* at 1.

⁷¹ Parallel private initiatives include the Asia-Pacific University established by Ritsumeikan University in Beppu, a hot-springs town located in the north of Kyushu,

1990s, where previously the Asian focus had been strongly oriented toward Chinese legal history.⁷² There is strong overlap in the field between the study of Asian legal systems and reporting on, or engagement with, Japanese legal technical assistance to Asia.⁷³ Many universities now teach Asian law and have faculty who are dispatched by government on legal technical assistance projects.

A further component of legal technical assistance has been the delivery of training programs, drafting initiatives and collaborative study projects both within Japan and in-country. Multiple players undertook multiple projects. Here, as with other forms of ODA, the linkages have been overwhelmingly government to government, but mediated through many Japanese government-affiliated players: the Ministry of Justice, national universities, and the Japan Federation of Bar Associations among others.

Japan's elevation of education within legal technical assistance is consistent with the role of educational reform in its own national development story. What is new is the initiative, which includes such projects as the Center for Asian Legal Exchange (CALE) at Nagoya University established in 2002,⁷⁴ and a new Asian Law Center at Kyushu University, that presents new global competition for political influence through legal education. Japan's Asian law and development law programs, like those of Singapore and Australia, exhibit high quality, are staffed with sophisticated scholars and are vastly more cost effective than those on offer in the United States.

Japan's regional gateway to North and South East Asia. *See* Asia-Pacific University, <http://www.apu.ac.jp>. A similar level of private investment has not, to date, extended to law and development studies in the same way.

⁷² *See* YASUDA NOBUYUKI, TŌNANAJIAHŌ [AN INTRODUCTION TO SOUTHEAST ASIAN LAW] (2000) (providing an update and revision to YASUDA NOBUYUKI, ASEANHŌ [AN INTRODUCTION TO ASEAN LAW] (1996)); HENYŌ SURU AJIA NO HŌ TO TETSUGAKU [ASIAN LAW AND PHILOSOPHY IN FLUX] (Imai Hiromichi et al. eds., 1999). The Asian Law Association was launched in November 2003.

⁷³ To be sure, scholars such as Yasuda, above, do not see the two fields as necessarily co-terminus. An example of careful scholarship and applied research that does explore the intersection explicitly is the work of Kaneko Yuka of Kobe University. *See, e.g.*, KANEKO YUKA, AJIAHŌ NO KANŌSEI [THE POTENTIAL FOR ASIAN LAW] (1998).

⁷⁴ *See generally* Center for Asian Legal Change, <http://cale.nomolog.nagoya-u.ac.jp/en>.

D. IMPLICATIONS OF JAPAN'S DESIGN CHOICES

What are the implications of these patterns of organization of legal technical assistance in Japan? One possible consequence is strong information capture. While there are multiple players involved in law-related projects, there is also a high degree of interpersonal connection, recycling of personnel and sharing and reporting of information. This is made easier, I suggest, by the fact that the level and type of activity to date presents few real commercial conflicts of interest. This is in sharp contrast to law and development practice in the United States, where the incentive to share meaningful information with commercial competitors is low, even when mandated by the procurement contracts under which the project work is distributed. The extensive use of independent, individual sub-contractors in the United States also tends to result in poor information capture by the government agency principal.⁷⁵

A second consequence is that both Japan's latecomer status to contemporary law and development⁷⁶ and its twentieth century identity and national history have sensitized Japanese practitioners in particular ways. On the one hand, Japanese legal scholars and policy makers are in a sense on their home ground: Asia. Their projects appear to emphasize extensive preliminary field-work, an understanding of local conditions and a real reluctance to press for the duplication of Japanese legal institutions. The absence of strong templates derived from new institutional economics or quantitative methods may allow more room for pragmatic approaches that seek to understand the issues from the local counterpart standpoint. Certainly Japanese practitioners in the field confirm that their time horizons are generous – by framing projects as “educational” there is a license to spend time getting deeply integrated with local counterparts in a way that a short-term donor-designed project does not allow. On the other hand, memories of Japan's colonial past in the region remain fresh on both sides and this too, seems to have produced an approach that perceives itself as supportive rather than didactic.

⁷⁵ See, e.g., Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (Carnegie Paper No. 57, 2005), available at <http://www.carnegieendowment.org/publications>.

⁷⁶ See generally the sections on “urgency” and “necessity for research” in the legal technical assistance project outline, Center for Asian Legal Exchange, Nagoya University, <http://tla.nomolog.nagoya-u.ac.jp>.

To their credit, Japanese players in the legal technical assistance field have spent considerable energy studying foreign theory and practice and engaging with non-Japanese practitioner counterparts in both academic and consulting projects. In my limited experience, this kind of Japan-plus approach to staffing is much more reminiscent of the Swedish or Australian project design approach than that of U.S. project design.

A third consequence is that Japanese legal professionals may be confronted with a new, postmodern identity. They are doing development at home under the rubric of the Justice System Reform agenda that claims that Japan's legal system is deeply flawed, while simultaneously expanding legal technical assistance abroad on the basis that Asian developing economies have much to learn from Japan's legal evolutionary path. This is both a paradox of modernity and a corollary of the political nature of law and development that is by no means limited to Japan.⁷⁷ Thus, for example, while Japan continues to lack self-sufficiency in service sectors such as transnational law and finance,⁷⁸ it embraces legal technical assistance that is itself a service export. Japan supports the use of communications technology for development assistance, but itself lacks a reliable digital database of statutes and cases and has no complete set of laws translated into English.

In the following section, I outline some of the ways in which legal elites in Japan who are involved in legal technical assistance understand such paradoxes and the narratives that they use to explain the emergence of Japan's contemporary law and development work.

IV. NARRATIVES OF JAPANESE DEVELOPMENT

Japan's role in legal development and reform in Asia, of course, is not really new; Japan has been exporting its formal law and concepts for over a century. In the early twentieth century this meant implementing variations of Japanese law and newly-minted colonial law in its colonies of Korea, Formosa and Manchuria, while carefully studying local law and custom in order to

⁷⁷ See, e.g., Open Society Institute, *supra* note 6 (detailing George Soros' financial support for criminal justice reform projects in the United States).

⁷⁸ By this I mean the large numbers of foreign professionals in these fields who work in Japan in comparison with what, from casual empiricism, seem to be much smaller numbers of Japanese nationals working in these fields outside Japan.

create concentric circles of (local) colonial and imperial law.⁷⁹ Korea's experience of the Japanese legislative "civilizing mission", for example, is described in a recent work by Dudden.⁸⁰ Not all legal reform modeled on Japan was coerced. In Thailand, Japan was a legal model that inspired voluntary study.⁸¹ Yet today most English-speaking law and development scholars do not typically think of Japan as an active law reform donor.

B. PERCEPTIONS FROM OUTSIDE JAPAN

A number of factors conspire to prevent Japan, despite its stature as the world's second largest economy, being readily cast by non-Japanese commentators as an international provider of legal reform and as a model for legal institution building. During the 1980s and early 1990s, there is some evidence that scholars in Asia had elsewhere had begun to consider the developmental states of Japan and Singapore as viable models for legal reform elsewhere in Asia.⁸² However, the collapse of the Japanese economic bubble in 1989 and the Asian financial crisis of 1997 convinced many policy elites that Asia had gone from "being a miracle to needing one."⁸³ In particular, the legal systems of Japan, Korea and Taiwan were viewed as having important institutional weaknesses that may have contributed to the weakness of corporate and public sector governance resulting in the crisis. As World Bank economist Yusuf argues, these economies were

[Y]et to engage fully in overseeing and enforcing the rules of the market, although the framework for doing so is in place. These economies still rely on the many informal mechanisms that have been developed over the years to

⁷⁹ The preeminent work in this field in English is Wang Tay-Sheng's study of Japanese law reception in Taiwan: *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945)* (1992).

⁸⁰ ALEXIS DUDDEN, *DISCOURSE AND POWER: JAPAN'S ANNEXATION OF KOREA 1910* (2004).

⁸¹ See generally KÔZÔ KAGAWA, MASAO TOKICHI DEN: HÔSEIBISHIEN KOKUSAIKY-ÔRYOKU NO SENKUSHA [BIOGRAPHY OF TOKICHI MASAO, PIONEER IN INTERNATIONAL COOPERATION AND LEGAL TECHNICAL ASSISTANCE] (2002).

⁸² On their potential as models for reform see generally *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA 91* (Christoph Antons ed., 2003). For a critique of what "rule of law" used as "authoritarian legalism" see Kanishka Jayasuriya, *Globalization and Law; Authoritarian Legalism in the Global Order*, 6 *IND. J. GLOBAL LEGAL STUD.* 425 (1998-99).

⁸³ See generally *EAST ASIA IN CRISIS: FROM BEING A MIRACLE TO NEEDING ONE?* (Ross H. McLeod & Ross Garnaut eds., 1998).

handle contract disputes and the like. Such informal mechanisms are increasingly inadequate for these complex modern economies. The formal legal systems need to continue expanding the prestige and competence of their personnel [who] need to be further strengthened.⁸⁴

The implication here is that, only with increased investment in formal legal capacity will Japan and other North East Asian economies flourish economically, and in time be admitted to the league of advanced Anglo-American and European nations boasting advanced, market-oriented legal systems. However, as John Ohnesorge correctly points out, these assumptions, common to much development discourse of the last decade, do not engage with pre-1997 economic successes in Asia and the subsequent rapid recoveries. Asian states continue to pose problems for the claim that modern law is a prerequisite for economic growth and that rule of law, democracy and governance are all natural by-products of legally-conditioned economic growth.⁸⁵ Frank Upham takes a more applied approach by examining Japanese legal and institutional history as a resource for understanding and modeling potential reforms in China.⁸⁶

At an ideological level, too, to cast Japan as a major source of law and legal technical support for transition economies is to invert perceived west-to-east movement of modernity,⁸⁷ which has direct antecedents in nineteenth European colonial rule⁸⁸ and in the twentieth century civilizing missions of Western Europe and the United States.⁸⁹ Nevertheless, it is precisely Asian nation-states like Japan, engaged in modernization and development for most of the twentieth century, that have salient experience for

⁸⁴ SHAHID YUSUF ET AL., *INNOVATIVE EAST ASIA: THE FUTURE OF GROWTH* 86 (2003).

⁸⁵ John K.M. Ohnesorge, *État de droit (rule of law) et développement économique*, 18 *CRITIQUE INTERNATIONALE* 46 (2003); John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 91 (Christoph Antons ed., 2003).

⁸⁶ Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Paper No. 30, 2002), available at <http://www.carnegieendowment.org/publications>.

⁸⁷ For an historical overview that seeks to correct views of Asia being technologically backward and overtaken by a rapidly industrializing West, see JOHN M. HOBSON, *THE EASTERN ORIGINS OF WESTERN CIVILIZATION* (2004).

⁸⁸ PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 111 (1992).

⁸⁹ MARK T. BERGER, *THE BATTLE FOR ASIA: FROM DECOLONIZATION TO GLOBALIZATION* 63 (2004).

twenty-first century transition economies. In this sense, Japan's use of the term legal technical assistance in preference to law and development seems both deliberate and apt.

C. EXPLAINING JAPANESE LEGAL TECHNICAL ASSISTANCE DOMESTICALLY

Legal technical assistance in Japan is a new and vibrant field. Explanatory narratives and contesting viewpoints abound. Even at this early stage we can identify at least three different narratives about law and development in Japan today. At one level we have the official, government-sponsored stories about law in the service of Japanese modernity. At another, we have recipient countries seeking a Japanese, non-Western template or solution to the law and development conundrum. At a third level, there is perplexity and debate among Japanese legal scholars about just how to theorize both Japan's own reception of modern law and its new role as provider of legal technical assistance.

The official story is the most succinct and arguably the least satisfying. In both government sources and in some scholarly writing the Japanese law and development story begins with the French legal scholar Boissonnade and the other foreign experts invited to Meiji Japan at great expense.⁹⁰ Japanese leaders of the nineteenth century also dispatch their best and brightest to Europe, in order to make an exhaustive study of comparative legal models. Decades of laborious statutory drafting and redrafting follow, resulting in hybrid Codes that draw on multiple sources. Following promulgation of the Codes come decades of "reception" of the new legal concepts, professionalization and then legal self-reliance.⁹¹ Then the story fast-forwards to the 1950s, and

⁹⁰ These towering figures sometimes had feet of clay, or at least very human foibles. See generally *RETHINKING THE MASTERS OF COMPARATIVE LAW* (Annelise Riles ed., 2001).

⁹¹ See, e.g., Mitsuya Araki, Chief Editor, *International Development Journal, Japan's ODA Policy* (Mar. 27, 2001), available at http://www.jica.go.jp/english/scholarship/previous_seminar/2001_sp/lecture/araki/. Surprisingly, a similar narrative is used in the opening paragraph of the Nagoya University Center for Asian Legal Exchange project, although we might infer that this is not because the authors believe it to be accurate, but because they believe it will resonate with grant-making bureaucrats. See Nagoya University Center for Asian Legal Exchange, <http://tla.nomolog.nagoya-u.ac.jp>.

Japan's meteoric rise as a developmental state and industrial superpower. The importance of economic ties to Asia and the mutual benefits that will flow from these also features as a sub-theme.⁹²

At this point, however, cultural attributes also resurface. The Japanese preference for alternate dispute resolution supports economic growth and legitimizes Japan as an Asian country, well-placed to assist neighbors seeking to avoid the litigious excesses of the United States. As insiders know, however, the twist is that these norms are also manipulated in the service of modernity—it is not cultural distaste for litigation that shapes dispute processing in postwar Japan, for example, but political choices about how legal institutions are designed and staffed.⁹³ This is an invented tradition of non-litigiousness.⁹⁴

This kind of sanitized narrative conceals Japan's use of law as a tool of social control, both at home and during its colonization of Asia. The Anglo-American reforms of the Occupation are hailed for their introduction of market-oriented commercial law, but the democratic institutions that create new possibilities for challenging the state and business interests are downplayed. Explanations for how regulatory law was subordinated to the needs of big business during the high growth period of the 1950s and 1960s, or the way that consumer protection and intellectual property rights were delayed until after the economy had taken off are also missing.⁹⁵ Absent also, are accounts of the many legal and litigated clashes between citizens and the Japanese government that challenged government regulatory lapses, in some cases successfully.⁹⁶

The accounts of Japan's legal technical assistance experience from the mid-1990s that center on Professor Morishima draw,

⁹² See, e.g., Yamashita & Tanaka, *supra* note 36.

⁹³ JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 193 (1991); Takao Tanase, *The Empty Space of the Modern in Japanese Law Discourse*, in *ADAPTING LEGAL CULTURES* 187 (David Nelkin & Johannes Feest eds., 2001). A translated volume of Takao Tanase's work is in draft form and scheduled for publication during 2005-06, which will make his more extended work on law, community and modernity accessible to a non-Japanese audience.

⁹⁴ Frank K. Upham, *Weak Legal Consciousness as Invented Tradition*, in *MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN* 48-64 (Stephen Vlastos ed., 1998).

⁹⁵ Seigo Hirowatari, *Post-war Japan and the Law: Mapping Discourses and Legalization and Modernization*, 3 *SOC. SCI. JAPAN J.* 155 (2000).

⁹⁶ See, e.g. ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY AND HEALTH POLICY* (2000).

consciously or unconsciously, on this Meiji-Showa story in which war, social conflict and toxic side effects of modernization are omitted. An evocative phrase that is often used is that (Professor) “Morishima is the Boissonnade of Vietnam,” that is, the invitation to a gifted foreign scholar and the subsequent collaborative drafting of key legal Codes replicates the process that the Japanese themselves used during the Meiji Restoration (1868-1912) in their voluntary adoption of European law in the service of rapid national military and economic development.⁹⁷ This is a mythic narrative of abstracted modernity in which the key themes are self-reliance, collaboration, choices that are ultimately in the hands of the local counterparts and a Japanese contribution that is clearly contributing to the local partner’s national development. In its favor, it also omits the overtly ideological language and hectoring tone of rule of law and governance projects championed by the international financial institutions (IFIs) and some other bilateral donors as a way to induce or coerce institutional change.

The other element lacking from the contemporary law and development “story” on the Japan side would seem to be its current institutional upheaval in the form of the Japan’s Justice System Reform agenda of the 1990s. The agenda originated with Liberal Democratic Party policy in 1997; in 1998 the Obuchi Cabinet established the Justice System Reform Council. Its Final Report was published in 2001 and the government immediately set about, under direct supervision of the Prime Minister’s Office, remaking the institutions of the Japanese justice system.⁹⁸ This includes, inter alia, far-reaching changes to civil and criminal procedure, and a fundamental redesign of legal education.

A clear theme in the Justice System Reform project is the insistence that rule of law never really took root in Japan, either during Meiji or after the Occupation reforms of 1945-1952. Despite the claim that Japan lacks real rule of law⁹⁹ and needs much

⁹⁷ Émile Gustave Boissonnade, a French jurist who had previously taught at the University of Paris, arrived in Japan in 1873 and began to teach French Law. He is best known for his contribution to drafting the (then) new Penal Code. See Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 5 (Arthur Taylor von Mehren ed., 1963).

⁹⁸ For the English translation of the Final Report, see FINAL REPORT, *supra* note 32.

⁹⁹ For the counter-argument, that rule of law was historically deeply rooted in Japan, see John O. Haley & Veronica Taylor, *Rule of Law in Japan*, in *ASIAN DISCOURSES OF RULE OF LAW* 475 (Randall Peerenboom ed., 2004).

stronger governance,¹⁰⁰ we can posit, and then seek to test empirically a counter-claim that there is abundant evidence that Japan's legal institutions today, however imperfect, are no less sophisticated and adaptable to the needs of a post-industrial society than any other major economic power's.

Not surprisingly, thoughtful academics in Japan have tremendous difficulty reconciling the apparent contradiction of their own country's justice system "failure" with the demands of multilateral donor law reform rhetoric that highly developed property and contract law and broad access to formal adjudication in courts are indispensable elements in economic growth. Providing an account of modern law as the central, propelling factor in Japan's industrialization is taxing, largely because this is a modernist fiction. Certainly Japan had civil, commercial and procedural law, and plenty of it, but as Haley and Upham have argued, it was the reliance on informal means of ordering and the selective use of formal legal tools and fora that really distinguished Japan historically.¹⁰¹ Japanese legal history does not lend itself to the predictive economic modeling beloved of the World Bank. Instead, it raises real questions about how much law is necessary for development (or modernization) and at what point, and how much predictability business really seeks (as opposed to claiming that it seeks) in a transitional economy. Leading Japanese legal sociologist Takao Tanase argues that "law was not a precondition of the modernization in Japan, at least to the degree that the sweeping statement of 'the law as a prerequisite for modern society' implies."¹⁰² Rather, he suggests, the disjointed law and development narratives outlined above in fact employ a standard modernist technique: simultaneous denial and affirmation of (Japanese) legal culture and legal institutions. This leads to, and indeed requires, more modern law.¹⁰³

V. CONCLUSION

The real significance of the Japanese experience of the last decade in legal technical assistance would seem to be the potential for crafting new paradigms of law and development. Some

¹⁰⁰ "Governance" was coined in Japanese as a technical term only during the 1990s [as *gabanansu*] and still retains a fairly elastic meaning.

¹⁰¹ HALEY, *supra* note 93, at 64; FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POST-WAR JAPAN* 78(1987).

¹⁰² Tanase, *supra* note 93, at 192.

¹⁰³ *Id.* at 187-98.

Japanese legal scholars are clearly aiming at this - we see this in their cursory dismissal of law and development scholarship in Europe and the U.S. as simply stopping at critique.¹⁰⁴ We see it also in the scant attention paid to the rule of law rhetoric from multilateral and other bilateral donors. If this pattern continues, Japanese legal scholarship may simply skip the rule of law debate altogether. More tangibly, we see it in the approach outlined by Matsuura in this volume: a multi-layered study of the process of law reform in the Lao PDR that is explicitly linked to law and society thinking.¹⁰⁵

A new paradigm of “Japanese” law and development is not fully visible at this stage but I suggest that if it does emerge, it is likely to be characterized by pragmatism; a strong intellectual orientation toward Asia; responsiveness to local conditions; and a deep awareness of legal pluralism.¹⁰⁶ This kind of Japanese approach would seem deeply attractive to national governments, whether democratically elected, authoritarian or despotic. The self-reliance of Japanese ODA and legal technical assistance theme is likely to be well received, even if the financial underpinnings are unmistakably Japanese.

As Japan’s legal technical assistance expands it will not be free of programmatic ambivalence and tensions. The educational mission may clash at some point with business imperatives, or legal technical assistance in the form of educational scholarship as a form of diplomacy may simply become too expensive to sustain on the current scale. On the other hand, some tension would not be a bad thing. Current Japanese approaches could benefit from some self-critique (or at least borrow from the surfeit of critique generated by Western legal scholars). Many Japanese colleagues at present resist understanding law and development as an industry and do not see law as an (export) commodity. Consequently it is difficult for many of them to imagine themselves as agents of a technocratic process that may be toxic for

¹⁰⁴ Center for Asian Legal Exchange, Nagoya University, Legal technical Assistance Research Project description, <http://tla.nomolog.nagoya-u.ac.jp>.

¹⁰⁵ Yoshiharu Matsuura, *Toward a New Generation of Comparative Law: A Framework for Bilateral Collaboration in Law and Development Projects in Asia*, 23 *Wis. INT’L L.J.* 233 (2005).

¹⁰⁶ See, e.g., Akio Morishima, *Japanese Approaches toward Legal Development Assistance (Law and Development)* (Conference Paper Presented at Center for Asian Legal Exchange, Nagoya University, 2004), available at <http://cale.nomolog.nagoya-u.ac.jp/en/files/morishima/en>.

the recipient, or that may require a thoroughgoing rethink of legal ethics. This, of course, is projecting far ahead of where the Japanese academy and Bar are located at the moment in their self-understandings and in the structural constraints of the legal technical assistance “industry”.

What we do see, however, is strong complementarity with counterpart fields and professional groups outside Japan. The challenge from this point onward is for foreign colleagues to acknowledge the interesting and significant work being done in Japan and to engage with it constructively.

