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## **RE-ESTABLISHING RULE OF LAW: JICA's APPROACH TO LEGAL DEVELOPMENT ASSISTANCE IN CAMBODIA**

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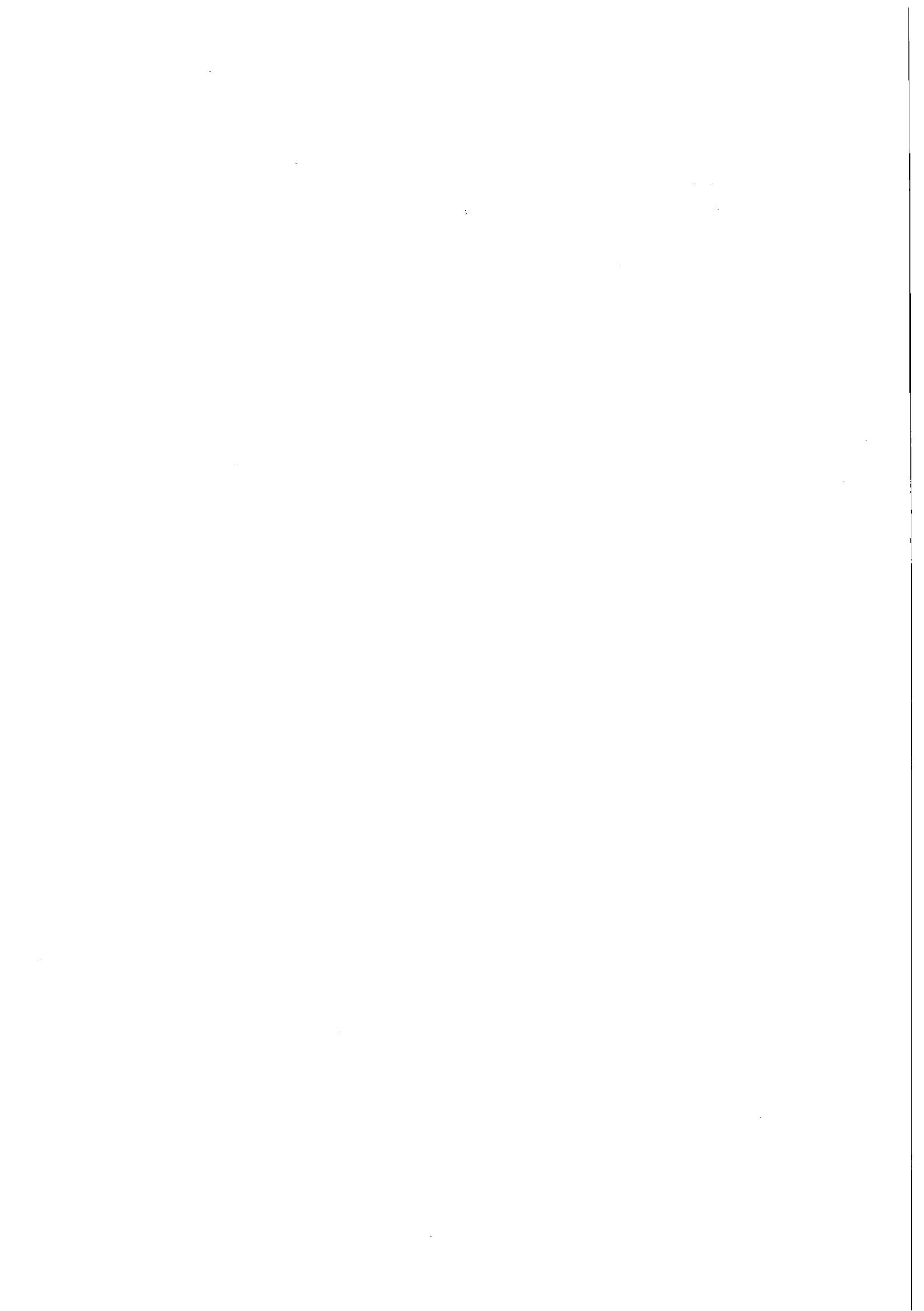
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## 1. BACKGROUND OF RESEARCH

### 1.1. Introduction

After the conclusion of Paris peace agreement in 1991, international community fully resumed development assistance to Cambodia, by providing various aid programmes aiming to reconstruct the country as well as to maintain fragile peace and order by supporting newborn democratic government of Cambodia. Especially, regarded as essential basis for democracy, economic development and good governance, re-establishment of rule of law has been highly prioritised amongst most of the donors.

(JICA 2002a)

In 1996, Government of Japan expanded its scope of assistance to the programmes for re-establishment of rule of law, and formulated a project taking charge of drafting new civil code and civil procedural code in Cambodia. One of the significance in Japanese rule of law project is its principles declaring to respect independence of the recipient country and cultural pluralism.

It was a new challenge for government of Japan as well as newly-built government of Cambodia, because Japan had been experiencing great shift in their strategy of development assistance. In 1992, the Government of Japan adopted the Official Development Assistance (ODA) Charter, aiming to propose basic philosophies and principles of Japanese development aid policies. This 1992 ODA Charter clearly prescribed that promoting democratisation is to be one of the basic principles which Japanese aid policies must be based on<sup>1</sup>. Following Medium-Term policy paper elaborated the scope of the Japanese aid programmes based on such basic philosophy and principles, and expanded its activities from conventional infrastructure building projects to more immaterial projects, such as technical assistance and human resource building,

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<sup>1</sup> the 1992 ODA Charter of Japan, Principles, paragraph 4

which was new field to Japan. (Togo 2005)

## 1.2. Problem statement

The last decade has witnessed increasing emphasis on building rule of law by the donor communities in providing development aid in the countries transitioning to democracy. As Belton (2005:5) argues, 'Like a product sold on late-night television, the rule of law (ROL) is touted as able to accomplish everything from improving from human rights to enabling economic growth to helping to win the war on terror.'

Despite broad proliferation of the term itself and repeated reference as a supreme goal of aid programmes, the concept of rule of law does not have a single, universally accepted definition. Therefore, each donor individually defines the concept of ROL in accordance with its value, mandate, and capacity. (Carothers 2003)

When we examine the donor projects on legal development assistance in Cambodia, one finds that it became a common practice for the donors to propose complete set of legal system to implant, which is regarded as a fast and comprehensive solution to respond urgent needs for sound legal system. (Morishima 2005)

There is an argument criticising such hasty transplant of legal system to the recipient state, which is under totally different context, is merely to hinder establishment of rule of law contrary to the aim of the donor, since it would cause poor coherence between implanted law and traditional norms existing in the society, and fail in settlement of the legal system in the society. (Golub 2003)

Reflecting its historical experience to adopted foreign legal system, the Government of Japan has built its own philosophy, which seeks optimal independence of the recipient country in re-establishing its own legal system to ensure the sustainable settlement of newly established legal system. Since 1996, government of Japan started ROL projects in Cambodia, based on this philosophy and this was the very first project for the

government of Japan.

In response to the termination of the project in March 2003, there is a growing debate to assess the Japanese new approach taken in that ROL project in Cambodia. Thus, it is our imminent task to take close examination both on the rationale and methodology of the new Japanese approach for future project planning based on it.

### 1.3. Justification

Although its importance has been recognised in development aid programmes, only limited amount of analysis and knowledge on the practice of rule of law project is accumulated in Japan. Consequently, in every process of project cycles, from planning, monitoring and evaluation, JICA heavily relies on the knowledge and information learned from the practices of other donor agencies. (JICA 2002a) Particularly in this case of JICA project for civil code drafting in Cambodia, since Japan had attempted to establish unique approach criticising comprehensive legal transplant, which now became a common practice, it is crucial to assess its rationale and practice, both from the legal perspective and policy perspective.

More practically, I am currently serving for Institute for International Cooperation of JICA, and hoping this research would contribute further improvement of prospect project planning and encourage vibrant discussion without any reluctance of self-criticism.

### 1.4. Objectives of the research

In this research, I am going to take Cambodia as a case study and assess JICA's new approach in the projects on law development assistance, specifically, its project on drafting new civil code and civil procedure code in Cambodia.

*Main objective*

To analyse its rationale and basic principles of the JICA's new approach in rule of law project in Cambodia, from both legal and policy perspective.

*Sub-objectives*

- To explore the concept of rule of law, and identify Japanese definition and assess its adequacy
- To identify specific context of post-war Cambodia in terms of policy environment
- To provide insight of the donor strategy and needs from the recipient on policy transfer in the rule of law projects

1.5. Research Question

*Main question*

How did JICA operationalised the rule of law concept in its legal assistance project in Cambodia?

*Sub questions:*

- What is definition of rule of law identified by JICA?
- What is the alternative principle proposed in the new approach by JICA?
- How did JICA formulated rationale which leads project input to overall goal of the rule of law project?
- What is the strategy in project implementation and its adequacy in practice?

1.6. Research Methods and Methodology

This research relies on secondary data. This data was obtained through reviewing academic literature, donor reports, white papers, and working papers collected at library, or provided by my colleagues in JICA

1.7. Limitation of the research

Although ROL projects refer not only the field of civil law, however, because of the specific objectives of this research to analyse JICA projects in Cambodia, the focus of

this study is limited to civil law.

#### 1.8. Organisation of paper

The paper has six chapters. The first chapter has given the introductory background of the issue to be discussed, problem statement, research objectives, research questions, justification for research, methodology used for the research and finally the limitations.

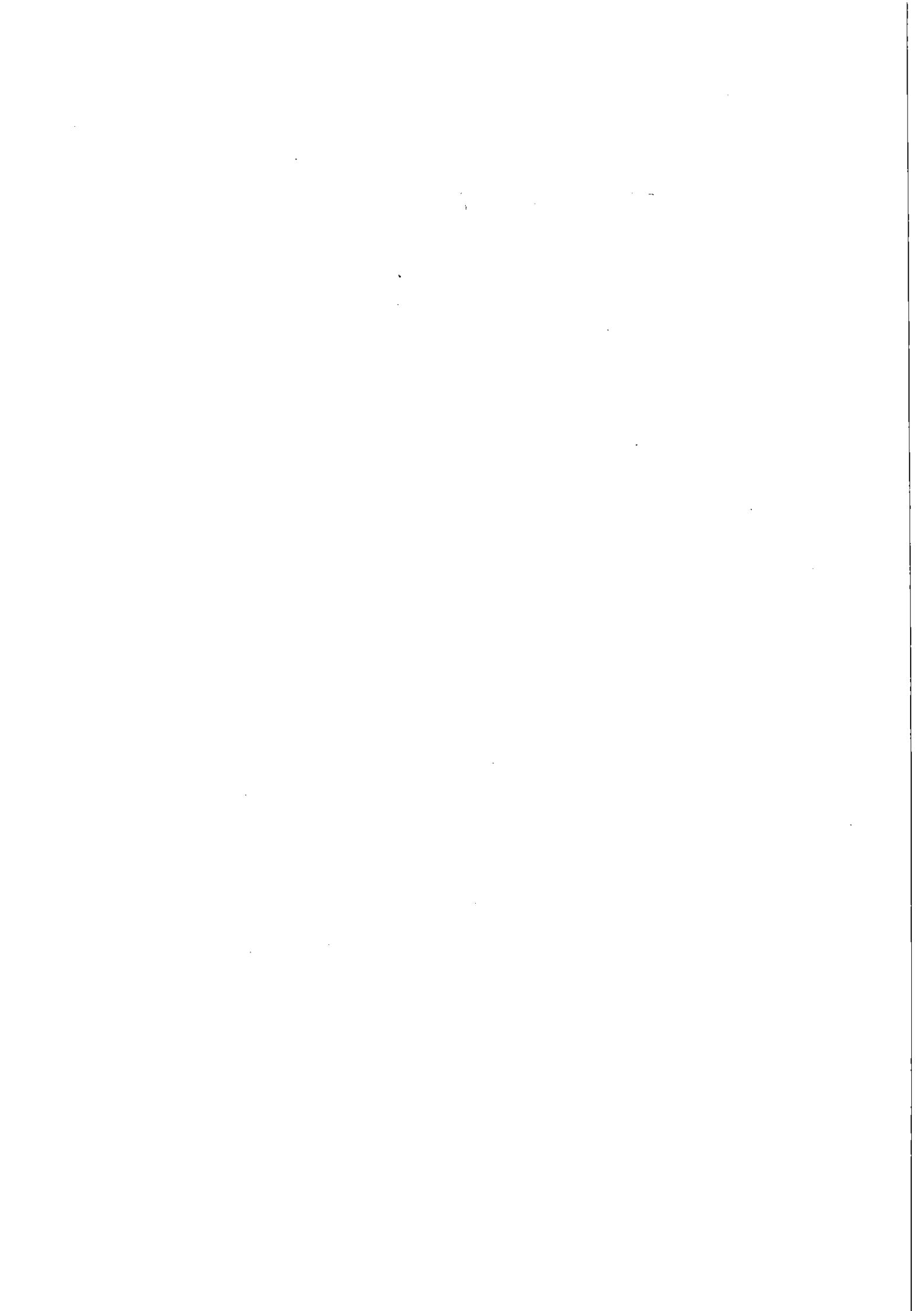
The chapter two provides conceptual framework to analyse the project on rule of law. The aim of this chapter is, first, to define complex concept of ROL both on theoretical and practical level and, secondly, to investigate specific nature of ROL projects from policy perspective. Theories of policy transfer will be referred to explain the donor strategy in ROL projects.

The chapter three describes specific context of Cambodia, reviewing the history of its transition of legal culture. This chapter also provides background information on the aid programmes carried out by various donor agencies as well as JICA.

The chapter four provides case study on JICA's rule of law programme in general, exploring its rationale, principles and logic of policy intervention. Then, more specific project on drafting civil code and civil procedural code in Cambodia is to be reviewed.

The chapter five undertakes an analysis and present the findings of the research; after which attempts will be made to answer the research questions.

And lastly, the chapter six offers the author's perspective on the significance of Japanese approach to rule of law projects as conclusion.



## **2. CONCEPTUAL FRAMEWORK**

### **2.1. Introduction**

Re-establishment of rule of law is JICA's ultimate goal targeted in their legal assistance projects in Cambodia. To analyse JICA's approach taken in these projects, it is essential to explore this legal concept of rule of law (ROL) and understand peculiarity of the issue of ROL projects. Therefore, the aim of this chapter is, firstly, to define complex concept of ROL both on theoretical and practical level, by exploring in practice how the donor agencies define this concept in their projects as well as by reviewing jurisprudential definitions. In the latter part of this chapter, it is attempted to investigate specific nature of ROL projects from policy perspective. Theories of policy transfer will be referred to explain the donor strategy in ROL projects, as well as some other relating concepts of best practice and epistemic communities, to figure out the context and rationale of those policies.

### **2.2. Definition of Rule of Law**

As Garth (2001) and Fogelklow (1997) argue, ROL is not a single concept, but rather compound regime of concepts consisting of numerous 'noble pronouncements'. As to the definition by Fogelklou (1997: 39), one country can be regarded as a state where ROL is at work if there exists (i) supremacy of law, (ii) separation of powers, (iii) protection of life, liberty, safety and property of persons, (iv) legal certainty, (v) equality before the law; and (vi) effectiveness of rule of law principles. Taking note that ROL covers an entire spectrum of political ideals, Hussain (2003:8) defines ROL as 'at minimum, it means a government bound by fixed rules, applicable to all, but its connotative qualities are more expansive, covering everything from a sense of equality under the law to political ideals of justice and individual dignity.'

Some studies investigate its historical roots in exploring multiple concepts comprising

the notion of ROL. Hussein (2003) argues that although the term ROL is developed in the modern context, it has long and complex genealogy in the Western tradition. As Fogelklou (1997:35) argues, the origin of ROL lies on the British tradition in 18th and 19th centuries, which proclaimed that “the Government” and “the Crown” were subordinate to the Parliament and to the rule of law, which refers to the principle that society should be ruled by legal rules adopted by Parliament, and developed by the courts, i.e. not by morality of political expediency or ideology. Other scholars, however, such as Hyek (1972), trace its historical roots even further. He argued that ‘in England, the term that precedes the ROL, particularly in the Elizabethan age, is the borrowed Greek notion of *Isomania*, which was closely related to early notion of democracy.

With due consideration on the importance of such jurisprudential definition of ROL, however, it is also essential to see practice of donor agencies in defining the concept of ROL, which serves as justification of their policy intervention. This is a way of thinking to separate ROL itself and ROL paradigm, and define the concept based on the way how it is operationalised in practice.

Normative principles of ROL must be interpreted to be social reality in practice, however, such interpretation may differ by practitioners thus it is not interchangeable for ROL. This is to say that “Supremacy of law” is one of the ROL principle but to see its existence in a certain society, we have to operationalise this concept by employing a set of assumptions, a chain of reasoning, and choose a group of activities. (Golub 2003:5) Carothers (2003:12) therefore criticises such ROL paradigm are yet based on great uncertainty, lacking systematic well-ground knowledge about how external aid can be used to promote the rule of law in other countries. Golub (2003) reinforced this criticism by saying;

“(ROL paradigm)... is a set of ideas, activities, and strategies geared toward bringing about the rule of law... This paradigm comprises a mélange of goals, assumptions,

activities, and strategies. Many of these vary according to context, are ill-defined, or are only implicit.” (Golub 2003:7)

To be more concrete, Belton (2005: 5-6) investigated practices in operationalising ROL concept and identified two different approaches, namely, end-based approach and institutional approach.

#### *End-based definitions of ROL*

Ends-based definitions are often found as form of policy pronouncement proposed by bilateral donors, or used as membership criteria set by regional organisations such as NATO and EU. (Belton 2005:7) In this approach, ROL is regarded as set of desired end, which encompasses more or less goals according to the society in question. This is to say that such goal or set of goals are usually selected by own direction of the government of the state in question or intervening donors rather arbitrarily in accordance with their interest or mandate, therefore, definition of ROL in this approach usually are not comprehensive to include all conceptual basis of ROL. Belton (2005) argues, “these ends were never clarified or separated, practitioner organisations did not fully appreciate their distinctiveness... (They) tend to mention some ends and forget others--- often with little consistency in which they include and which they leave out from definition to definition.” (Belton 2005:7)

#### *Examples of end-based definitions*

World Bank defines as follows;

ROL prevails where, (i) the government itself is bound by the law, (ii) Every person in society is treated equally under the law, (iii) the human dignity of each individual is recognised and protected by law, and (iv) justice is accessible to all. (World Bank 2004)

Table.2.1 also provides example of how ROL is defined individually in accordance with

the mandate of each donor. By comparing these definitions, one can find that some basic principles are common in most definitions. (Belton 2005:7). Those principles are largely accepted amongst Western states, which have common historical roots developed in the society for more than thousands of years, and formed common values and philosophy. (Belton 2005, Fogelklou 1997)

Besides those generally accepted definitions, each donor also makes particular definition of ROL and sets policy goal in accordance with its priority determined by its cultural and political circumstance. For instance, World Bank emphasises the institutional aspect of ROL (i.e. accessibility) and sees it as essential requirement for economic growth and poverty alleviation so that their activity is focused on law reform and legal institution building to establish favourable environment to attract private and foreign investment. (World Bank 2004:3) While both EU and the United States regards protection of human rights as essential function of ROL, USAID brings 'law and order' concepts as an end of ROL. (table 2.1)

As shown above, ROL is often defined 'based on the ends it is intended to achieve'. (Belton 2005:15) This is to say, ROL definition and ROL projects based on such definition are very much depends on the institutional attributes derived from its political and cultural values.

**Table 2.1 End-based definitions of ROL by donor agencies**

Donor Agency	Definition of ROL	Policy Goals
World Bank	(1)The government itself is bound by the law; (2)Every person in society is treated equally under the law; (3)The human dignity of each individual is recognized and protected by law; and (4)Justice is accessible to all." (World Bank 2004)	"The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy. Legal and judicial reform is a means to promote the rule of law." (World Bank 2004)
EU	"(1) <u>The primacy of the law</u> is a fundamental principle of any democratic system seeking to	To achieve: • a legislature respecting and giving full effect to

	<p>foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. (2)<u>The principle of placing limitations on the power of the State</u> is best served by a representative government drawing its authority from the sovereignty of the people. (3)<u>The principle must shape the structure of the State and the prerogatives of the various powers.</u>" (European Initiative for Democracy and Human Rights: emphasis and numbering are added)</p>	<p><u>human rights and fundamental freedoms;</u></p> <ul style="list-style-type: none"> <li>• an independent judiciary;</li> <li>• effective and accessible means of legal recourse;</li> <li>• a legal system guaranteeing equality before the law;</li> <li>• a prison system respecting the human person;</li> <li>• a police force at the service of the law;</li> <li>• an effective executive enforcing the law and capable of establishing the social and</li> <li>• economic conditions necessary for life in society.</li> </ul> <p>(European Initiative for Democracy and Human Rights: emphasis and numbering are added)</p>
USAID	<p>The term "rule of law" embodies the basic principles of (1) equal treatment of all people before the law, (2) fairness, and both constitutional and actual guarantees of basic human rights. (3) A predictable legal system with fair, transparent, and (4) effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and <u>lawless acts of both organizations and individuals.</u> (USAID Website "Rule of Law"<sup>2</sup> emphasis is added)</p>	<ul style="list-style-type: none"> <li>• Foundation for Protection of Human Rights and Gender Equity is in Conformity with International Commitments</li> <li>• Laws, Regulations, and Policies Promote a Market-based Economy</li> <li>• Equal Access to Justice</li> <li>• Effective and Fair Legal Sector Institutions</li> </ul> <p>(USAID 1998:19-23)</p>

Source: personal construction

#### *Institution-based definitions of ROL*

While most of the donor agencies define ROL by its ends, however, in practice, when they evaluate degree of ROL in a certain state, institutional attributes are often used as measurable indicators. Belton (2005) argues that:

'modern rule of law practitioners still define the rule of law as a state that contains these three primary institutions:

- **Laws** themselves, which are publicly known and relatively settled;
- **A judiciary** schooled in legal reasoning, knowledgeable about law, reasonably

<sup>2</sup> [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law/](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/) (Last Accessed on 13/11/2005)

efficient, and independent of political manipulation and corruption.

- **A force to enforce laws**, execute judgements, and maintain public peace and safety: usually police, bailiffs, and other law enforcement bodies.'

(Belton 2005:16)

One of the critical point here is that practitioners often regard institutional building is 'not as means but as intermediate or measurable ends' to achieve ROL. (Belton 2005:16) Belton (2005) argues that this orientation to institutional building has theoretical basis proposed by new institutional economists, such as Douglass North. The new institutional economists defined institution as 'sets of informal and formal rules', which refers to not only 'material' organisations but also the norms and values governing them. (Moore 1994) However, as Belton (2005: 17) cautions, 'when practitioners turned these ideas into practice, they inevitably had to simplify nuanced theoretical concepts'. Thus, institutional building may serve as a sort of checklist for ROL projects, and such orientation to institutional reform is to greatly narrow down the scope of definition of ROL. Carothers (2003) explains the motivation for practitioners to use institutional checklist for ROL definition, arguing that;

'By their nature as practitioners intent on producing tangible, even measurable changes in other societies, rule-of-law aid specialists need to concretise the appealing but inevitably somewhat diffuse concept of "rule of law".' In the broader field of democracy assistance, the pattern has been for democracy promoters to translate the overarching idea of democracy into an institutional checklist or template that they can pursue through series of specific aid initiatives. Similarly, rule-of-law promoters tend to translate the rule of law into institutional checklist, with primary emphasis on judiciary. (Carothers 2003:8)

### 2.3. Policy process of ROL projects

As we saw in the previous section, in analogy to other notions such as human rights there is no overarching fixed definition of ROL concept. Notion of ROL have been changing over time, and been developed and reinforced through the various law development projects in practice. In this section of the chapter, then, the practice, which determines notion of ROL, and nature of policy process are to be examined in reference to the theory of policy transfer.

### 2.3.1. Strong role of international/regional organisations

One of the key features of ROL projects are strong initiative taken by international and regional organisations. Common (2001) pointed that globalisation is one of the major factor which encouraged greater role filled by such trans-national organisations. He (2001:69) explains that 'globalisation was regarded as a process of integration facilitated by an increasing number of trans-national actors. The result of this process is the emergence of "global class structure" or an "international elite"... forming a kind of cultural cohort'. Such external actors including international organisation and trans-national cooperation solving a certain issue serves as key actors in policy diffusion mechanism'. (Common 2001:71)

On the other hand, there is another argument that brings up another factor which ascribed from the nature of the issue itself. As already mentioned above, definition of ROL and goal setting of ROL project are inseparable, and depend heavily on the values of the provider of such aid projects. Therefore, international/regional organisations play leading roles to define ROL regime based on the shared value amongst members, and provide various ROL projects using their trans-national networks and serve as knowledge bank to store "best practices" of one country and transfer them to another. (Carothers 2003, Golub 2003)

### 2.3.2. Epistemic communities and their influence on policy process of ROL projects

In line with this argument, the notion of epistemic community may have relevance here. Haas (1992:3) defines epistemic community as 'network of knowledge-based experts recognised expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area' He also identified attributes of epistemic communities to possess '(1) shared set of normative beliefs, which provide value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices...; (3) shared notion of validity and common policy enterprise....; (4) a common policy enterprise' Haas (1992) argues that the epistemic community members' professional training, prestige, and reputation for expertise in an area are highly valued by the decision makers and accepted by them to legitimise and authorise their activities.(Haas 1992:17) Accordingly, epistemic community has strong influence on international organisations by monopolising key post within an organisation in the issued area, as far as 'the community can form an alliance with the dominant political actors'.(Common 2001:71)

Haas has also elaborated the role of the epistemic communities and identified the context, which decision makers in either certain organisation or a state seek support from such community. He argues that the advantage of epistemic community holding great amount of scientific knowledge based network attract policy makers under 'condition of uncertainty', because such community are capable of providing 'clear cause-and-effect relationships and advices about likely effects' (Haas 1992:15) 'Condition of uncertainty' refers to the situation characterised by (1) post-crisis or shock (2) complex interlinkages between the issues and the chain of events; (3) lack of identification of self-interests of a state or factions within it; and (4) urgent needs for new policy formulation. (Haas 1992: 15) Situations of the most of the recipient country of ROL projects fall into this conditions of uncertainty so that in ROL projects are very

much likely to accept epistemic community as a knowledge source determining causal relations and assumption of possible outcome of policy intervention.

### 2.3.3. Policy transfer and policy process of POL projects

As Golub (2003) argues, in ROL project operation, strong initiative by the trans-national organisations influenced by epistemic communities formed 'ROL orthodoxy', which diffused ROL projects by means of policy transfer.

Similar to the motives to seek directive support from epistemic communities, policy makers accept policy transfer under certain context. Dolowitz and Marsh (1996) argue that inducement of the policy transfer is usually generated from dissatisfaction of status quo. Such dissatisfaction results from the perception of "policy failure" either by the Government or public. Another inducement of voluntary policy transfer are analysed to derive from perception of 'uncertainty' about the cause, the effects of the complex problems today. Such uncertainty leads policy makers to learn from predecessors, by searching for the policies they can borrow, or asking for advices from international experts. (Dolowitz and Marsh 1996)

On the other hand, coercive direct policy transfer has been carried out by the international organisation. One of the examples which demonstrate this trend is the spread of Western monetary policies to the developing countries. One of the most typical examples are practices of international monetary funds to force the recipient country to import certain laws or adopt institutional reforms as a conditionality for their loan provision.

## 2.4. Concluding remarks

As discussed above, ROL does not have single definition but consist of several principles which deeply depend on political ideals or cultural values of the society. Although such values and ideals must be different to context, some broadly accepted

basic principles which have same roots as notion of democracy. Because of such characteristics of the issue, international or regional organisations are taking leading roles in defining ROL and policy goals of ROL projects. Uncertain condition of recipient country often forces policy makers to seek for directive advice by such organisations, donor communities, to be provided with clear solution to determine causal relations and chains of effects by their policy intervention. Thus, in practice, ROL projects are often take a form of policy transfer from one state to another.

### **3. CONTEXT OF CAMBODIA**

In this chapter, first, socio-political context of Cambodia will be illustrated to understand the roots of the problems, which Cambodia suffers until today. Then secondly, the changes in Cambodian legal system will be reviewed and the consequent changes in the legal culture which affects psychological aspect of people's mind will also be focused as well. Lastly, recent legal assistance programmes of various donor agencies and international/regional organisations will be reviewed.

#### **3.1. Socio-political context of Cambodia**

By studying preceding researches, three major approaches can be identified to understand the socio-political context of Cambodia. (Basil 1998, Chandler 1992, Kiernan 1993) One is to see it as a country of "post-colonial" country, stressing its difficulty in restructuring its economic, social and political institutions, negatively affected by its colonial legacy. The second approach regards Cambodia as "post-revolutionary" society, which has unique problems rooted in its communist regime. The third approach is to treat Cambodia as "post-conflict" society and explain the cause of its instability as a result of the civil conflicts. (Basil, 1998)

##### **3.1.1. Cambodia as "post-colonial" society**

Although each society has unique aspects derived from its history and culture, there are common characteristics of "post-colonial" countries. As a result of the colonial rules, they often be burdened with colonial legacy which became constraints to development after the independence. Ndulo (2001) identified such colonial legacy to be: (1) disrupted social and political organisation in society; (2) arbitral demarcation of states or administrative district; (3) lack of human resource; and lastly (4) limited human institution to governing society by their own (Ndulo 2001:103)

##### **3.1.2. Cambodia and its communist legacy**

Basil (1998) identified the features of Cambodia's communist legacy. Some have inherited to the present day Cambodia, and affect as constraints in rule of law project. Those are: (1) total destruction of the pre-revolutionary social institutions and practices; (2) Socialist dispute resolution practice, which often be arbitral use of power by the Party officials; and (3) weak perception to be obliged by law amongst people. (Basil 1998) In addition to them, as to the human resources, since most of the intellectuals or administration officials have been educated in the USSR, so that most of the intellectuals today, which is limited to be small number because of the massacre under Pol pot, have its knowledge basis in the communist type of legal system and administration, and consequently have little knowledge on legal systems based on democratic values.

### 3.1.3. Cambodia as failed state after the civil conflict

The term "failed" State does not always precisely defined but serves rather as a broad label for a phenomenon which can be interpreted in various ways. Thus, this concept can be defined and analysed from three different perspectives. (Zartman, W.)

According to Thürer (1999), there are three elements which characterise the phenomenon of the "failed state" from the political point of view. Those are:

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#### Socio-political features of the failed state identified by Thürer

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- disintegration and destracturing of States rather than their dismemberment.
- total breakdown of structures guaranteeing law and order, rather than fragmentation of State authority
- absence of bodies capable, on the one hand, of representing the State at the international level

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Source: Thürer (1999)

Some characteristics as a failed state could be found in Cambodia in the beginning of 1990, just after its civil war. Those were the collapse of the core of the government, and

no governmental bodies efficiently working to maintain law and order; and fragmented society and fragile politics as a result of the civil war. One of the features peculiar in the Cambodian context was severe shortage of human resources because of the genocide under Pol Pot regime. (Kiernan 1993)

### 3.2. Changes of the Cambodian legal system in historical view

‘Cambodia’s legal system has undergone drastic changes over the short period of 130 years since 1863.’ (JICA 2002a) Under the French colonial rule, Cambodia introduced French law. Under the following Lon Nol regime, liberalist legal system had been adopted in the shift to a market economy. (Aragaki 2004, JICA 2002a) However, it did not last long.’ Pol Pot’s “genocidal rule” between 1975 and 1979 brought a period of a legal vacuum and the complete absence of legal experts from the country, as the regime denied not only the legal system but also the very existence of legal experts. Even at present more than 20 years after the Pol Pot period, the legal system still remains impaired, with the country lacking legal experts trained to draft laws. In extending technical assistance to Cambodia in relation to its legal system, consideration must be given to such a lack of experts who are capable of making use of the assistance.’(JICA 2002a) Basil (1998) also argues that the Pol-Pot revolution totally destroyed and eliminated administrative structures and qualified personnel established by the colonial regime as well as legislature and judiciary. Such institutions usually supposed to contribute as a starting basis for newly independent government.

### 3.3. International assistance for post-war Cambodia

After the conclusion of the Paris Peace Agreements in October 1991, international assistance had start its operation based on the agreement reached in the The Consultative Group Meeting for Cambodia (CG). (JICA 2002a) Japan has been one of the largest donor international assistance to Cambodia and hosted CG meetings.

The reconstruction process of post war Cambodia heavily depends on international assistance. In the field of legal assistance, more than 20 donor agencies are currently in operation, which includes bilateral donor agencies, international/regional organisations or international NGOs. Donor agencies identified their own possible scope of cooperation in accordance with own mandate or limits of the activity, and allocated the area of operation as agreement in CG meeting through political process. (Donovan 1993) In the latter part of this chapter presents an overview of the legal assistance projects of the major donors.

### **France**

France was the first donor to provide assistance for the establishment or reform of the judicial system. (JICA 2002a) In 1993, France started its projects aiming to train the Cambodian legal experts, by dispatching two experts to Cambodia for legal training and drafting relevant laws. France is taking charge of the assistance for drafting criminal code and code of criminal procedure through Ministry of Justice of France.<sup>3</sup> Law on criminal procedures was prepared with assistance from France, and was submitted to the Council of Ministers after debates at the Ministry of Justice and the Supreme Council of the Magistracy.

### **United States (USAID)**

The USAID program in Cambodia traces its roots to humanitarian assistance in support of Cambodian non-communist resistance groups. On the 1991 Paris peace agreement it resumed assistance. The Cambodia program evolved towards a more traditional USAID program with emphasis on meeting basic human needs throughout the country and, supporting the UN-lead initiative to establish a freely elected government. (USAID 2002)

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<sup>3</sup> information is obtained from the website of Ministry of Justice of France  
<http://www.justice.gouv.fr/anglais/anavig.htm> (last accessed on 10 Nov 2005)

‘USAID had given legal assistance since 1994, helping to draft a contract law and providing technical training to Cambodian legal practitioners USAID dispatched an American expert of Cambodian origin who holds a doctorate degree in law from the US to help draft a criminal law and a criminal procedure law to be applicable after the period of UNTAC authority to replace the 1992 transitional provisions related to the criminal law and procedure. To provide assistance in legal education, USAID first tried to cooperate with the Faculty of Law and Economic Science of Phnom Penh University, but to no avail. It then set up a separate law department at the Faculty of Business Management and dispatched an assistance team from the Law School of the University of San Francisco.’(JICA 2002a)

However, The United States suspended its assistance to Cambodia after the armed violence of July 1997, except for humanitarian assistance. (USAID 2002)

## **EU**

EU has been providing assistance Cambodia through the European Commission. It dispatched a survey team from 1995 to assess assistance in relation to the judicial system. (European Commission 1998, JICA 2002a)

## **Australia (AUSAID)**

Through AusAID, Australia is providing assistance in the field of criminal justice, helping improve the police, courts and prison facilities, and distributing manuals on criminal procedures to practitioners. The process from surveying, decision-making to the achievement of visible results is done very quickly, which has been evaluated highly by the Cambodian counterparts. (JICA 2002a)

## **World Bank**

The World Bank has been taking charge of drafting a contract law in cooperation with Ministry of Commerce in Cambodia. (World Bank 2004) ‘In 1997, the Ministry of

Justice took charge of drafting the law. The World Bank helped the Ministry of Justice draft a commercial enterprise law and a commercial contract law, and is now working towards their enactment.' (JICA 2002a) The World Bank also conducted a legal and judicial diagnostic study on the whole legal system and held a workshop in April 2000, in which there were participants from the Cambodian government and various assistance organizations. (World Bank 2004)

The bank also managed a steering committee on the judicial system. The Bank has thus continued to play a leading role in coordinating overall assistance concerning the judicial system.

#### **Asian Development Bank (ADB)**

In its Country Strategy and Program report, it identified that 'strengthening the justice system and the integrity of the courts is key to ensuring effective rule of law. The rule of law plays an important role in empowering the poor, providing effective guarantees to private investors and ensuring impartial dispute resolution.(ADB 2005)

Based on that mandate identified in its CSP report, ADB has been assisting Cambodia in revising the land law, and a revised bill was submitted to the National Assembly in August 2000. Further, it expanded its activities to capacity building of law enforcement institutions. (ADB 2005)

#### 4. Case Study: Japanese ROL project in Cambodia

##### 4.1. Background of Japanese aid to Cambodia

Since the 1991 peace agreement, the Government of Japan has been providing various aid projects to Cambodia, ranging from initial peace-keeping operations to reconstruction projects. Acknowledging that Cambodia's stability is vital for Asia-Pacific regions' peace, stability and development, which will ultimately contribute to Japan's own national interests (MOFA 2002). The government of Japan prioritised the establishment of a stable government in Cambodia, which is an essential requirement for post-conflict rehabilitation, reconstruction and democratisation. Table 4.1 shows the significance in Japanese aid to Cambodia emphasising the capacity building assistance as well as hardware-orientated assistance.

**Table 4.1 Priority area of JICA assistance to Cambodia**

JICA's Country-specific program implementation plan for Cambodia 2000-2003 identifies eight priority areas based on the following basic recognition:

1. As Cambodian administrative capacity to absorb assistance is limited, not only the transfer of specific technical knowledge but also human resource development that supports institutional building is important.
2. Development of the physical infrastructure that has been damaged over the period of conflicts is essential. The eight priority areas are
  1. Good governance,
  2. Creating the environment for economic development,
  3. Improvement of the economic and social infrastructure,
  4. Extension of healthcare services,
  5. Improvement of education,
  6. Development of rural areas and agriculture,
  7. Removal of land mines and support for land mine victims, and
  8. Conservation of natural resources, including forests.

Source: JICA (2002a)

Japan has provided grant aid and technical cooperation through the Japan International Cooperation Agency (JICA) with the collaboration of other relevant ministry and agencies if necessary. Japan is the largest donor in Cambodia, and the total of Japanese

assistance to Cambodia in 1992-2003 reached 126.1 billion-yen (approximately 1.1 billion US\$; 95.5 billion yen for the grant aid and 30.6 billion yen for the technical assistance). The Yen loan had been frozen since 1968 since Cambodia was under the category of an LLDC and politically unstable. It was resumed in 1999 with a 4.1 billion yen loan provided exclusively on the harbour construction project, however since there has been no Yen loan recorded. (MOFA 2004)

#### 4.2. Japanese legal technical assistance in Cambodia

##### 4.2.1. Background

Since 1996 in response to the request from the Cambodian Government the Government of Japan has started to provide technical assistance projects in the legal field, mainly through the Japan International Cooperation Agency (JICA) using various channels. In 1996 the JICA launched a new training scheme in Japan inviting the Cambodian law experts to introduce the Japanese legal and judicial systems. This was done with cooperation from the Ministry of Justice, the Supreme Court, the Japan Federation of Bar Associations (JFBA) and legal academics (JICA 2002a). In the following year the JICA dispatched a group of experts for a preliminary survey to identify the needs of Cambodia and the targeted area of Japanese assistance project (JICA 2002, MOFA 2004).

##### 4.2.2. Objectives of Japanese legal technical assistance

In providing the legal assistance programme, Japan has been seeking to take a more comprehensive approach. It regards re-establishment of the rule of law in Cambodia as the 'ends' of the project rather than the 'means' to economic development. This ideology has been reflected in their project design (MOJ, MOFA 2004).

##### 4.2.3. Significant characteristics of Japanese legal technical assistance

Some scholars such as Mong and Tanaka (2002) analysis showed that the Japanese law

development assistance has unique characteristics, affected by its history in developing legal systems.

“Japan had a feudal Chinese-type legal system until Meiji revolution of 1868 put an end to the national isolation policy and the country embarked upon the modernisation of its legal system inspired by Western examples. It drew on French and German models, and after World War II, also on that of the U.S.A., modifying them as appropriate, in accordance with the needs of Japanese society and culture. Comparing legal traditions (especially between Continental law and Common law) and taking inspiration from foreign law, remained a Japanese legal custom and is apparent in internal legal reforms. It is this experience that especially qualifies Japanese lawyers to advise individual Asian countries as to which legal system might best suit their needs and as to which problems might arise in adopting a particular legal model.”(Ming and Tanaka 2002:1048)

Morishima (2005) confirms this view by arguing:

“The philosophy of Japanese Legal Assistance is the partnership or equality between the two parties. Of course, the country of transition does not have the appropriate market legal institutions. The society itself is currently far behind the developed countries. However, the law of the country has to function in the society. Even when a country has an ideal legal system, it is not the law of the country if the system does not work in its society. Japan received European legal system in the 19th century and took long time to adjust to our own culture and society. That is the reason why we request our partners to take initiatives in making final decisions. Needless to say the countries of transition inevitably have to shift to market economy. In this sense, we have to show our partners what are the merits and demerits of a legal institution and other alternatives of the market law. However, we refrain from imposing our preference on our partners.” (Morishima 2005:19)

A similar phrase can also be found in JICA report:

“It is said that Japan has transplanted the legal and judicial systems of Western countries in the most comprehensive form and succeeded in the modernization process. However, this experience has not been appreciated by other nations since Japan has not so far contributed much to legal assistance for foreign nations.... Assistance in establishing a legal system, when extended by a foreign government, might risk being taken as encroaching on the recipient’s sovereignty as a nation. Therefore, this issue should be treated carefully.”(JICA 2002)

Based on this Japanese philosophy regarding legal assistance, JICA formulated a criteria for appropriate assistance and the methods;

- (1) Respect for the recipient’s independence.
- (2) Guarantee of neutrality.
- (3) Persuasiveness based on objective facts and scientific method; (e.g. sustained efforts to conduct field surveys).
- (4) Pluralism in values; (e.g. information from NGOs, specialists from foreign nations); and transparency.

(JICA 2002)

#### 4.2.4. Scope of the Japanese legal technical assistance

In 1999, JICA and the Government of Cambodia signed a *Record of Discussions on Japanese Technical Co-operation in the Legal and Judicial Co-operation Project*. In this document, the scope of Japanese assistance had been determined. In response to the request from the Cambodian government, JICA has set its main task as to provide support of the Japanese experts to draft new Civil Code and Code of Civil Procedure, and build up the capacity of Cambodian judges, prosecutors, advocates, judicial

personnel and officials of ministry of Justice in the domain of Civil Code. (Mong and Tanaka 2002:1049) Table 4-2 shows the summary of prospective scope of Japanese assistance, which is agreed between two countries and is to be formulated as JICA projects. (JICA 1998, 2002)

**Table 4-2 Prospect scope of Japanese aid agreed in 1999**

Targeted area of the projects	Project goals
Reinforcement of the legislation	<ul style="list-style-type: none"> <li>• Enactment of civil code and civil procedural law</li> <li>• Enactment of relating laws (e.g. the Real Property Registration Act, the Family Registration Act, the Residents Registration Act, etc.)</li> <li>• Maintenance of coherence of the civil and the criminal procedural laws</li> <li>• Training in the technique of civil code drafting for bureaucrats of the Ministry of Justice and other ministries</li> </ul>
Judicial reform	<ul style="list-style-type: none"> <li>• Improvement of procedural regulations, the court organisation act and other related laws</li> <li>• Improvement of facilities of the courts</li> <li>• Human resource development ((judges, clerks, prosecutors, judicial police officers and lawyers)</li> </ul>
Legal aid	<ul style="list-style-type: none"> <li>• Strengthen legal aid system with reference to existing Japanese system</li> </ul>
Settlement of laws	<ul style="list-style-type: none"> <li>• Enhancement of people's awareness</li> <li>• Developing human resources in the local communities</li> </ul>
Improvement of legal education/research	<ul style="list-style-type: none"> <li>• Improvement of law school education</li> <li>• Establishment of research institutions</li> </ul>

Source: prepared by the author with reference to JICA (2000)

### 4.3. JICA's civil code drafting project

#### 4.3.1. Project formulation

Based on 1999 agreement, JICA formulated the first project to provide assistance in civil code and civil procedural code drafting. The project title was *Japanese Cooperation to Support the Formulation of Key Government Policies on the Judicial System in the Republic of Cambodia*, and the period of the project was from 5 March 1999 to 4 March 2002 followed by the follow up terms starting on 5 March 2002 and ending on 4 March 2003. 'Two overall goals were identified, which was to provide JICA expertise to assist Cambodia in drafting its new Civil Code and Code of Civil Procedure, and to build up the capacity of Cambodian Judges, prosecutors, advocates and judicial personnel and officials of the Ministry of Justice.'(Mong and Tanaka 2002:1049) Table 4-3 shows the overview of the project, including its goals, project purpose, desired outputs and inputs.

**Table 4-3: Project Planning Matrix of the JICA project on civil code drafting**

OBJECTIVEA/ACTIVITIES	OBJECTIVELY VERIFYABLE INDICATORS	SOUCEES OF VERIFICATION	ASSUMPTIONS
<b>SUPER GOAL</b> Re-establishment of rule of law in Cambodia	1. Existence of laws, which are publicly known and settled 2. Existence of efficient and independent judiciary 3. Established force to enforce laws, execute judgements		
<b>OVERALL GOAL</b> Reinforcement of the legislation			
<b>PROJECT PURPOSE</b> 1. Enactment of the Civil Code and the Code of Civil Procedure 2. Development of legal experts specialised in civil law	1. Drafted civil code and code of civil procedure 2. <u>(not specified in policy documents/ not evaluated in terminal evaluation)</u>	Progress reports of Ministry of Justice of Cambodia	Efficient legislature to ratify drafted codes
<b>RESULTS/OUTPUTS</b> 1. Establishment of necessary organisation for drafting process 2. Conducting training schemes for Cambodian experts in civil law 3. Drafting civil laws both in Khmer and Japanese language through joint work of Cambodian and Japanese experts	1. Number of the organisation established 2. Number of the trainings provided 3. Number of the joint meetings carried out	Minute reports of drafting organisations JICA report on training course	Stable political condition in Cambodia Order and peace maintained
<b>IMPUTS</b> 1.1 Establishment of working group in Japan 1.2 Establishment of steering committee and study group in Cambodia 1.3 Determining duty and power of those organisations 2.1 Conducting fact-finding survey on civil law in Cambodia 2.2 Providing on-the-job trainings through workshops in Cambodia 2.3 Providing trainings in Japan 3.1 Proposing first draft by the Japanese working group 3.2 Discussion in Cambodian study group on the first draft	1. Number of the Japanese experts dispatched 2. <u>(not specified in policy documents/ not evaluated in terminal evaluation)</u> 3. <u>(not specified in policy documents/ not evaluated in terminal evaluation)</u>	JICA progress reports/ training reports Minute reports of drafting organisations Interview on implementation process	

3.3 Proposing second draft in response to the comments from Cambodian study group			
3.4 Discussion in Cambodian study group on the second draft			
3.5 Proposing final draft			
3.6 Achieving co-ordination amongst ministries and other donors			

Source: prepared by the author with reference to JICA (2002b)

#### 4.3.2. Establishment of working organisation

One of the significance in this project was the establishment of the working organisations and joint drafting process through these working organisations, although in many of the law development assistance, it now became common practice for the donors to propose complete set of legal system to implant as fast and comprehensive solution to respond urgent needs for sound legal system. (Morishima 2005:19)

In 1999 a working group responsible to produce the first draft of the two codes was established in Japan (JICA 2002b). In response the Cambodian government also formulated a steering committee, which consisted of officials from the Ministry of Justice, however because of the capacity problem of the members this committee was dissolved two years later and a new working group called study group was formed. As Mong and Tanaka argue (2002:1049), the member of the committee consisted of qualified experts, however the actual selection process was not clear. According to the interviews taken in the projects evaluation, the committee often proceeded in accordance with the political interests of the ministry.

#### 4.3.3. Drafting process through working organisation

Mong and Tanaka (2002: 1049) argue close consultation process through small groups of working committee is one of the key strategies taken in this project. They continue:

‘This was to reflect to the failure of direct transplant of western legal systems in the

Central/South American countries, which caused discrepancy between the newly established law and customary norms of the local society. Consultation process was firstly, initiated by the Japanese experts, by presenting first draft of the Code, followed by interpretation of each articles into Khmer and intensive workshops based on the draft written in the local language. This involved continuous flow of information revisions both on the substance of the articles and on the language, as well as explanations, observations, and commentary. This process formed the foundation for genuinely fruitful cooperation fulfilled by the unremitting efforts and team spirit of all participants.<sup>3</sup>

This strategy which highly values consultative process is very often emphasised in policy brief issued by the Japanese ministries.<sup>4</sup> As rationale this strategy, JICA explains that settlement of law is top priority in Japanese aid as well as establishment of laws itself, by saying: 'in order to avoid the kind of problems that had arisen in respect of a number of other draft laws prepared with assistance of other donors, which failed to be ratified by Parliament, because of lack of appropriate consultation between the foreign consultants and Cambodian legal professionals (JICA 1998) Mong and Tanaka (2002) appreciated this strategy as it contribute to match Cambodia's specific socio-economic context, customs and traditions, as well as to modernise their legal systems.

However, in reality, joint process was carried out with strong initiative by the Japanese side. Because of the delay in establishing effective working committee on the Cambodian side, due to political selection of unqualified member and/or prolonged training required to obtain sufficient capacity of the members, all drafting process had been initiated on the Japanese working group and it prepared all articles of the code as a

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<sup>4</sup> See for example, policy brief on legal technical assistance issued by Ministry of Justice of Japan. <http://www.moj.go.jp/HOUSO/LTA/lt01.html#part02> (Original in Japanese language; last accessed on 10 Nov. 2005) Also, JICA newsletter *Frontier*, July 2002. [http://www.jica.go.jp/jicapark/frontier/0206/02\\_b.html](http://www.jica.go.jp/jicapark/frontier/0206/02_b.html) (Original in Japanese language; last accessed on 10 Nov. 2005)

first draft. Joint procedure with the Cambodian working committee was followed it. The main task of that joint process was to fix terminology in Khmer language. However, in the first two years of the project, this joint process had been hindered due to the delay in Cambodian working group establishment. (Table 4-4)

During the civil war, Cambodia lost most of knowledgeable legal experts as well as legal documents which both serve as source of knowledge on its legal culture, tradition and terminology. Therefore, the working organisations on both sides were particularly concerned to explore and determine most precise terminology in Khmer language and ensure uniformity in the legal texts. 'This is especially important to developing countries where various donors are assisting with drafting laws, using variety of terms on the basis of translations from the original languages.' (Mong and Tanaka 2002:1050)

**Table4-4: Number of the meeting of drafting working committee**

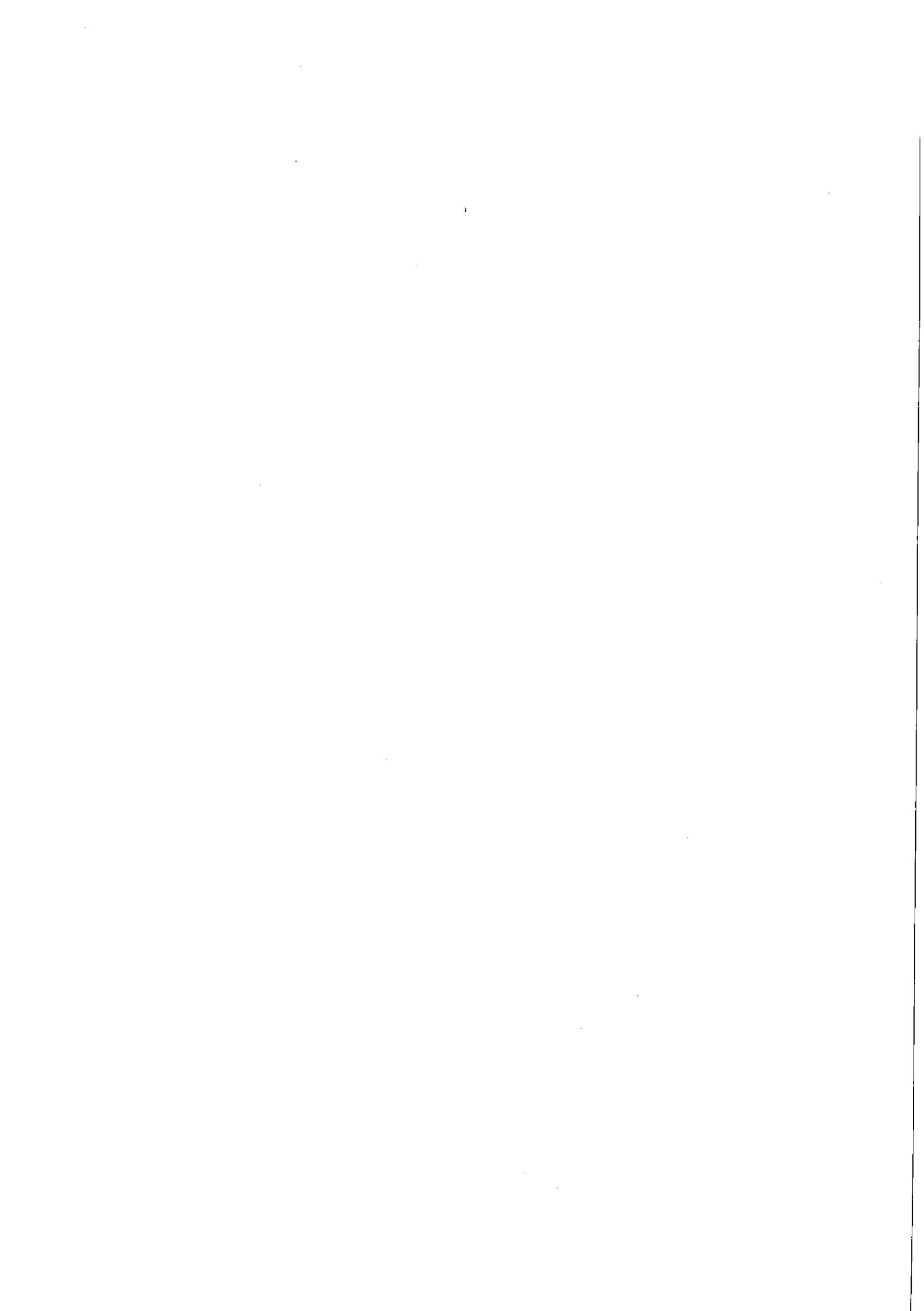
		03/1999-03/ 2000	04/2000-03/ 2001	04/2001-03 /2002
Japanese working group meeting	On civil code	13	13	14
	On code of civil procedure	13	13	16
Joint workshop	On civil code	5	9	0
	On code of civil procedure	4	4	4
Joint meeting on terminology		1	1	68

Source: JICA (2002b), translated by the author

#### 4.3.4. Training scheme for Cambodian experts

As already discussed above, the first two years of the project had to be focused on capacity building of the Cambodian counter part. In 1999, 15 Cambodian experts were invited to Japan to join the on-the-job training scheme in Japanese judiciary. In the following years, number of the training was increased from once to twice a year. The workshops conducted in the drafting process also contributed capacity building as

on-the-job training. Training scheme had been designed by JICA, with reference to the request and comment from the Cambodian working committee members. (JICA 2002b)



## **5. ANALYSIS AND FINDINGS**

### **5.1. Introduction**

This research paper firstly presented model of ROL paradigm, discovering its nature, practice, and challenges. Secondly, it investigated further on the mechanism why coercive policy transfer in a form of implant of a certain legal system to another is very much likely to happen in the context of legal development assistance. In reference to the policy process of the JICA's ROL projects in Cambodia reviewed in the chapter four, this chapter undertakes an analysis and present the findings of the research; after which attempts will be made to answer the research questions.

### **5.2. Analysis and findings on Japanese philosophy and its new approach to ROL project**

#### **5.2.1. JICA's definition of rule of law**

As reviewed in the chapter four, Japanese experience of adopting foreign legal system and its long and anfractuous process to settle such law fully into the Japanese society, have often been referred to justify the negative aspects of direct transfer of 'success story' in other context. Based on this criticism, Japan tried to find sound justification for their strategy, which aims to allow optimal independence of the recipient country, in this case, Cambodia.

However, close examination of the discourse on that strategy, one may found apparent inconsistency. As fond in Mong and Tanaka's (2002) argument, arguing Japanese experience is one of the success stories to strategically imported foreign legal systems by own initiatives and emphasising importance of such independence and ownership of the process by the recipient country, however, they meanwhile argue that 'it is this experience that especially qualifies Japanese lawyers to advise individual Asian countries as to which legal system might vest suit their needs and as to which problems

might arise in adopting a particular legal model.' (Mong and Tanaka 2002:1048) In fact, such argument encourages Japanese directive role in the law reform process with little independence of Cambodia.

Same argumentation is to be found also in JICA policy document. In the report of the preliminary study of ROL project in Cambodia, it suggested that Japan should present a model, which counters Western model of modernised legal system, showing that Western standard and its system to apply such standard are not always to be accepted universally nor uniformly. (JICA 1998:132) In this regard, however, if the Japanese role is supposed to propose alternative model, it will not mean to maximise independence of the recipient state, but merely to reinforce the conventional approach, by forcing policy transfer of the different model of legal system.

Subsequently, cultural pluralism and definition of ROL is another key concern. No one can deny the importance to incorporate cultural values into modern laws to establish sound ROL taking its root deep in the society. However, practitioners of the ROL projects also have to be cautious about dogmatic use of the term 'culture' or 'value'. Otto (2002:27) argues that 'international academic research about developing country's legal systems ...has suffered from stereotypical assumptions that lack of a factual basis.' He criticised that even in the context that one argues importance to respect indigenous culture and values, it is quite likely to be given stereotypes and standard judgement to development countries without sound 'socio-legal, multidisciplinary research, including the sociology and anthropology of law, political science, public administration, economics and, last but not least, history. (Otto 2002:38) Only on the strength of such research with sufficient factual basis, consequently, adequacy of indigenous norms based on the value and culture should be examined carefully.

In Japanese case, for example, it is claimed that despite its repeated transplant of German, British and US legal system, Japan preserves Asian legal culture to a certain

extent, derived from China especially in terms of defining relationship between citizens and the state. (Bishop2003) However, it is notable that transplanted Western legal system greatly contributed to lead Japanese economic growth by endowing environment of sound market system and means of dispute resolution.(Ohnesourge 2003) Thus, in the twenties century, most of the society have indeed ‘undergone major social changes and upheavals. These societies have become differentiated in terms of social and ...and quite fragmented, rather than being homogenous’ (Otto 2003:29)

Too much emphasis on alternative culture and value in defining rule of law may threaten ROL itself, allowing arbitral legislation either by the government or a certain powerful group, claiming such legislation is based on their cultural values. In Cambodia, ‘the government... is reportedly moving to enact an NGO law to control the activities of human rights NGOs that are critical of the government.(JICA 2002a:156) Thus such situation is rather “rule *by* laws” by the government, which must be avoided through ROL system.

Accordingly, it is not a primal importance to question ROL definition, consisting of universally accepted principles, whether they are in accordance with own existing norms claimed to be based on culture and value. This is to say that practitioners do not have to choose one from either ROL principles or own indigenous norms to exercise pluralism in culture and value. On the contrary, such universally accepted ROL principles are critical condition to protect individual human rights, which ultimately contribute to cultural pluralism. It is very much crucial under the post-conflict context of Cambodia, because, as a result of civil war, its society is very much fragmented and political power structure is unequal as well as very much complex and it is often manipulated rule *by* law to be rule *of* law.

#### 5.2.2. Cambodia’s definition of rule of law

In this decade, Cambodia has been receiving various legal and judicial reforms aiming to bring rule of law in the country. In the initial stage of this process, it is assumed that Cambodia itself did not have much independence to formulate own strategy on the reforms of legal and judicial systems as well as to design those programmes provided by the donors. Although the Consultative Group Meeting for Cambodia (CG) has been held annually since 1993, with attendance of major donors and concerning ministries and NGOs in Cambodia, lack of consistent strategy and effective donor coordination still remains as critical issue.

In 2001, the Steering Committee for Legal and Judicial Reform under the Ministry of Commerce issued a first report on its strategy, titled "*Legal and Judicial Reform Strategy for Cambodia*" This report (MOC 2001)<sup>5</sup> critically assesses these ten-year effort of reforms, arguing that 'past assessments have shown that although many donors have been actively involved in legal and judicial reforms in Cambodia, there is a perception that the considerable resources which have been so far applied in the process have not been used as effectively as they might have been.' Therefore, it recalls urgent formulation of Cambodian strategy on how to reform its legal and judicial system through donor projects. (MOC 2001) This is a clear message that the government of Cambodia sets priority to avoid delay in re-establishing ROL. In the following paragraph, the report strongly recommends to adopt a sector wide approach to legal and judicial reform in order to maximise the benefits of donor aid projects, especially one lead by World Bank. (MOC 2001)

Accordingly, three objectives of rule of law project, which Cambodia values as foundation for its strategy has been presented in the report; (1) to maximise "competitive advantages" of Cambodian economy; (2) to emphasise the partnership

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<sup>5</sup> Available at [http://www.moc.gov.kh/laws\\_regulation/legal\\_reform\\_strategy-fnal\\_draft.htm](http://www.moc.gov.kh/laws_regulation/legal_reform_strategy-fnal_draft.htm) (last accessed 11 Nov. 2005)

between the public sector and civil society; (3) to deliver capacity building support to state and non-state organisations. (MOC 2001:3)

Needless to say that it is premature to judge Cambodia's view to ROL only from this document, since it was prepared under the Ministry of Commerce so that its priority may differ from the one in the context of civil law reforms. However, it still holds some significance as the first attempt of the Cambodian government to show its strategy in concrete manner. Thus, as observed here, discrepancy may have existed between Japanese side and Cambodian side, since the priority of the Cambodian side in the ROL project seems to be establishment of comprehensive, sound legal and judicial system without any delay, and they are rather reluctant to go back to question more fundamental issues such as definition of the scope of ROL.

On this very point the difficulty of JICA's alternative approach lies. Although JICA aims to maximise independence of Cambodia, however, Cambodia itself prefer to accept ready-for-use package of legal reform as fastest solution. Thus as Golub (2003) argues, departure from conventional approach to ROL requires perceptual change from regarding legal system as a solid, transferable tool to bring positive change in society on the recipient side as well as on the donor side. Alternatively, Golub suggested "Legal Empowerment" approach which does not have model but proposes a set of the process to go through, which ultimately to bring social change. Process of Legal Empowerment is featured by 'prioritising the needs ad concerns of the disadvantaged; emphasising civil society, including legal services and development NGOs, as well as community based groups; using whatever forms (often not the courts) the poor can best access in specific situations; encouraging supportive rather than lead role for lawyers; cooperating with government whenever possible, but pressuring it where necessary; using community organising or group formation; developing paralegal resources; integrating main socioeconomic development work; and building on community level operations to

enable the poor to inform or influence systemic change in laws, policies, and state institutions.' (Golub 2003:37)

#### 5.2.3. Criteria for assessing degree of ROL

As JICA (2002a) itself admits in the terminal evaluation report<sup>6</sup>, the comprehensive evaluation methodology for its ROL projects have not yet established in the JICA ROL project. In reference to the PPM previously presented in the chapter four, the terminal evaluation report failed to present clear criteria for evaluation and missed out some of the crucial indicators to evaluate the project's impact on its overall goal.

As well as the technical issue how to evaluate the impact of law making process, problematic inconsistency in JICA's approach to ROL itself. This is to say that, although it defines ROL from the ends which includes Cambodia's independence, pluralism in value in addition to the universally accepted principles (e.g. supremacy of law), on evaluation it avoid to propose own criteria to assess the degree of achievement to such goals, but instead employs institutional checklist for an assessment.

#### 5.2.4. Encouraging factor for policy transfer

As Carothers (2003) argues, ROL is 'an area of great conceptual and practical complexity,' and requires understandings on 'how law functions in society, the roles it plays, and how it can change'. (Carothers 2003:12) It is difficult for the foreign aid providers to gain such knowledge on the society whose context is not fully understood. In practice, it is not easy for the aid agencies to conduct minute legal anthropological survey additional to preliminary survey of the project itself because of time and resource constrain.

It is also difficult for the recipient side as well to gain such knowledge. Like the context

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<sup>6</sup> The terminal evaluation of the project in question should be regarded as internal evaluation because of the composition of evaluation team

of Cambodia, the country greatly suffering from shortage of well trained human resources, effective administrative structure and resources due the destruction in the war time. Therefore, it does not have accumulated comprehensive and insightful information on its own society. As Dolowitz and Marsh (1996) argues, perception of such uncertainty about the causal relationships, and effects of the activities, may serve as an encouraging environment for the recipient state to accept direct transfer of “best practices” identified by the donor.

Consequently, facing great uncertainty, lack of knowledge, and particularly in Cambodian case, shortage of human resources, it is very much likely for Cambodia to welcome transplant of the modernised legal system from Europe or the United States.

### 5.3. Analysis on the project implementation

#### 5.3.1. Effectiveness of joint work by the working groups

Joint work by Cambodia-Japan working group forms the core main methods of implementation, employed to respect the independence of Cambodia. The drafting process was supposed to be initiated by the Japanese working group by proposing first draft of the articles, and followed by presentation and explanation of the drafts in the joint meeting with the Cambodian study group for the examination of the adequacy in legal terminology, or of article itself. JICA positively emphasise the importance of this process, arguing that ‘Since this assistance method is different from the previous methods applied by western countries, it is drawing the attention of many countries and assistance organisations. It has been highly evaluated as a method of maintaining objectivity, neutrality, and a diversity of values.’ (JICA 2002)

Aragaki (2004) also argues that these joint processes brought significant benefits to Cambodia. Those are firstly, by encouraging initiatives from Cambodian side, it serves objectives to build capacity amongst Cambodian specialists. Secondly, careful drafting

by intensive meeting of the working group and study group contributes to form people's awareness to the law and understandings towards rule of law.

Meanwhile, Cambodian counterpart has also appreciated this joint process in general. One of the members of Cambodian study group stated in the interview<sup>7</sup> carried out in the end of the project that it is recognised amongst Cambodian members that these joint processes are precious opportunity for the Cambodian experts to gain full understandings on the terminology used in the article, and meaning and necessity of the articles based on careful research and examination, which are essential for the further independent law drafting by Cambodia.

On the other hand, however, there is criticism in Cambodia that it took too long for codification. The first two years of project have spent only in establishing such joint workshops and making them capable for the joint work, because of the problems in selection of members and unexpected urgent needs for trainings due to scare of human resources of Cambodian side. (JICA 202b) Joint working process also took considerable time to translate the huge volume of original drafts of the civil code and civil procedural law partly due to the lack of interpreters in Cambodia. (JICA 2002b) As to the drafting process, however, one of the Japanese workshop members pointed out that since civil code is supposed to take roots in culture, custom and tradition of the society, it is appropriate to take optimal time in the joint process of drafting it.<sup>8</sup>

Accordingly, selection of the members is one of the challenges to overcome in the future projects to avoid unnecessary delay in the projects. Current difficulties lies in little transparency of the member selection process of the Cambodian side (JICA 2002b), which is often done out of political interests so that make it fragile to the political

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<sup>7</sup> Interviewee was a Cambodian legal expert. In JICA's minutes report on the interviews taken in the project terminal evaluation in 2003.

<sup>8</sup> Interviewee was a Japanese legal expert. In JICA's minutes report on the interviews taken in the project terminal evaluation in 2003.

situation. Another issue brought for the point for improvement is the importance of assessment on the capacity of counterpart institutions prior to the stage of project designing. In spite of the fact that most of the developing or post –conflict context has limited administrative capacity, JICA did not either collected enough information or build necessary strategy of the implementation methodology prior to the project, therefore unexpected delay in joint drafting process has occurred. Even in the case of very limited capacity of the counterpart, if one fully understands the weakness on the institution, it will be manageable through careful goal setting, determination of the project period, and distribution of the human resources. (JICA 2002b)

#### 5.3.2. Effectiveness of training scheme for capacity building

Providing training scheme for the capacity building on law drafting for Cambodian experts is another pillar of the methods of implementation. Contribution of the training scheme for capacity building of the working group members was highly appreciated both by the Cambodian and Japanese side. (JICA 2002b) Under this project, training schemes limited their area to civil code and civil procedural code drafting.

However, to fully exercise the JICA's principle to respect Cambodian independence further in the future projects, such capacity building training should be expand the counterpart from legal experts and ministry officers to NGOs workers, community workers or social workers to make the drafted law and enacted law assimilated and actively exercised within the society.

#### 5.3.3. Concluding remarks on the project implementation

As repeatedly referred, the rationale of these two implementation method is to maximise Cambodian independence and to allow pluralism in value in the drafting process of civil code. One of the obvious weaknesses of the JICA's implementation process using these two methods is lack of necessary information on the capacity of Cambodian counterpart,

and little power to intervene political power games happening in the counterpart working group. On the other hand, throughout whole three year process, agreement and acceptance by the Cambodian side has been fully respected. Due to the unexpected problems, JICA changed some of the strategies, plans, and schedule in the middle of the project, but based on the agreement with or request from the Cambodian side. In this sense, the project implementation was reflective to the real situation and served as “leaning process” to a certain extent. Nature as the joint work and closer network and trust build through those joint work shops must have contributed to such project planning.

## 6. CONCLUSION

In providing legal assistance programme in Cambodia, JICA have set basic principles which aim to respect Cambodian independence in the project process, and to allow cultural pluralism in the selection of the legal systems to be established in Cambodia to ensure the rule of law. Therefore the rationale underlying in the JICA's project design, was supposed to be based on the ROL principles, which Cambodia itself chose to be fit in its social, political, economic, and legal context.

Subsequently, JICA identified its role to provide an enabling environment for Cambodia, by proposing alternative model of modernised legal system modelled by Japanese legal systems, emphasising its strategic advantage derived from historical experience. However, in practice, this approach failed to establish more participatory, alternative approach, but resulted in merely presenting another, not alternative, model of legal system based on the Japanese experience.

Further more, too much emphasis on culture and value in defining rule of law may threaten ROL itself, allowing arbitrary legislation either by the government, who claims legitimacy of such law making based on its 'culture' or 'value'. This is rather "*rule by laws*" by the government, which must be avoided through ROL system.

Accordingly, it is not a primal importance to invent Cambodian definition of ROL in accordance with own culture or value. Universally accepted ROL principles are not concepts conflict against indigenous norms and values. On the contrary, ROL is critical condition to protect individual human rights, which ultimately contribute to cultural pluralism. It is very much crucial under the post-conflict context of Cambodia.

When we look at the practice of JICA's rule of law projects, it also aimed to establish more participatory method for law drafting, by formulating and utilising joint working group. This approach was highly appreciated from the Cambodian side as well,

contributing capacity building of the Cambodian counterparts. Such participatory joint process contributed to make newly drafted law fully understood and adjusted to the Cambodian context. However, there was criticism against this joint process, since it requires long, time-consuming and in the end, rather costly processes..

Admitting strong needs for establishing sound legal system as soon as possible, as an essential condition for development, it is also requires special attention to the Cambodian context which is likely to welcome direct policy transfer due to constraints derived from its post-colonial, post-communist' and 'post-conflict' context.

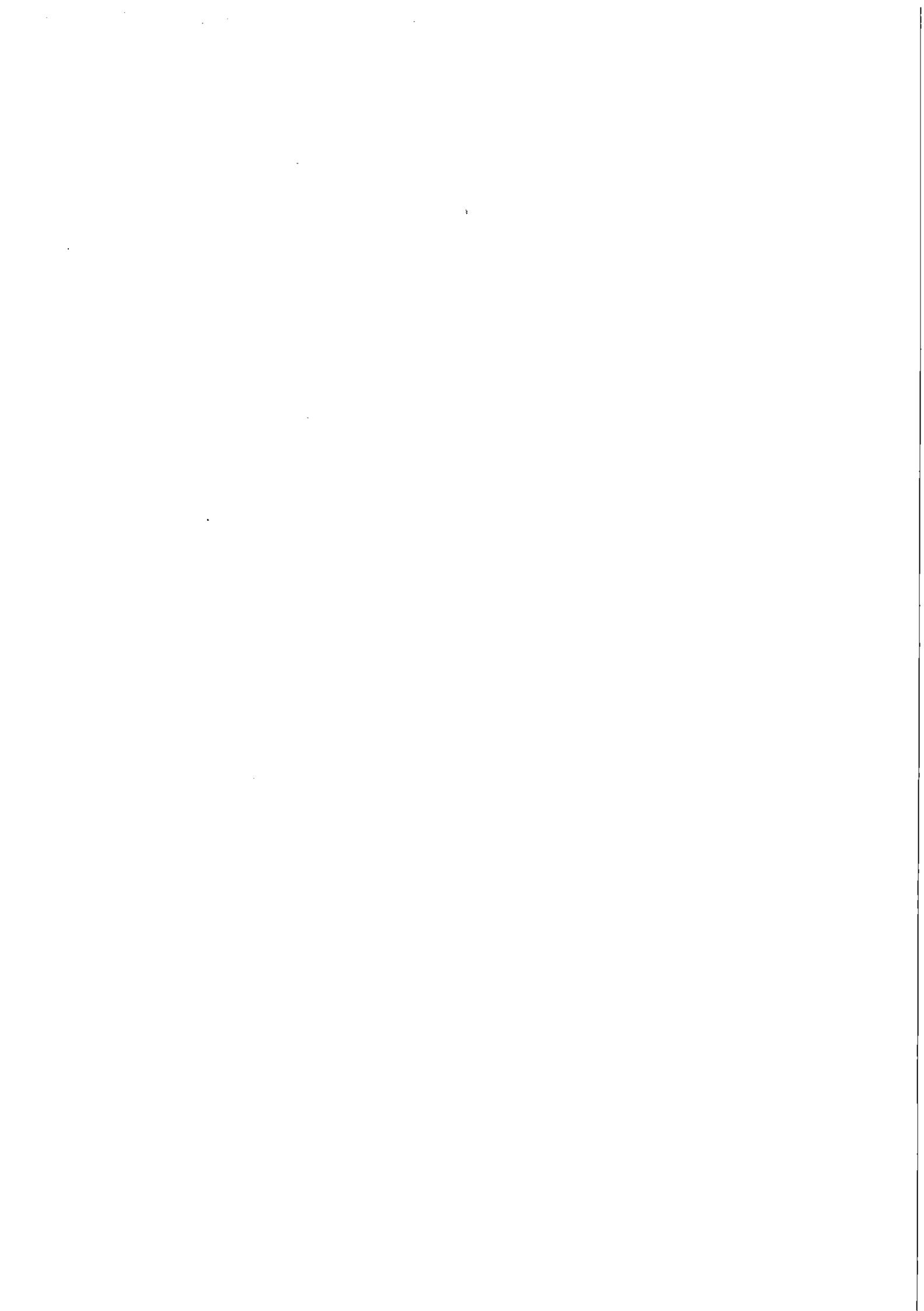
Consequently, JICA should continue its attempt to take more participatory approach, however, scope of the 'participation' should be expanded from legal experts and ministry officers to NGOs workers, community workers or social workers to make the drafted and enacted law assimilated and actively exercised within the society.

For this purpose, careful situation assessment prior to the project planning is to be indispensable. Especially, the information on the capacity of counterpart is crucial, since it is one of the most influential determinant of the success or failure of the project. Under the context of developing country, which have been burdened by multiple adverse legacies as Cambodia, capacity of state institutions tend to be very limited, but those are to be the counterparts to operate projects in corporation with. Even if the capacity of the counterparts is limited, with sufficient information about its weakness and current situation, it is possible to formulate strategic planning to overcome difficulties resulting from such ill capacities. Additionally, in case of legal assistance, scope of activities may not be limited to one sector or one ministry. Coordination of several counterparts is to be another crucial task in project management.

Hence, through this experience of ROL projects in Cambodia, Japan has been identified the unique principles which is ascribed from its historical experience. Those were the

principles trying to avoid transplant of a model legal system, and encouraging the recipient country to make their own choice by themselves in accordance with its culture, tradition, or value. However, since it was the first attempt for the government of Japan to make a commitment to legal assistance programme, effective methodology and chain of rationale were not effectively established, so that it employed conventional methodology to certain extent. Therefore, there were inconsistency between its philosophy on the project and its project planning in planning.

Thus, first, it is essential to accumulate vital information within the organisation in Japan, by carrying out long-term impact assessment of the project and preliminary situation assessment including broader assessment on potential counterpart other than legal experts. Then based on such information, it is highly required to establish long-term strategic plan on how to implement ROL projects from the new Japanese approach.



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