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Role of Law in Development / Peacebuilding[1]

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1. Introduction

As seen in the Comprehensive Development Approach emphasized by the World Bank, human development approach that the UNDP has promoted since 90s, as well as Institutional school approach for development economy, the governance become more and more important element in development and peacebuilding efforts. Especially, the development of legal system, the normative component of good governance, has obtained increasing attention. Law, however, is less investigated subject in relation to development and peacebuilding comparing to economics, education or politics.

There are two points that should be considered for researching the role of law in development and peacebuilding. First, how law should be located in the international development cooperation study? Second, what is the relation between "law in development" and "law in peacebuilding", and what analytical framework can be constructed?

This paper will consider the outline of researching approach for "law and development" and "law and peacebuilding", as the starting point of further systematic research and education of those subjects.

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[1] The Graduate School of International Development (hereinafter, GSID), Nagoya University, offers some lectures relevant to this subject, namely "Law and development studies", "Asian Law" (on the law in non-European countries), and "Special lecture on peacebuilding" (on the rule of law in peacebuilding). The author of this paper is in charge of those lectures, and now researching role of law in development process (in Indonesia) and peacebuilding process (in Aceh and East Timor).

2. Role of law in development context

(1) Law and Development Studies

Law and Development Studies (hereinafter, LDS) is a unique research subject with two different but closely interdependent areas, namely practice-oriented research and theoretical research, both of which are essential to international development cooperation.

At first, the LDS as a practice-oriented subject aims to locate each reform in legislation or legal institutions within the more general socio-economic development programs. This practice-oriented side of LDS stems from an academic movement in the United States in the 1960s. It was when the modernization and development of the Third World and international assistance for it became international agenda[2]. At that time, many law scholars tried to identify relationships between law and society as well as functions of legal systems to promote modernization in developing countries[3].

The LDS is conducted with assumption that an underdeveloped or ill-functioned legal system impedes national development in one country. Thus, in 1960s, the LDS began with the hypothesis that by transplanting Western legal systems or norms (especially, the US ones) to non-Western developing countries (mainly Latin America and Indochina countries), the latter could achieve socio-economic transformation by removing traditional barrier for development, and subsequently modern industrialization by changing its economic behavior, as Western countries did in the past. This hypothesis fits the unilineal (one line) theory of development, whereby the goal of development is to emulate the trajectory of western industrialized countries. However, the law and development movement collapsed in the late 1970s and left few, if any positive, results to target countries, as it encountered methodological problems and failed to garner new research grants. Especially, the LDS's methodology was criticized for its ethnocentric conception of Western European law.

After the decline of the LDS, there were several academic streams on the role of law in the development. One of those is the dependency approach. According to dependency approach, the underdevelopment was structural of the international relation, therefore the realization of distributive

[2] UN declared the "United Nations Development Decade" on 1961 until 1970.

[3] For the history of the emergence and the decline of the law and development study in 1960s, see Trubek=Garanter (1974).

justice in the international relation is important[4]. In this approach law is the tool for realizing redistribution among countries. Other one is the neo-liberal market approach. This approach strictly limits the state intervention to the market. So the role of law is just securing private transaction and property rights by defining rules. In addition, the Third World Jurisprudence and the legal pluralism have contributed to correct ethnocentric view of western law in the LDS.

The LDS revived again after the end of the Cold War and the globalization of economy in the 1990s. Many countries, even socialist countries, have been urgently required to change their legal systems in order to make their legal systems more harmonious to the global market economy system. So, nowadays, targets of research and practice of the LDS are ex-socialist countries, transitional countries and post-authoritarian countries. This movement is called "New Law and Development Study[5]."

In the new LDS, donor countries and agencies become more diverse than those of the past LDS. Actors that involve in the new LDS as donors are not only the United States, but various western countries, Japan and Korea, international organizations, NGOs and even private law firms. The area of assistance also diverse, too (for example, legislation drafting, judicial reform, legal infrastructure, human resource development, and election support). As a result, there is competition among the donors in the recipient country. This means that the recipient country can have more choice and ownership in their legal reform. However, problems occur, too. One of those problems is the conflict between laws that different donors assisted. For example, in Cambodia, the draft of civil code assisted by Japan partly contradicted to the draft of land law assisted by the ADB. Therefore, the coordination among donor is very important in the legal assistance.

One of the methodological features of the new LDS is that non-western countries' unique legal situations should be taken into account in legal reform. In order to do this, academic knowledge on law in developing countries, legal pluralism, legal culture theory and so on should be included in the planning process. This is not an easy task, but very important in order to overcome the western-centered limitations of the LDS in the past.

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[4] This understanding on unfair distribution between rich and poor countries led the declaration on the New International Economic Order (NIEO) in 1974 and the Declaration on the Rights to Development by the General Assembly in 1986.

[5] For the comprehensive analysis on the new law and development analysis, see Trubek=Santos (2006).

Secondly, theoretical aspect of the LDS includes, for example, comparative legal study covering non-western as well as western legal systems, theoretical analysis of the transplantation process of a rule or rules between different legal systems, and detailed explanation of socio-legal interaction.

As mentioned above, the LDS has a very practical aim of integrating law and socio-economic development. In order to approach this practical task effectively, it is necessary to seek a theoretical framework and knowledge to compare different legal systems. A particularly important but hitherto neglected area of study is the reconstruction of broader comparative law theory extending to non-western countries. These are, for example, the "institutional approach" that emphasis the role of institution in economic development, and the "human security" approach that emphasizes the importance of the human development. Therefore, in the NLDM, "market can fail and compensatory intervention is necessary" (institutional approach), and "the idea of "development" means more than economic growth and must be defined to include "human freedom"" (human security approach). Along with these ideas, one of the most important goals of the NLDM is to achieve the "good governance" in the recipient countries.

One of the practical applications of the LDS is international cooperation in the legal field[6], This international legal cooperation is, in other words, an attempt to transplant or export certain legal systems or norms of one country to other different systems. In this practical activity, it is necessary to examine the legal transplant theory as a methodology in comparative law. This is a dynamic aspect of comparative law that focuses on spread and movement of law.

If we do not pay sufficient attention to theoretical investigation in the practice of the LDS, discord or estrangement between law and society is more likely to occur, resulting in failure of the reform. Of course, theoretical research cannot guarantee 100 percent success of social projects covering complicated human relations. However, as researchers engaging in LDS as a social experiment, we have a strong responsibility to maximize the likelihood of success. Therefore, theory and practice of LDS cannot be separated.

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[6] The Center of Asian Legal Exchange, Nagoya University is playing a leading role in the Japanese international cooperation in the legal field. Target countries include Cambodia, Laos, Mongolia, Indonesia, Uzbekistan, Vietnam and East Timor. Many researchers, students and alumni of the GSID also participate in these activities.

Thus, the role of law in the development might be located in context of the more comprehensive development cooperation efforts. There are three main categories of professionals involved in the LDS, namely legal practitioners, experts in certain area study and program coordinator in international development cooperation. Their roles in the LDS are as follows:

a. Legal practitioners

Legal practitioners play an important role in producing concrete laws or rules, as well as improving implementation of existing legal systems. To successfully carry out such work, professionals require appropriate expert knowledge and experience. Such expertise will consolidate the partnership among law professionals from both recipient and donor sides of legal transplant.

b. Area study experts

Area study experts (area experts) identify and analyze socio-economic problems in a given geographical area, focusing on relations between law and society. Observation and analysis by area experts will be shared with legal practitioners and program coordinators, and then utilized in practice. Area experts should have deep knowledge not only of the area's legal system but also of its society, economy and history.

c. Program coordinator in international cooperation

Program coordinators plan and set up the comprehensive socio-economic development program. Program coordinators should understand the importance of the legal system in development and incorporate legal development projects into the overall program. Moreover, program coordinators must be able to cooperate with legal practitioners and area experts using knowledge about LDS.

It is unrealistic to expect a single person to have all the above capacities. Therefore, the tasks in international legal cooperation should be divided among appropriate specialist professionals[7].

3. Analytical framework of the rule of law in peacebuilding

[7] The law school can train and produce legal practitioners more effectively than the higher education institutes focusing international development cooperation such as the GSID. GSID will focus on training and producing area experts and program coordinators who are well versed in socio-economic situations of developing countries. With experts and researchers on various aspects of development, GSID offers an ideal institutional setting for cultivating LDS professionals.

UNDP emphasizes the importance of legal reform for the peacebuilding effort and subsequent development as: "the failure to reform the justice and security sector in a crisis and post-conflict country will perpetuate the cycle of continued injustices and criminality and will be unable to prevent conflicts from re-emerging, hence slowing down overall development efforts. This is equally important when such a country has turned the page of the immediate post-crisis period and progresses towards the normalization of its social relationships." (UNDP 2005: 15)

"Law and peacebuilding" is, however, a much newer academic subject than "law and development." Significance of legal system in the peacebuilding process has caught attention of international aid partners only since the end of the Cold War[8].

There are two reasons of increasing interest to the legal system in peacebuilding effort. The first reason is related to the transformation of the nature of armed conflicts. Second reason is the expansion of the UN role in the peacebuilding process.

On the first point, the goal of peacebuilding effort in the Cold War era was largely to resolve the international armed conflict that background was the ideological confrontation (Socialist ideology and Capitalist ideology, and sometimes those armed conflict were the proxy war between the superpowers). Since 1990s, however, the task of peacebuilding project is to reconcile the internal armed conflicts with complex hostilities among several parties cloven by ethnic and religious affiliations (complex conflict). Therefore, the critical importance of the peacebuilding effort for those complex conflicts is the state-building after the peace agreement. In other words, it is essential to establish legal system that is able to provide fair and common rules to secure the peaceful coexistence of conflicting parties, and direct them to new nation building with democratic way.

On the second point, the transitional authority scheme by the United Nations has been common since Cambodian peacekeeping operation (UNTAC, 1992-1993). After Cambodian PKO, the UN employs this transitional authority scheme partly in Kosovo (UNMIK) and Afghanistan (UNAMA), and then the PKO for East Timor (UNTAET, 1999-2002) is the biggest transitional authority by the UN both in its scale and in its mandate[9]. In this scheme, the UN transitional authority has the quasi-sovereign

[8] See Chesterman (2005).

[9] Article 1 of United Nations Security Council Resolution 1271 (1999) adapted on 25 October 1999

power over the territory, and has responsibility to all administrative, legislative and judicial issues (this power includes changing governmental system in the territory). Therefore, the reformation of legal system is the key of peacebuilding process led by the transitional authority.

It is in contrast with the treatment of legal issue in the past post-conflict peace building effort. In the past conflicts, contrasting to current transitional authority scheme, peace-building process has been considered internal affairs because post-conflict society was ruled by a winning group or state (either side of the Cold War). Thus, international society paid less attention to the role of law in post-conflict societies because intervening to legal issue by the other party might constitute the contravention of the noninterference principle. There were, actually, a few exceptional examples in which international organizations exerted direct governance for certain territories, e.g. the League of Nations' administration of the Saar Basin from 1920 to 1935, and the UNTEA (UN Temporary Executive Authority) for West New Guinea from 1962 to 1963[10]. In these cases, however, international organizations carried its duty just as a temporary occupier of the territory, so they did not have competency to decide permanent government structure of the territory in accordance with international law.

As the ultimate goal of peacebuilding is establishing new state order from scratch, "law and peacebuilding" shall be a very long term program for state-building. In addition to the duration of program, "law and peacebuilding" also covers extremely wide range of issues. In a weak state after armed conflict, on the one hand, informal legal system (especially, in local community level) plays larger role to maintain social order than normal state, but, at the same time, there are also strong international intervention to the legal reform issues (such as the requirement for international human right standard, or internationally acceptable economic regulations in accordance with WTO standard) in the internationalized peace building process under the UN transitional authority.

The table 1 is the matrix that represents the wide range of current "law and peacebuilding" program. The horizontal axis of the matrix shows the chronological phase from short term to long term.

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decide "to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice."

[10] See Chesterman (2004).

The short term phase may be up to 1 year after peace agreement that allows starting institutional building. The priority of justice activities in the short time phase is to secure the survival of conflict victims and to address emergency issues that will endanger peace and security. The mid term phase may be as long as 5 years and the main activities relating to justice sector are to reconstruct or newly establish functioning institutions and human resource. Finally, the long term phase may be up to 10 years. There should be justice sector reform for further development that enables sustainable peace.

The vertical axis indicates territorial size of issues concerned. If a legal problem concerns only for community level, it is categorized in local issue. Problems concerned to national legislation is second category. Finally, problems that need addressed internationally are included in third category. Table 2 shows an example of mapping of land law problems in the post-conflict society.

Table 1: Mapping the legal problem in the peacebuilding process

	up to 1 year survival/ emergency	up to 3-4 years reconstruction	up to 10 years – development/sustainable
	Short Term	Mid Term	Long Term
Local			
National			
Inter-national			

Table 2: Example - land law problem in peacebuilding program

	up to 1 year survival/ emergency	up to 3-4 years reconstruction	up to 10 years – development/sustainable
	Short Term	Mid Term	Long Term
Local	community level land dispute resolution under the absence of applicable law	land Inheritance and gender discrimination in inheritance	legal awareness of village people on their right
National	tentative allocation of land for security, humanitarian, or survival purpose	establishing functional land law system	development of land management mechanism (registration etc.)
International		negotiation with former ruling states on asset and liability	International support for development of legal system

As this table shows, the goal of longer term phase in "law and peacebuilding" project could be seen as same as the goal of "law and development" project, namely establishing and consolidating functioning legal system that is conducive for sustainable development. Further, although public law

(such as administrative law and judiciary) have been main concern in the "law and peacebuilding" because of the transitional authority scheme, but private law (such as inheritance and land law) also important in the post-conflict society in order to resolve social conflict in peaceful way and to avoid reoccurrence of physical conflict[11].

Even though the legal system development in the post-conflict society is indispensable to sustainable peace and development of that society, "law and peacebuilding" has some unique difficulties distinct from "law and development." One of these difficulties is that immediate legal measures and reconstruction of legal system usually must be implemented in the highly instable security, deep-rooted antagonism and violent oriented social condition. Furthermore, the path dependent nature of law would make it more difficult to resolve post-conflict legal problems[12].

Because the path already taken determines the possibility and desirability of potential futures, initial decisions on some legal problems will bind future possibility of legal system in the independent state. Thus, the temporary or transitional authorities in the early phase of peacebuilding have to make decision that might have strong influence over future legal system. Because, however, transitional authorities in the early phase usually lack enough democratic foundation, it is probable that such authorities hesitate or just avoid making such decision (for example, making rule on land dispute resolution rule immediately after the armed conflict)[13]. This avoidance of providing fundamental legal rule would result in accepting factual status under the conflict or anarchic situation as an accomplished fact, and then that would cause obstacles of future national development (for example, illegal occupation of land by returning refugee in post-conflict East Timor, or the unofficial traffic check points set by the neighborhood securities in Kosovo).

Table 3 shows the image how the previous decision making on legal issue will influence over later legal systems. Temporally governing system and temporally structure of governing body agreed by

[11] However, research on the private law in post-conflict society is still very limited (one of precious works is Fitzpatrick (2002)) compare to research on public law.

[12] One of the most important of law is to give predictability and to secure the legal transaction. Predictability is possible only if legally obtained rights and interest in the past are protected by authority in the future. Thus, radical change that deprives such rights and interest will lead to instability of legal system and social order.

[13] See Fitzpatrick (2002)

conflicting parties in the peace agreement will decide future public law system, such as administration system and representative system in legislative power.

Private law is not free from past decisions, too. For example, an allocation of land where the pre-conflict ownership was deprived by new government during conflict and then occupied by returning refugees after cease-fire. The decision that whether land ownerships should be recognized based on pre-conflict land registration, certification issued by new government, or the fact of occupation may become the foundation of future national land law system. The radical change of that decision that means re-deprivation of vested land right will cause the danger of new conflict.

The transitional justice in the mid term phase also has an impact on future system. For example, the dismissal, vetting and appointment of judicial (including polices and prosecutors) and administrative personnel become the base for administration system of new independent state. Thus, the style of the rule of law in post-conflict states is possibly bound by the tentative decision in the initial peacebuilding phases.

Table 3: Example of path dependent character of law

Peace Agreement	Base for future public law system	Governing principle (republic, federation etc.) Representative system (quota for conflicting parties)
Transitional Justice	Base for administration system	Dismissal, appointment and vetting of judicial and administration personnel
	Base for private law system	Resolution of land dispute, inheritance, truth and reconciliation
Sustainable peace	Rule of law	Making legal system necessary for governance.

4. Conclusion

At first, I try to define the relationship between law and development, especially what role law plays in the development effort. Then, this paper portrait that the legal assistance for developing countries and transition countries can be located in the overall development cooperation effort, at least, since 1990s (the era of new law and development study).

Secondly, through the mapping table, this paper explains that there are different legal issues in different phase and stage of peacebuilding process. In addition to this, even though law in peacebuilding process share the role with law in development to the certain extent, the path independency nature of law

make special difficulty of the legal reform in post-conflict society.

Because the analytical framework in this paper is just tentative idea about broad outline, so it is important to examine and modify this framework through concrete case study.

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