Promoting International Human Rights Standards*

Jefferson R. Plantilla

Diverse human rights education initiatives in Asia and the Pacific indicate continuing promotion of human rights at various levels and for different groups of people in the region. These initiatives maintain the hope of a better understanding and realization of human rights for most societies in the Asia-Pacific. And yet, there is an equal presence of anxiety about the sustainability of these initiatives, or the capacity of these initiatives to maintain their impact as their respective political, social and economic environments change over time.

Another area of concern is the content of human rights education. To what extent are the international human rights standards being conveyed to the people? And how are they represented—global ideas, commitments of governments, values that people already have, or local ideas?

To be able to answer these questions, one needs to reflect again and again on the human rights education experiences.

Domestic laws have in one way or the other been amended or enacted to reflect changing local needs and challenges. In some cases, the change in laws occurred due to the recognition of the need to adopt new ideas including the international human rights standards. In some cases, specific movements of people (lawyers, academics, workers of non-governmental organizations, or members of affected groups or communities) led to such changes in laws.

Similarly, jurisprudence changes over time particularly when the courts are presented with new issues that require different perspectives. Once in a while the highest courts of the countries adopt new ideas that have probably been influenced by the international human rights standards or ideas similar to what these standards stand for.

The following sections highlight some court decisions that apply international human rights standards, particularly those statements that exemplify human rights restatements in national or local contexts. The follow-

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ing sections also discuss how these court decisions support human rights education.

Importance of Court Decisions

The citation of international human rights standards by the courts in various countries in Asia and the Pacific lends great weight to the argument that human rights are not "alien" concepts in the domestic legal system. The courts, in adjudicating cases presented before them, restate human rights principles as they apply to specific issues and contexts. Some courts have clarified the meaning of particular human rights drawing from recommendations or observations of human rights treaty monitoring bodies, whose competence in interpreting the appropriate meaning of human rights under particular human rights treaties is hardly assailable.

The courts therefore are authoritative promoters of the international human rights standards by finding their relevance and applicability in specific situations at the national level. Their decisions constitute important local resources that explain the practical and appropriate meaning of the international human rights standards. As such, they are important materials for human rights education.

Consequently, courts have the influence in defining legislative and executive agendas that implement their decisions. Thus, court decisions are important content of human rights education programs that support policy or law reform.

There should, however, be serious consideration of the fact that some court decisions are not supportive of the application of international human rights standards for a variety of reasons. Such stance covers the dismissal of the UDHR as a valid reference to international law that should bind countries, the strict application of the rule that ratified international human rights instruments do not bind the courts without domestic enabling legislation.

Some court decisions are criticized for going beyond the pale of judicial function. As declared by a law professor in relation to progressive Indian Supreme Court decisions,[1]

> The role of judiciary in the protection of human rights is certainly commendable. However, in the quest for socio-economic justice the judiciary seems to overstep the limits of its judicial function and trespass into the areas assigned to the executive

> and the legislature. The need of the hour is to properly balance the judicial activism with judicial restraint!

But these views should be seen as challenges to be overcome by presenting better arguments for the application of international human rights standards as they relate to particular cases. Persistent use of international human rights standards in court cases has the possibility of getting court attention, as much as strengthening of existing judicial support for them.

In the same vein, the international human rights standards should be taught as compulsory subject in law schools and judicial training institutions. Lawyers and judges should have enough familiarity with the international human rights standards to be able to apply them in their respective work.

Legal Education and Human Rights

There has been a long-standing observation that international human rights law has hardly been given space in law education curriculums. This results in lawyers failing to argue cases based on international human rights standards and judges seeing human rights as irrelevant unless contained in domestic laws. In other words, there is no room for human rights unless couched as domestic legal provisions.

Thus the initiatives on incorporating human rights education in the curriculums of law schools and judicial training academies are most welcomed. The *Manila Declaration for a 21st Century Independent Judiciary*[2] of the Judicial Reform Network in the 21st Century (JRN21)[3] states as its principles the reaffirmation of the "core judicial independence and accountability principles enshrined in the [U]niversal [D]eclaration of [H]uman [R]ights, the United Nations Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the Beijing Declaration on Independence of the Judiciary, and recommit ourselves to their speedy and effective implementation." This statement mainstreams human rights into the functioning of the judiciary. But does human-rights-based judicial independence extend to the application of the international human rights standards in the decisions of the courts? If so, are the members of the judiciary ready to do so?

The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region adopted by a significant number of Chief Justices of

Asia-Pacific in Beijing in 1995 and then amended in Manila in 1997 provides a view on what judicial independence means in the context of the region. As a component of judicial independence, its provision on objectives of the judiciary is an important guide on the relationship of the judiciary and the international human rights standards. It states:

> OBJECTIVES OF THE JUDICIARY
>
> 10. The objectives and functions of the judiciary include the following:
>
> a) To ensure that all persons are able to live securely under the rule of law;
>
> b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
>
> c) To administer the law impartially among person[s] and between persons and the State.

Subject to appropriate consideration of the different systems and views among the judiciaries in Asia and the Pacific about the application of the international human rights standards on cases before them, JRN21 is in a proper position to translate its human-rights-laden principles (and guided by other human-rights-related declarations of the chief justices in the region) into concrete activities that support the incorporation of the international human rights standards in court decisions. This can be done in the context of JRN21's promotion of judicial reform and its aim at making

> links to existing constitutional and legal databases, ongoing and planned judicial reform projects and resource and key contact information for reformers and organizations worldwide. In addition, it will include resource links to other relevant regional and global electronic networks, databases, electronic training programs and websites, as well as key [non-governmental organizations] NGOs, regional and global organizations, donors and professional associations.[4]

JRN21 can very well facilitate the compilation and analysis of court decisions that discuss human rights. Many court decisions that applied the international human rights standards have already been summarized and published. Some of these court decisions are available online.[5] They constitute appropriate materials in understanding the views of the judiciaries in

the region about human rights, and in finding ways of further promoting, "within the proper limits of the judicial function, the observance and the attainment of human rights."

Some law schools in South Asia (Bangladesh, India, Nepal, Pakistan and Sri Lanka) established the South Asian Law Schools Forum for Human Rights (SALS Forum) in 2004[6] because of their desire to bring

> qualitative changes in our legal education systems through promoting and strengthening the understanding of the human rights education, and developing a congenial environment for a progressive outlook for mainstreaming of the human rights education at all levels with special emphasis on university legal education.

The Charter of the SALS Forum states the following objectives of the network:

> 1) To strengthen the quality of legal education and promote exchange of ideas and experiences among South Asian law schools and similar institutions in matters of legal education in general and human rights studies in particular;
>
> 2) To promote consistent development of regional human rights jurisprudence through active participation of faculties by developing common understanding on human rights issues, curriculum of the universities and teaching methodologies;
>
> 3) To ensure that legal education's vision is socially responsive to the needs of the community;
>
> j) To promote a pro-active attitude towards the development and implementation of the international and regional human rights instruments;
>
> 4) To develop and promote human rights education for the empowerment of marginalized and vulnerable sections of the society;
>
> 5) To strengthen social commitment and develop the standard of legal professionals in matters of human rights violation.[7]

The rationale for the establishment of SALS Forum is very clearly embodied in these objectives that emphasize the role of the academe in addressing issues affecting the community/country. These objectives recognize the

teaching of human rights (in various forms and comprehensiveness) in at least some South Asian law schools and state the need to learn from and improve on these experiences. SALS Forum is an appropriate response to the need for more effective incorporation of human rights education into formal legal education.

In Southeast Asia, a similar initiative was established in 2009 though not exclusively for law schools. The Southeast Asian Human Rights Studies Network (SEAHRN) is a "consortium of academic institutions which provide human rights education through study programs, research and outreach activities within the Southeast Asian region."[8] Its members include faculties and schools of law in several Southeast Asian universities.

This network has the following main objectives:

- To strengthen higher education devoted to the study of human rights in Southeast Asia through faculty and course development
- To develop deeper understanding and enhancement of human rights knowledge through collaborative research
- To achieve excellent regional academic and civil society cooperation in realizing human rights in Southeast Asia
- To conduct public advocacy through critical engagement with civil society actors, including inter-governmental bodies, in Southeast Asia.

For 2011, SEAHRN focuses on capacity-building training for emerging scholars, academics and network members through the following activities:

- Human Rights Textbooks and Teaching Guides: development by experts from different fields of human rights, development of educational materials that facilitate a more holistic learning and understanding of human rights in colleges and universities.
- Human Rights Training Workshop for Emerging Scholars: a series of capacity-building seminars for a selected number of students, educators, civil society workers, and activists from Southeast Asia to help them improve their skills and knowledge in human rights research.
- Human Rights Training for Academics and Network Members: aimed at increasing the capacities of network members and academics in doing research on human rights in Southeast Asia.

For East Asia (covering Northeast and Southeast Asia), a network of legal scholars has the potential of providing studies that relate to human rights. This network considers that the law and society in "East Asia are currently in the midst of rapid and fundamental changes... [and thus provide] fertile grounds for socio-legal research."[9] The Collaborative Research Network East Asian Law and Society (CRN-EALS) was formed in 2010 "within the Law and Society Association (LSA)[10] to provide a forum for promoting research on East Asian law and society, and disseminating its findings to a wider community of socio-legal scholarship."

Another initiative with a much broader legal education agenda provides an important opportunity in the development of law curriculums with human rights content. The Asian Law Institute (ASLI), established in 2003 by several leading law schools in Asia, aims to foster Asian legal scholarship and facilitate greater interaction among legal scholars in Asia and those working on Asian law-related issues.[11]

A new Asian network that has a role in the human rights education of members of the judiciary is the Asian Consortium for Human Rights-Based Access to Justice (HRBA2AJ). It was established in 2010 as a network of national judicial and human rights institutions, civil society organizations and academic institutions in Asia. Its members include judicial academies. And it has project on capacity-building on application of the human-rights-based approach to access to justice.[12]

Despite these existing initiatives, formal education on the application of human rights to specific issues remains underserved. Kelley Loper, Caroline Fleay and Linda Briskman report in their respective articles in this publication on the need for universities to offer human rights programs at both undergraduate and graduate levels. For the non-formal education programs, Kathryn Choules and the Asia Pacific Forum on Women, Law and Development provide examples of training initiatives for NGO workers and even members of the judiciary on how they can apply international human rights standards in their respective fields and contexts.

The Pacific experience on legal education with human rights content provides concrete proof of the importance of education in ensuring application of international human rights standards.[13]

One report states that human rights training for judges, magistrates and lawyers have contributed to the use of international human rights standards in court decisions. The report explains that[14]

> [T]hese cases have resulted in numerous court decisions in which judicial officials have shown intolerance to domestic violence, greater willingness to order more realistic financial settlements to deserted women and children and to apply human rights conventions to decision making. Judgments in Fiji, Vanuatu, Samoa, Solomon Islands and Kiribati indicate that lawyers, magistrates and judges use human rights language more often and as guidance in decision making or as the basis of arguments.

The courts in these Pacific countries have cited a number of human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CDC), International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

While courts in Asia and the Pacific exist within different legal systems and socio-cultural and political contexts, upholding human rights constitutes by and large a developing common field. A few of these court decisions are presented below to illustrate their support for human rights, and show their importance as content of human rights education.

Some Court Decisions

A limited review of decisions of the highest courts in a number of countries in Asia and the Pacific shows the application of the international human rights standards at the national level. One study of northeast Asian courts asserts diverse coverage of human rights, not preferring one set of rights (such as economic, social and cultural rights) to another set of rights (such as civil and political rights):

> There has never been any particular judicial agenda or preference of some rights over the other in adjudication of rights in the three countries (Japan, South Korea and Taiwan). Rather, human rights cases in these courts spanned from rights to vote, religious freedoms, freedom of speech, freedom of association, gender equality, to economic freedom, right of property, labor rights and right to education."[15]

A number of court decisions in the Asia-Pacific region have either explicitly upheld the application of international human rights standards or ruled in favor of protecting human rights by referring to corresponding constitutional rights and freedoms. It is also true, however, that there are court decisions that favor a less welcoming view of human rights and their international instruments.[16]

A report from the Philippines explains the support that the Philippine Supreme Court has extended to the application of the international human rights standards in the country. It explains:[17]

> As early as 1951, three years after its inception, the UDHR [Universal Declaration of Human Rights] was invoked in an alien deportation case[18] by the Supreme Court as an essential component of the "constitutional structure of world community" to characterize the freedom from arbitrary and unnecessarily prolonged detention as a customary norm. Quite radically, in another case half a century later the Supreme Court recognized the latent superiority of the UDHR over the Constitution, and its active role as a limit on the exercise of governmental authority "during the interregnum when no Bill of Rights or Constitution existed."[19] In that case of Republic v. Sandiganbayan the Court held that even though the Constitutional proscription was unavailing during the period that the 1973 Constitution had been abrogated on February 25, 1986 up to the promulgation of the Freedom Constitution weeks later, the UDHR obligated the government to respect this right of individuals, among others found in the UDHR, as subjects of international law.

In the words of the Philippine Supreme Court:[20]

> The [UDHR] … provides in its Article 17(2) that "[n]o one shall be arbitrarily deprived of his property." Although the [UDHR was not intended] as a legally binding document, being only a declaration, the Court has interpreted the [UDHR] as part of the generally accepted principles of international law and binding on the State. Thus, the revolutionary government was also obligated under international law to observe the rights of individuals under the [UDHR].

On a specific right to travel and movement, the Philippine Supreme Court stated that[21]

> The right to travel and to freedom of movement is a fundamental right guaranteed by the 1987 Constitution and the Universal Declaration of Human Rights … That right extends to all residents regardless of nationality. And "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law."

The right to return to one's country was also discussed in another case:[22]

> The right to return to one's country is not among the rights specifically guaranteed in the Bill of Rights [in the Philippine Constitution], which treats only the liberty of abode and the right to travel, but it is our well-considered view that the right to return may be considered, as a generally accepted principle of international law and, under our Constitution, is part of the law of the land [Art. II, Sec. 2 of the Constitution.] However, it is distinct and separate from the right to travel and enjoys a different protection under the International Covenant of Civil and Political Rights, i.e., against being "arbitrarily deprived" thereof [Art. 12(4).]

The Indian Supreme Court has likewise provided rules in applying international human rights standards domestically.[23] In one case,[24]

> [T]he Supreme Court rejected the argument that the woman, as a foreigner, was not afforded certain constitutional protections. Some provisions of the Indian Constitution refer to ''citizens" while others refer to ''persons". Regardless, the Court held that ''life" as used in Article 21 must be interpreted consistently with the Universal Declaration of Human Rights. Thus, Article 21 protections protect both citizens and non-citizens. Since rape is a violation of Article 21's fundamental right to life, the victim was entitled to compensation.

In a class action by Indian social activists and NGOs regarding the gang rape of a social worker, the Indian Supreme Court "looked to international law and designed rules to combat sexual harassment." A report further states that the court stated that ''[A]ny International Convention not inconsistent

with the fundamental right and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee." The report concluded:

> Thus, in India, in the absence of domestic law, gender equality should be interpreted in light of international conventions and norms. The Court looked to CEDAW when it said that ''[g]ender equality includes protection from sexual harassment and the right to work with dignity." The Court then drafted a detailed sexual harassment code and imposed a duty on employers (ostensibly both public and private) to prevent sexual harassment in the workplace and to provide a grievance option for employees.

The Indian Supreme Court grounded its decision on the basis of standards set in unincorporated international agreements, as these conventions ''elucidate and go to effectuate the fundamental rights guaranteed by our Constitution [and therefore] can be relied upon by Courts as facets of those fundamental rights and hence enforceable as such."

The Commonwealth Human Rights Initiative reported[25] a case of a mother who

> wrote a letter to the Supreme Court of India, requesting monetary compensation for the death of her 22-year-old son, who died in police custody. She claimed that her son was beaten to death. The Supreme Court took up her case.

The Indian Supreme Court was quoted to have ruled:

> "Article 9 (5) of the International Covenant on Civil and Political Rights, 1966, lays down that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. This Covenant has been ratified by India, which means that the State has undertaken to abide by its terms . . . The State has a "duty of care" to ensure that the guarantee of Article 21 is not denied to anyone. This "duty of care" is strict and admits no exceptions the Court said. The State must take responsibility by paying compensation to the near and dear ones of a person, who has been deprived of her/ his life by the wrongful acts of its agents. However, the Court affirmed that the

> State has a right to recover the compensation amount from the wrongdoers."

One should also note in this case the exercise of the so-called "epistolary jurisdiction" that allows people to file a petition to the Indian Supreme Court by simply sending a letter of request, which is then treated as writ petition. Justice P.N. Bhagwati of the Indian Supreme Court explained this novel judicial procedure:[26]

> The Supreme Court of India also felt that when any member of the public or social action group espouses the cause of the poor and the underprivileged he should be able to move the Court even by just writing a letter. It would not be right or fair to expect a person acting pro bono publico to incur expenses from his own pocket in order to go to a lawyer and prepare a regular writ petition to be filed in Court for enforcement of the fundamental rights of the poor and deprived sections of the community. In such a case then, a letter addressed by him to the Court can legitimately be regarded as an appropriate proceeding within the meaning of Articles 32 and 226 of the Constitution [of India]. The Supreme Court thus evolved what has come to be known as epistolary jurisdiction where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons. This new strategy which we evolved was a major breakthrough achieved by the Supreme Court in bringing justice closer to the large masses of the people.

The Indian Supreme Court has acted on a number of cases under its "epistolary jurisdiction." It also stated that a strict application of the rule that only affected person can seek judicial recourse would not serve justice since this rule[27]

> breaks down in the case of a person or class of persons whose fundamental right is violated but who cannot have resort to the court on account of their poverty or disability or socially or economically disadvantaged position and in such a case, therefore, the court can and must allow any member of the public acting bona fide to espouse the cause of such person or class of persons.
>
> xxx xxx xxx
>
> This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any

> procedural technicalities to stand in the way of enforcement of fundamental rights.
>
> xxx xxx xxx
>
> It is not at all obligatory that an adversarial procedure, where each party produces his own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both parties, must be followed in a proceeding under Article 32 for enforcement of a fundamental right. *(emphasis mine)*

The Nepali Supreme Court has likewise in recent years been issuing judgments that support human rights. In a case filed by an association called Friends of Needy Children (FNC) in 2004, the Nepali Supreme Court clarified the obligation of a state regarding fulfillment of child rights. The Nepali Supreme Court ruled that[28]

> 42. It is a legal and constitutional obligation and duty of the Respondents to protect the rights of the child in line with the provisions of the Bonded Labor (Prohibition) Act, 2002 A.D. (2058 B.S.) and the CRC [Convention on the Rights of the Child]. It is also an international commitment of Nepal pursuant to Nepal Treaty Act, 1990 A.D. (2047 B.S.) and Article 26 of the Constitution of the Kingdom of Nepal, 1990 A.D. (2047 B.S.).

The court also saw the importance empowering the children through education in order to help realize their rights, as the following paragraph explains:

> 44. Mere formulation of an Act and provisions of the Act cannot provide facility of education in a country like ours where poverty, illiteracy and ignorance [are] rooted with traditional and conservative ideas. Hence the provisions of the Act and the CRC alone cannot eradicate child labor. As the stakeholders and target groups of the Children Act, Bonded Labor (Prohibition) Act and the CRC are the children themselves, it is essential for the Government to facilitate them from higher level, and the stakeholders themselves should be aware towards their rights from the grassroots level. Only then, the Conventions including the CRC protecting the rights of the child and the Child Labor

(Prohibition and Regulation) Act, 2000 A.D. (2056 B.S.) could be implemented effectively.

The Bangladeshi Supreme Court has ruled that it is now "an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law."[29] But it also clarified this rule:

> Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the *corpus juris* of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. In the case of *H.M. Ershad v. Bangladesh, 2001 BLD (AD) 69,* it is held: "The national courts should not ... straightway ignore the international obligations which a country undertakes. **If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments."** In the case of *Apparel Export Promotion Council v. Chopra, AIR 1999 SC 625* it is held, "In cases involving violation of human rights, the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field." (emphasis mine)

A report from Hong Kong states that its courts cite "extensively and regularly from other common law jurisdictions, including the European Court of Human Rights as well as the jurisprudence of the United Nations treaty bodies (in particular the Human Rights Committee) authorities."[30]

From the Pacific, several court decisions show a variety of application of international human rights instruments. Several volumes of the *Pacific Human Rights Law Digest*[31] provide a review of court decisions in a number of Pacific countries that uphold human rights or restrict them.

In relation to the application of international human rights standards, one case that provides an important ruling is presented as follows:[32]

> **Life/International standards**
>
> The Tongan case of R v Vola was the first verdict in a murder case in Tongatapu in over 20 years. The court did not hesitate in applying international cases and the International Covenant on Civil and Political Rights, notwithstanding that they did not apply directly to Tonga or that Tonga had yet to ratify the covenant. It was recognised that the principles set out in the covenant and in the numerous authorities cited were reflective of the circumstances exercised in relation to the death penalty. The court was not hindered by the kingdom's non-ratification. The case illustrates the philosophical concerns of the judiciary in particular, and the wider community in general, in relation to the irreversible nature of the death penalty. Like Solomon Islands in the Kelly cases in this digest, this case marks the first clear departure from traditional non-enforceability approaches to international law in Tonga, and the growing influence of international human rights law on domestic courts.

The Kelly case in Solomon Islands involved the prosecution of a child soldier for murder in the context of the inter-ethnic fighting between the people of Malaita and Guadalcanal in 2000 that followed a coup d'etat by a civilian militia against a democratically elected government of Bartholomew Ulufa'alu. The parents of the child contested the decision to prosecute the child on ground that it was unfair and in violation of CRC. The court ruled against the appeal of the parents. While the court ruled that CRC applied only in cases of child soldiers of the "the armed forces of a country and not into an illegal paramilitary group," it emphasized the constitutional responsibility of ensuring fair trial for the child accused at every stage of the proceedings:[33]

> While Article 37 of the CRC provided safeguards for the children, it was for the court to ensure the procedure and process conformed to the provisions of the CRC. The Solomon Islands Government had the responsibility to enact legislation that would give effect to relevant international conventions. In the absence of legislation, the court would do all within its powers to protect juveniles under the CSI [Constitution of Solomon Islands] and the JOA [Juvenile Offenders Act].

Some court decisions have significance beyond the country concerned such as the so-called Mabo case in Australia[34] that settled the issue of native title in 1992. The High Court of Australia discussed the limit of the doctrine of exclusive Crown ownership of all lands in the Australian colonies. It did not support the claim that the "interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest." The court explained:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (68) See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol.2, p 23 brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

In sum, the court ruled that

> [N]ative title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to ex-

> tinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

This decision echoes a 1909 decision of the United States Supreme Court regarding the right of an indigenous person in the Philippines to his land.[35] It ruled that[36]

> [E]very presumption is and ought to be against the government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt.

This decision became the basis of the 1997 The Indigenous Peoples Rights Act, which defines native title as follows:

> Sec. 3 [l]. Native Title-- refers to pre- [Spanish] conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples], have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.

Some court decisions, however, promote a limited application of the international human rights standards. The courts may not apply the international human rights standards to particular issues (such as issues on political structure and sovereignty,[37] national security laws[38]) or limit the meaning of human rights (the rights under the Universal Declaration of Human Rights are considered merely declaratory in nature and thus non-binding).[39]

Constitution as Basis of Human Rights

One author floated the idea of "human rights constitutionalism," which is a set of normative standards by which to "assess the quality of a constitutional

system and its day-to-day operations – the human rights of each individual in the community."[40] It is grounded on the "recognition of the equal inherent dignity and nobility of each individual and a comprehensive notion of human rights." According to this perspective, a "government of human rights constitutionalism" would include the following:[41]

(1) a constitutional division of governmental power among two or more basic organs or "branches";

(2) some form of independent judicial system, with jurisdiction including cases on civil rights and liberties;

(3) regularized limits on the amount of governmental power possessed by anyone and generally, on the length of time power may be legitimately possessed. (A few Asian constitutional monarchies present partial exceptions.) Democratic elections using the secret ballot assure peaceful, routine passage from one national leader or group of leaders to the next, and encourage public agreement on the legitimacy and composition of the leadership;

(4) government authority and means of coercion under law sufficient to maintain public peace, security of person, and national security, within limits defined by the human rights of citizens and those of other countries. Rigorous restraints on military power and military involvement in government politics;

(5) government involvement in socioeconomic problem-solving in order to meet citizens' subsistence needs (e.g., food, clothing, shelter) and a life compatible with human dignity, insofar as the private sector fails to meet these needs. Property rights and economic freedom are protected insofar as they do not result in such inequitable distribution as to deny the socioeconomic rights of other citizens, particularly the least fortunate;

(6) legally protected and encouraged freedom of peaceful expression of personal and group beliefs about the meaning of human life and the universe, insofar as such expression is compatible with respectful treatment of other people in the circumstances of the specific society;

(7) a system of local autonomy showing the maximum respect for regional desires for self-governance that is compatible with human rights claims in other affected territories;

(8) procedural rights in criminal and civil justice for each citizen equal to those of all others within the national community; the stan-

dard for treatment of the most privileged members of society is applied to the least fortunate;

(9) acceptance of the constitution and human rights as the supreme law of the land, by the government and by the general public.

Many constitutions in Asia would probably contain many of these characteristics. In the case of a few Constitutions, human rights have been explicitly provided. The 1947 Japanese Constitution can be considered to be the first such document that uses the words "human rights" instead of the usual terminologies such as constitutional rights, fundamental rights, or basic rights which indicate their national (rather than international) character. Because they are "human rights," they are considered "pre-constitutional" rights.[42] This view, in effect, means that the Japanese Constitution protects the existing and "inviolable" rights, and does not create them. This idea relates to a Philippine Supreme Court decision on the "right to a balanced and healthful ecology" found in the 1987 Philippine Constitution. The court declared that[43]

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

In the case of Hong Kong, there was a deliberate act of making human rights gain domestic law status through the enactment of the Bill of Rights Ordinance (BORO) in 1989. BORO incorporates most of the rights provided in the ICCPR. But more importantly the Constitution of Hong Kong (Basic Law, 1990) incorporates international human rights instruments by providing that

> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restric-

> tions shall not contravene the provisions of the preceding paragraph of this Article. (Article 39)

It has been observed that while rights under ICCPR have been incorporated into domestic law through BORO, this is not so in the case of the rights under ICESCR.[44]

However, there are practical problems that should be noted. People may appreciate the Constitution as the only standard of rights and consequently ignore the international human rights standards. One author argues that in Japan, the courts do not regard the international human rights standards with appropriate respect. As he explains:[45]

> Japanese courts assume that the meaning, scope and effect of human rights provided under international human rights law are the same as those under the Japanese Constitution. Accordingly, if a governmental action is found to be lawful under the Japanese Constitution, it is automatically regarded as lawful under international human rights law as well.

Without proper examination of ratified international human rights instruments, the Japanese courts may virtually disregard their application or their necessity at the domestic level.[46]

This somehow reflects the observation on the character of judicial review in Northeast Asia:[47]

> The Constitutional Courts of South Korea and Taiwan have both earned acclaim for their respective judicial activism in steering democratic transitions and guarding human rights. Both courts have on average denounced legislative enactments or ruled against government actions in about one third of [their] decisions ever since democratization began in the late 1980s. Thus, a common understanding of judicial review in East Asia is that the Japanese Supreme Court is relatively conservative while the Constitutional Courts of South Korea and Taiwan are very active and even aggressive.

But the authors do not see this situation as suggesting "judicial activism," rather they see courts in Korea, Taiwan and Japan as merely reacting to the "social and political circumstances and majority demands in a rather cautious way."[48]

It is also necessary to understand that not all human rights, as internationally defined, have their corresponding counterparts in the Constitutions. A case in point is the right to education, which is not explicitly provided in the Indian Constitution. And if not for the interpretation of the Indian Supreme Court, such right would not have been properly recognized. As a report explains[49]

> The [Indian] Supreme Court held that although the right to education as such has not been guaranteed as a fundamental right under the Constitution, it becomes clear from the Preamble of the Constitution and its Directive Principles, contained in section IV, that the framers of the Constitution intended the State to provide education for its citizens. The court then relates the Directive Principle of Article 14 which requires that the state attempt to implement the right to education within its economic capacity. The court then reasons that this principle creates a constitutional right to education because education is essential to the fulfillment of the fundamental rights of dignity and life. The court links the right to education to the right to life by reasoning that to sustain life a human being requires the fulfilment of all the enabling rights which create life of dignity.

In Kiribati, the Constitution of Kiribati "does not contain an equal rights clause or a non-discrimination clause clearly making discrimination against women illegal."[50] But the ratification of an international human rights instrument (CEDAW) "may provide the only short term opportunity" to urge it (CEDAW) as basis of argument in court cases. This then provides the Kiribati courts the chance to support the non-discrimination principle that is absent in the Constitution of Kiribati.

The concept of "human rights constitutionalism" provides a set of criteria for examining Constitutions and the extent of their subscription to the international human rights standards. Court decisions, on the other hand, can provide the constitutional bases of human rights that have no explicit constitutional counterpart.

Application of Court Decisions

In 2004, the Supreme Court of India[51] declared that there is "no reason why these international [human rights conventions] and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity." It went on to state that

> 16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Art. 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Art. 141 of the Constitution.

And thus the Indian Supreme Court proceeded to state as part of its decision the guidelines more popularly known as "Vishaka Guidelines against Sexual Harassment in the Workplace."

The guidelines refer to the definition of human rights under the Protection of Human Rights Act, 1993 of India. The court declared that the guidelines "would be binding and enforceable in law until suitable legislation is enacted to occupy the field."

Since then, non-governmental organizations have been lobbying the government for the drafting of a law on sexual harassment.

The Vishaka Guidelines, aside from being a concrete basis for pressuring the government to enforce international standards on women's rights, is an example of a judicial "legislation" that should be complied with by the people.

In 2008, the Supreme Court of Bangladesh[52] declared its own set of guidelines on sexual harassment following this decision of the Indian Supreme Court. It ruled that

> [P]rotection from sexual harassment and right to education and work with dignity [are] universally recognised as basic hu-

> man rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great significance in the formulation of the guidelines to achieve this purpose.

This is one example of a court decision of a country being recognized and adopted for its significance by the court in another country.

Court decisions are also important in questioning existing laws that run counter to international human rights standards. As the cases earlier cited show, laws are not only declared unconstitutional but also in violation of ratified international human rights instruments.

The power of the courts to define how international human rights standards apply in concrete cases is helpful in addressing issues that have just recently been given attention as human rights issues. The campaign for the recognition of the rights of people living with HIV/AIDS and those belonging to the gay, lesbian, bisexual, transgender and intersex communities is an example.

Court decisions can pave the way for policy review or law reform. The Commission on AIDS in the Pacific,[53] the current negative public perception of people belonging to the gay, lesbian, bisexual, transgender and intersex communities facilitate HIV transmission, and violate the rights of these people. Another study[54] revealed the existence of repressive legal environments in majority of the Asia-Pacific region that affect men-having-sex with men and transgender people. One court decision in Fiji addressed this issue stating that[55]

> In my view the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one's private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction.

This decision subsequently led to the enactment in Fiji of a penal law that decriminalized sex between male adults.[56] This is one example of how court decisions lead to law reform particularly the enactment of laws that uphold the international human rights standards.

Implications for Human Rights Education

As earlier stated, court decisions have to be considered in promoting human rights, particularly in explaining how the international human rights standards and principles apply to concrete, local issues.

Though there is no agreement so far among the judiciaries in Asia and the Pacific on how they should treat human rights, existing significant court decisions or judicial principles that rightfully uphold human rights should be given weight as examples of domestic application of the international human rights standards.

The following views on human rights, for example, from the court decisions cited earlier constitute important content for human rights education:

a. The UDHR should be treated as part of international customary law and thus binding upon all members of the international community of states;

b. In cases of crisis situation, such as the lack of an operating Constitution, the UDHR is a basis for enforcement of human rights;

c. Human rights as declared in the UDHR and provided for in ratified international human rights instruments and the Constitution are for all persons, regardless of nationality;

d. Human rights are state obligations under both Constitution and ratified international agreements, and should be given practical support for their effective implementation.

The Constitution and human rights are closely linked and should be discussed together in human rights education:

a. There are constitutional concepts that can enrich human rights principles, giving human rights greater importance to the people whose Constitutions have such provisions;

b. While constitutional provisions may not cover some human rights, judicial interpretation based on the international human rights standards can provide support for the judicial declaration that such rights exist;

c. Constitutional provisions should not be assumed as the same as the international human rights standards, to the extent that the fulfillment of constitutional rights becomes automatic fulfillment of state obligations under international human rights treaties.

Linking constitutional rights to the international human rights standards avoids the problem of a narrow view of legal education – that is, education on all existing laws and the duty to follow them without fail. Equating legal education with human rights education requires the explicit inclusion of the international human rights standards as educational content. This, in turn, means a critical understanding of laws based on the international human rights standards should be part of the educational objectives.

This is the kind of legal education promoted by many Asian legal resources groups. They do not assume that laws are perfect. And when evaluated against human rights standards, some laws may turn out to be violating human rights. In this regard, jurisprudence that supports the application of the international human rights standards at the domestic level would be most useful in evaluating laws.

This approach likewise points to the necessity of reviewing jurisprudence, old and new, and promoting those that have established

a. The principle that international human rights standards apply at the domestic legal systems;

b. That international human rights treaties should be faithfully and effectively implemented through national programs of governments;

c. That absence of laws should not prevent recognition of human rights in order to address issues of injustice.

It is also important to note that international human rights standards should not be seen only from the so-called legal positivist perspective in order not to limit their domestic application. Some court decisions have reached out to the international human rights standards to be able to give justice to victims of human rights violations, despite the absence of explicit supporting legal provisions. One observation is worth mentioning in this regard:[57]

> we may think that if human rights laws are not codified into our national laws, there will always be a problem to its implementation in our country. We may be led to think that human rights need that element of legal enforceability; otherwise human rights will remain pure fiction.
>
> Added to this concern [would] be that inexorable challenge from that school of lawyers inclined to adopt a legal-positivist approach to say that the only rights are those that are legally

> enforceable. They urge the courts not to look at the declarations, instruments, protocols, conventions, and treaties which have not been ratified, acceded or introduced into our domestic laws and harmonised with our legal system. It sounds desirable that human rights should be legally enforceable so as to ensure that they are clear and precise. However this view also misrepresents the character and distorts the true picture of human rights and its advocacy. The very concept of human rights suggests that they should not assume a character of legal enforceability alone. To do so could have dangerous implications to human rights.
>
> If the entire corpus of human rights is legally enforceable we would be appealing only to legal rights instead, and would not need to appeal to human rights. If legal positivism were true there is no way to criticise unjust legal systems and unjust laws. It is vital that human rights have to stand outside that system of legal enforceability (SLE) to launch its barrage of criticism in order to be rights effective. To stand inside SLE would be appealing to legal rights instead and the consequences of doing that would be some steps backward for human rights and its advocacy in a many instances.

The evolution of the international human rights standards is a fulfillment of the international community's mandate of continuing search for measures to protect people who suffer injustice. The failure of national laws to immediately adapt to such development in the international community is also a failure of the countries to give justice to their own people. Thus, judicial power should be able to address injustice using the international human rights standards as basis.

Conclusion

Human rights education aims to make human rights a reality in people's lives—to ensure their well-being as much as protect their freedom to do what they see fit with due regard for the rights of others or the community.

Court decisions, particularly those that support the application of the international human rights standards are important bases to claim human rights regarding issues that affect ordinary people in both ordinary and extra-ordinary situations, concerning both basic individual needs as well as pursuit of community or national interests.

In many cases, courts are seen from a distance and their decisions mainly known by lawyers and magistrates. This is even more so in the case of human-rights-related court decisions.

In light of the diverse and numerous human rights education initiatives in the Asia-Pacific, it is important that relevant court decisions take their proper place in these educational activities. And one indispensable step includes the incorporation of human rights education in the education of would-be and current officers of the court (lawyers, magistrates and judges).

Endnotes

1. This is the view of H.G. Kulkarni, *Judicial Process: Development and Creativity,* in relation to the Supreme Court of India decisions that constitute "progressive judicial activism for the protection of human rights " regarding issues affecting women (such as the Vishaka decision), workers and other marginalized sections, and the introduction of novel procedures such as the epistolary jurisdiction.

2. Text of the declaration available at http://jrn21.judiciary.gov.ph/forum_icsjr.html.

3. The new network was formed during the International Conference and Showcase on Judicial Reforms held in Manila in 2000 with the theme "Strengthening the Judiciaries of the 21st Century," see http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_Conference_Guide.pdf

4. JRN21 aims to facilitate networking and access to relevant judicial reform information, including treaties, laws, lessons learned and best practices reports, pilot programs, case studies, and country, regional and global research papers. It will also include links to existing constitutional and legal databases, ongoing and planned judicial reform projects and resource and key contact information for reformers and organizations worldwide. In addition, it will include resource links to other relevant regional and global electronic networks, databases, electronic training programs and websites, as well as key [non-governmental organizations] NGOs, regional and global organizations, donors and professional associations. These links and easy access to related web pages and regional and global networks will enable JRN21 participants to access a wide range of documents, organizations and individuals around the world. (Source: http://jrn21.judiciary.gov.ph/jrn_about.html)

5. See for example HURIGHTS OSAKA's Human Rights and Jurisprudence section in its website (www.hurights.or.jp/english/human_rights_and_jurisprudence/) that features some of the court decisions from a number of Asia-Pacific countries that applied the international human rights standards. The website of the Pacific Regional Rights Resource Team has downloadable publications on Pacific court decisions and human rights, see www.rrrt.org/page.asp?active_page_id=82. Full text of court decisions in Pacific countries can be found in the website of the Pacific Islands Legal Information Institute, www.paclii.org/. The websites of the highest courts in the different countries also provide the full text of court decisions. The website of the

Asian Legal Information Institute (AsianLII) also provides information on databases on Asian laws and court decisions, which include human rights issues among other issues. Visit: www.asianlii.org.

6. "South Asian Law Schools' Forum: An initiation for regional cooperation," Kathmandu School of Law website, www.ksl.edu.np/extra_curricular_activities.asp#sal. The SALS Forum was established in June 2004 in Nepal.

7. Article 1, Charter of the South Asian Law Schools Forum for Human Rights, in Yubaraj Sangroula, editor, *Social Responsive Human Rights Legal Education South Asian Law Schools Forum for Human Rights SALS Forum - A Compendium of Conference Proceedings and Papers* (Bhaktapur: Kathmandu School of Law, 2004), page 5.

8. See the website of the Southeast Asian Human Rights Studies Network (SEAHRN) at www.seahrn.org/content/about.html.

9. For more information, visit the website of CRN-EALS at www.crn33-eals.org/Main.htm.

10. The Law and Society Association (LSA) was founded in the United States over forty-five years ago as a group of scholars from many fields and countries, interested in the place of law in social, political, economic and cultural life. It has both American and international members. For more information visit: www.lawandsociety.org/.

11. Visit the website of the Asian Law Institute (ASLI) at http://law.nus.edu.sg/asli/about.html.

12. For the meantime, further information on the HRBA2J-Asia is available at: www.facebook.com/pages/Asian-Consortium-for-Human-Rights-Based-Access-to-Justice-HRBA2J-Asia/134340173310986?sk=wall.

13. See P. Imrana Jalal, UNDP/Regional Rights Resource Team (RRRT), *The Situation of Human Rights Defenders in the Pacific Islands* (Suva: Pacific House, 2005).

14. Ibid., page 26.

15. Jiunn-Rong Yeh and Wen-Chen Chang, "The Emergence of East Asia Constitutionalism: Features in Comparison," *ASLI Working Paper Series,* No. 006 (Singapore: Asia Law Institute, August 2009), page 29.

16. See Jefferson R. Plantilla and Salbiah Ahmad, editors, *Law, Jurisprudence and Human Rights in Asia,* (Kuala Lumpur: HURIGHTS OSAKA and SIRD, 2011) for the different examples of court decisions that either favor or oppose the application of international human rights standards. This publication is the full report of HURIGHTS OSAKA's multi-country research project, with the support of the United Nations Office of the High Commissioner for Human Rights, on the application of the international human rights standards in several countries in Asia to determine the extent of use of such standards in local laws and jurisprudence. The research project covered eight countries: China, Indonesia, India, Japan, Nepal, the Philippines, South Korea, and Thailand. The issues included child rights, right to health, criminal procedure, rights of indigenous peoples, women's rights, and the rights of (domestic and foreign) migrant workers. Each case study presented distinct social, political and economic contexts. Each country covered by the research project has its own legal and judicial systems that interact differently with the interna-

tional law system. The case studies present challenges to the domestic application of the international human rights standards. They likewise help draw the opportunities for human rights education.

17. Ibarra M. Gutierrez III and Marc Titus D. Cebreros, "Realizing the Right to Health in the Philippines: A Review of Norms, Standards and Practice," in Jefferson R. Plantilla and Salbiah Ahmad, editors, *Law, Jurisprudence and Human Rights in Asia,* page 235.

18. See Mejoff v. Director of Prisons, 90 Phil 70 (1951).

19. Republic of the Philippines v. SANDIGANBAYAN, Major General Josephus Q. Ramas and Elizabeth Dimaano, GR 104768, July 21, 2003, available at http://sc.judiciary.gov.ph/jurisprudence/2003/jul2003/104768.htm.

20. Republic of the Philippines v. SANDIGANBAYAN, et al., ibid., as cited by Adolfo S. Azcuna, former Justice of the Supreme Court of the Philippines in his paper entitled *Constitutional Standards for Civil, Political & Socio-Economic Rights,* presented at the Fifth Conference of Asian Constitutional Court Judges, 9-11 October 2007, Seoul, Republic of Korea.

21. Kant Kwong and Yim Kam Shing v. Presidential Commission on Good Government, Secretary Ramon A. Diaz and Commissioner Mary Concepcion Bautista, G.R. No. L-79484, December 7, 1987. Quoted from Azcuna, ibid., pages 5-6.

22. Ferdinand E. Marcos, et al. v. Raul Manlapus, et al., G.R. No. 88211, September 15, 1989.

23. Cited by Eileen Kaufman, ''Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence" in *Georgia Journal of International and Comparative Law,* Vol. 34, No. 3, pages 560, 609-613.

24. Chairman, Railway Board v. Das, A.I.R. 2000 S.C. 988, cited in Kaufman, ibid.

25. Mandeep Tiwana, *Human Rights and Policing: Landmark Supreme Court Directives & National Human Rights Commission Guidelines* (New Delhi, Commonwealth Human Rights Initiative, April 2005) page 34.

26. P.N. Bhagwati, "Judicial activism and social action in Asia," in Jose Ventura Aspiras, *Law as Weapon – Alternate Approaches to Distributive Justice* (Makati: PROCESS, 1990), page 110.

27. Bandhua Mukti Morcha v. Union of India & Others, December 16, 1983, page 71, available at www.indiankanoon.org/doc/595099/

28. Secretary Som Prasad Paneru, among others, authorized by, and on behalf of, the Friends of Needy Children (FNC), located at Ekantakuna, Ward No. 4, Lalitpur Sub-municipal Corporation, Lalitpur District versus His Majesty's Government, Office of the Prime Minister and Council of Ministers, among others. Decision No. 7705, *Nepal Law Reporter,* 2006 A.D. The Law Book Management Board translated the court decision into English.

29. Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and others, Writ Petition No: 5916 of 2008, available at www.law.georgetown.edu/rossrights/chapters/BangladeshWomenLawyers.html.

30. See Yiu Kwong Chong, "Implementation of International Human Rights Conventions – the Hong Kong Experience," in Plantilla and Ahmad, *Law, Jurisprudence and Human Rights in Asia,* op. cit., page 46.

31. This publication is available at the website of the Pacific Regional Rights Resource Team, www.rrrt.org/page.asp?active_page_id=82.

32. R v Vola, Supreme Court of Tonga, [2005] TOSC 31, in *Pacific Human Rights Law Digest,* 2/2008, 68.

33. *Pacific Human Rights Law Digest,* 2/2008, 16.

34. Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), available at www.austlii.edu.au/au/cases/cth/HCA/1992/23.html

35. Cariño v. Insular Government, 41 Phil. 935 (1909), 212 U.S. 449, 53 L.Ed. 594

36. Ibid., page 941. This quotation is taken from the separate opinion of Justice Ricardo Puno of the Philippine Supreme Court decision about a law on the rights of indigenous Filipinos, Isagani Cruz and Cesar Europa v. Secretary of Environment and Natural Resources, et alia, G.R. No. 135385, December 6, 2000, available at http://sc.judiciary.gov.ph/jurisprudence/2000/dec2000/135385_puno.htm

37. Chong, op. cit., page 46.

38. Vipin Mathew Benjamin, "India: Anti-Terrorism Laws and Human Rights," in Plantilla and Ahmad, *Law, Jurisprudence and Human Rights in Asia,* op. cit., page 80.

39. Roger Chan Weng Keng, *Legal Positivism and the Nuances of Human Rights Implementation in Malaysia,* citing the Mohamad Ezam Mohd Noor v. Ketua Polis Negara & other appeals (2002) 4 CLJ 309, in Kuala Lumpur Bar Blog, in http://klbar.blogspot.com/2009_10_01_archive.html

40. Lawrence W. Beer, editor, *Constitutional Systems in late Twentieth Century Asia,* University of Washington Press (Seattle: 1992), page 8.

41. Ibid., page 9.

42. Nobuyoshi Ashibe, "Human Rights and Judicial Power," in Beer, page 225.

43. Juan Antonio, Anna Rosario and Jose Alfonso, All Surnamed Oposa, Minors, et al., v. The Honorable Fulgencio S. Factoran, Jr., et al., G.R. No. 101083 July 30, 1993.

44. See Chong, "Implementation of International Human Rights Conventions – the Hong Kong Experience," op. cit., page 42.

45. Yuji Iwasawa, *International Law, Human Rights, and Japanese Law – The Impact of International Law on Japanese Law* (Oxford: Clarendon Press, 1998), pages 294-295.

46. Ibid., page 294.

47. Yeh and Chang, op., cit., page 21.

48. Ibid., page 21.

49. This is a discussion of the decision in Mohini Jain v. State of Karnataka (1992 AIR 1858) in www.escr-net.org/caselaw/caselaw_show.htm?doc_id=888109

50. See Jalal, op. cit. page 27.

51. Vishaka and others v. State of Rajasthan and others. (AIR 1997 SUPREME COURT 3011).

52. Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and others, op. cit.

53. Commission on AIDS in the Pacific, *Turning the Tide: An open strategy for a response to AIDS in the Pacific* (Suva: Commission on AIDS in the Pacific, 2009)

54. John Godwin, *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action* (Bangkok: United Nations Development Programme and Asia Pacific Coalition on Male Sexual Health, July 2010).

55. McCoskar v. The State [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005), available at www.paclii.org/fj/cases/FJHC/2005/500.html

56. Goodwin, op. cit., page 93.

57. Weng Keng, op. cit.