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Editorial

Human Rights and Justice

How are human rights violators held accountable? What are the best means of ensuring full human rights accountability? These are difficult questions, even more so in the case of violators being current high officials of an independent state. The answers go beyond existing human rights mechanisms and have much to do with international politics. This is the situation of North Korea.

Past experiences on cases of massive and systematic human rights violations point to the need for the preparation of solid bases for the prosecution of violators at some future date.

At the same time, while the accountability mechanisms are not yet established, the victims deserve assistance in protecting and realizing their human rights.

The main challenge lies in pursuing a two-pronged approach to addressing the human rights situation in the country; building accountability measures and helping to protect and realize human rights are both important but also inherently difficult tasks.

In all these efforts, serving justice to the people must be the ultimate objective.

South Korean Policy on Human Rights in North Korea After the Political Change

Go Myong-Hyun

The new South Korean President, Moon Jae-in, has stated that he would reverse his conservative predecessors' North Korea policy of pressuring and isolating North Korea and return to one that focuses on engagement. In addition to bringing a fresh, new approach to North Korea's nuclear issue, the Moon administration will refocus their North Korea policy on humanitarian assistance, development aid, economic cooperation (e.g., restarting the Kaesong Industrial Complex and Mount Kumgang tourism projects), and cultural and people-to-people exchanges. This policy could potentially create friction with the international community's approach of prioritizing accountability for the human rights violations in North Korea.¹

North Korea Human Rights Policy: New vs Old

Under the conservative administrations of Lee Myung-bak and Park Geun-hye, the North Korean human rights movement² received a major boost in support. The Park administration in particular was very keen on raising global awareness of North Korean human rights issues; it supported the work of the United Nations (UN) Commission of Inquiry on

Human Rights in the Democratic People's Republic of Korea (UN COI) and raised North Korean human rights issues in other high-profile international gatherings.³ Domestically, one of the major achievements of the Park administration in improving the North Korean human rights situation was the passage of the 2016 North Korean Human Rights Act, which had been languishing in the National Assembly for more than ten years. The law provides for the establishment of the North Korea Human Rights Foundation that would support research on human rights and humanitarian issues as well as provide grants to civil society organizations. One important feature of the Foundation's work is the creation of the Human Rights Archive, which is modeled after the Central Registry of State Judicial Administrations in Salzgitter, West Germany. Just like the German model, the Human Rights Archive is designed to help in the identification and prosecution of those responsible for human rights violations in North Korea. The law has also institutionalized the international coordination efforts of the South Korean government through the creation of an ambassadorship

specifically for the North Korean human rights issue.

The new progressive administration is likely to maintain the institutions created under the conservative administrations, but it would reassign policy priorities and resources. Under the new, more engagement-oriented administration, the South Korean government will shift its focus from accountability to humanitarian assistance when it comes to improving the human rights situation in North Korea. Moon's electoral platform concerning North Korean human rights (Vision 2, Section 5)⁴ states that his administration will work for the "combined" improvement of political and social rights of North Koreans. Given that the North Korean regime's horrendous treatment of political prisoners and repression of political dissent has been the main focus of the North Korean human rights movement for several decades, suddenly giving equal prominence to social rights could be considered as detracting from the international community's focus on accountability. However, social rights as well as economic and cultural rights are certainly less controversial since they concern collective rights rather than individual rights (e.g., political rights), and their

improvement is more amenable to the Moon administration's policy of increasing humanitarian assistance and development aid to North Korea.

One area that the Moon administration could make a significant impact with its use of humanitarian assistance is the reunion of separated families, since the North Korean regime would likely be more responsive to South Korean requests if the administration is willing to add economic payoffs, such as the construction of health facilities. The humanitarian concern is certainly enormous given the urgency of family reunions due to the advanced age of the applicants. Despite this, only 972 individuals were able to meet their separated kin in the last family reunion that took place in 2015, and in South Korea alone there are still 60,000 persons awaiting their chance to travel to the North and meet their families. Moreover, records show that progressive administrations have been more successful than conservative administrations in this regard. Whereas 12,576 South Koreans were able to meet their Northern kin from 2002 to 2008 (the Roh Moo-hyun administration), only 3,559 did during the period of the conservative administrations of Lee Myung-bak and Park Geun-hye.⁵

Institutionalization of the North Korean Human Rights Issue

The institutionalization of the North Korean human rights issue began in earnest when the international community took notice of the worsening human

rights situations in North Korea and China, especially with the outflow of refugees from North Korea after the economic collapse in the 1990s. International actors instituted a series of human rights initiatives on the North Korean issue within the framework of international law. The first action was the UN Human Rights Council's adoption of the North Korean Human Rights Resolution in 2003. This marked the beginning of the UN's efforts to shed light on the North Korean regime's long history of human rights violations. In 2004, the first Special Rapporteur was appointed to look into the human rights situation in North Korea. Other governments also adopted legal measures, such as the United States' 2004 North Korean Human Rights Act, Japan's 2006 Law on the Abduction Question and Other North Korean Human Rights Problems, and the European Union's Council Regulation (EC) No. 329/2007. In 2013, the UN COI was established, and, in 2014, it released its landmark report on the North Korean human rights situation.

The report by the UN COI put mechanism for accountability into motion. The UN COI report found that the North Korean regime had committed crimes against humanity and recommended referring individuals responsible (i.e., the top leadership) to the International Criminal Court (ICC). This recommendation was overwhelmingly reaffirmed by the UN General Assembly in 2014. The most engaged actor in this regard was the United States, which had incorporated

human rights components into its sanctions against the regime in North Korea. Several countries have since condemned North Korea, including Botswana, who cut all diplomatic ties with North Korea after the release of the COI report.⁶

The international ramifications of the UN COI's findings and recommendations are still unfolding. Now, there is international attention not only on North Korea's domestic human rights violations, but also on the regime's violations beyond its national borders. One particular issue that caught the international community's attention was the case of North Korean workers posted overseas, which was the perfect example of how the regime's policy of human rights violations were being used to generate hard currency income.

The North Korean human rights movement regards North Korea's export of workers overseas as forced labor, which is a form of slavery. This classification is based on ample evidence of severe restrictions on the workers' freedom of movement: passports are confiscated, and they are forced to live in barrack-like dormitories under the watch of North Korean security agents sent to guard them. There is no formal labor contract, and working conditions are inhumane; their work schedule typically ranges between twelve to fourteen hours of work per day, with only one day off per month.

The international community appealed to destination states to

address the situation; the United States and South Korea applied diplomatic pressure, while the international media put a spotlight on the issue.⁷ As a result, the governments of Qatar, Malta, and Poland expelled some or all North Korean workers deployed to their countries.⁸

Conclusion and Pending Issues

The case of the North Korean workers overseas is a perfect example of how the international community is addressing the North Korean regime's abuses in an institutionalized manner. By working together to institutionalize the issue, South Korean civil society and state actors galvanized the international community around the cause of protecting the human rights of the North Koreans, and they made the issue a robust part of the political changes in key stakeholder countries. As such, this case serves as the template for future actions to address North Korean human rights violations.

What is left pending is how to strengthen the civil society actors that are vulnerable to political changes. Civil society actors play a key role in collecting evidence and helping victims, but their work is not sufficiently supported, especially in South Korea. The South Korean government in particular does not extensively support the work of non-governmental organizations (NGOs). The total size of government funding on North Korean concerns tends to be quite small; for example, South

Korea's Ministry of Unification disbursed only 650 million won (roughly 560,000 US dollars) to twenty-six recipients in 2015. Furthermore, the bulk of the money went to NGOs that help defectors resettle through educational programs, rather than to NGOs that prioritize human rights campaigns. As the focus of the government's policy shifts towards engagement, finding stable sources of financing can become even more challenging.

One should also consider how to empower North Korean defectors to help them take more prominent leadership roles within the North Korean human rights movement. Their number is likely to pass the 30,000 mark this year, and a growing number of young, South Korean-educated defectors are joining the movement. As activists that carry the moral authority as victims, North Korean defectors have the ample potential to become very effective civil society actors when given proper training and support. However, given their collective political orientation that at present tends towards the conservative opposition, it is likely that they will be less influential in affecting the new administration's policy of engaging North Korea. This could be addressed by providing them with international platforms to voice their concerns and capacity-building opportunities.

The North Korean human rights movement must adapt to the political changes in South Korea by institutionalizing mechanisms for monitoring and

prosecuting North Korean human right abuses, as well as by empowering civil society actors.

In conclusion, the new administration's policy towards North Korea presents opportunities and challenges in equal measure. Putting aside the debate on the validity of engagement, it is likely that the new administration would be more successful than their conservative predecessors in addressing the urgent humanitarian concern of helping separated families to meet before they pass away. Human rights NGOs, in particular, can raise awareness on this issue and extend their support. On the other hand, the new policy can also divert some attention from the issue of the regime's systematic violation of human rights. An institutionalized approach to the human rights issues through close coordination between international, state, and civil society actors is key to keeping the North Korean human rights movement effective in the long run.

Go Myong-Hyun is a Research Fellow at the Center for Risk, Information and Social Policy of the Asan Institute for Policy Studies.

For further information, please contact: Go Myong-Hyun, Asan Institute for Policy Studies, 11, Gyeonghuigung 1-ga-gil, Jongno-gu, Seoul 03176 Korea, ph (822) 3701-7311; fax (822) 8254-7573; e-mail: mhgo@asninst.org; www.asaninst.org.

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Crimes Against Humanity in North Korea: Three Options for Accountability

Transitional Justice Working Group

The United Nations Commission of Inquiry on Human Rights in North Korea (UN COI) reported in 2014¹ that crimes against humanity, including extermination, murder, enslavement, torture, imprisonment, rape, forced abortions, persecution, deliberate starvation, and enforced disappearances, have been committed “pursuant to policies established at the highest level of the State” in the Democratic People’s Republic of North Korea (DPRK).² In his statement to the UN Human Rights Council, COI Chair, Michael Kirby, stated that the gravity, scale, and nature of these violations — which have been perpetrated for decades — “reveal a state that does not have a parallel in the contemporary world.”³ The UN COI called for practical measures to end the abuses and pursue accountability for those responsible.⁴

Transitional Justice Working Group

Sparked by the report of the UN COI, the Transitional Justice Working Group (TJWG) was formed in September 2014 to support the call for accountability and develop strategies of redress for victims of abuse. Its first two years of activities include the development of a digital mapping system to document

and visualize evidence of possible crimes against humanity in North Korea. The database and mapping system securely collects information on alleged mass burial and killing sites and visualizes the information in the form of digital maps. The data also includes locations of national security offices, local police, military units, and administrative units where documentary evidence may be stored. The TJWG believes that the preparatory work of locating these sites is crucial in preventing blanket amnesty for alleged perpetrators and, in the case of future investigations or trials of individuals charged with serious human rights violations, quickly securing forensic and documentary evidence. Importantly, its work also focuses on surveying defectors regarding their desires and hopes for the future, and what, if any, transitional justice mechanisms they recognize as relevant or necessary.

Accountability Preferences

The TJWG conducted a survey of North Korean defectors on the accountability of perpetrators of human rights abuses in the DPRK. “Accountability” in transitional justice is a concept often associated with legal remedies applied to situations where atrocities have taken place. The

survey has revealed that among defectors who have participated in its mapping project, there is a strong preference to see those deemed responsible for human rights abuses held accountable in a courtroom setting. When asked about what they would like to see happen to those who committed violent human rights abuses in the DPRK, punitive measures featured highly, with the restorative measures of confessing crimes and asking for forgiveness also being seen as important. Amnesties were a less popular option.⁵

The large volume of potential perpetrators in the North Korean system means that it may well be practically impossible to bring formal charges against every individual suspected of carrying responsibility for human rights crimes, not to mention the problems that may arise in attempts to charge those who are both victims and perpetrators of the regime’s abuses. The data gathered by the mapping project will make an important contribution to determining the nature of the crimes concerned and in building cases against known perpetrators. While amnesties may have a place in the future, the survey respondents deem punitive measures as important, and this should be taken into consideration in any transitional justice process.

The question of whether judicial measures *alone* have the capacity to redress systematic or massive violations of human rights is a crucial one, and transitional justice (and the TJWG's research) operates on the conviction that they do not. The UN Backgrounder on transitional justice states that, to be effective, the process should be holistic: "It should be made up of several initiatives that complement and reinforce each other."⁶ The design of a potential transitional justice process, which includes accountability measures in the North Korean context, must be accompanied by sustained engagement with the affected communities, and the efficacy of different accountability mechanisms should be properly assessed. However, at this early stage in our work, the TJWG seeks to draw attention to three main types of accountability mechanisms most often tried elsewhere by pointing out their associated obstacles and opportunities.

Types of Courts

The International Criminal Court

The UN COI's recommendation for the referral of the situation in the DPRK to the ICC was welcomed by North Korea-focused human rights groups in South Korea. However, there are numerous obstacles, including the lack of jurisdiction for crimes committed prior to the establishment of the International Criminal Court (ICC) in 2002 under Article 11(1) of the Rome Statute, the DPRK's hostility to the ICC, as well as China and Russia's objections to the ICC referral by

the UN Security Council. Because the ICC Prosecutor can initiate investigations only for "crimes within the jurisdiction of the Court" under Article 15(1), the ICC may exercise jurisdiction over the crimes committed by nationals of States Parties to the Rome Statute, such as South Korea and Japan, but not by China, perhaps the DPRK's last, reluctant ally.

It would, however, be possible to prepare for possible future cases at the ICC. Long-term political changes in the DPRK may lead it to accede to the Rome Statute with a declaration accepting jurisdiction for cases reaching back to July 1st, 2002, per Articles 11(2) and 12(3) of the Rome Statute. In the case of the reunification of the two Koreas, the successor state may issue a declaration to the same effect. If so, it would be possible for the Prosecutor to initiate investigations *proprio motu*, or for the successor state to refer the situation to the ICC.

An Ad Hoc Tribunal

The UN COI also mentioned the possibility of an *ad hoc* tribunal. However, the current DPRK regime is not likely to consent to investigating and prosecuting its own leaders and executioners for the numerous atrocities they committed. Therefore, this option also must be preceded by fundamental political change within the DPRK to become viable.

Thus far, when thinking about transitional justice for regime crimes in the DPRK, South Korean civic groups and academic advisors to the government have shown a growing preference for an *ad*

hoc tribunal over ICC proceedings in The Hague, which is geographically far removed from the scene of crimes as well as the domicile of the perpetrators, victims, and the interested population. The logistics and resource requirements for the recruitment of Korean-speaking personnel and the transportation of the witnesses and documents to the court, which is located on the other far end of the Eurasian landmass, would be inefficient and detrimental to the investigation and trials. The vast majority of the victims and concerned individuals in the Korean Peninsula would have difficulty following the proceedings even via TV or webcast, given the 8-hour time difference. The same may be said of Japan, which would have particular interest because of the abduction of its citizens by the DPRK in the past. In the case of an *ad hoc* tribunal, South Korea's judicial institutions and legal expertise may provide helpful infrastructure for the investigation and trial of the atrocities in the DPRK.

One option may be a hybrid tribunal akin to the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC), which would ideally be situated in Pyongyang. The Cambodian case may be pertinent to the DPRK given the similar pattern of murder, extermination, enslavement, torture, deportation, imprisonment, rape, persecutions, and enforced disappearance committed as state policy by a totalitarian regime in the context of a communist-influenced, post-colonial

national liberation movement radicalized by devastating war into xenophobic paranoia. The ECCC as an institution also suggests a way to by-pass the UN Security Council, where China may wield its veto and rely upon the authority of the UN General Assembly, which may enjoy greater international legitimacy.

The Domestic Transitional Justice Process

The UN COI also alluded to the urgent need for a “Korean-led transitional justice process” parallel to the international judicial procedures, including “extensive, nationally owned truth seeking and vetting measures to expose and disempower perpetrators at the mid- and lower-levels ... coupled with comprehensive human rights education campaigns to change the mind-sets of an entire generation of ordinary citizens, who have been kept in the dark about what human rights they are entitled to enjoy and in how many ways their own state has violated them.” A special national prosecutor “relying on international assistance to the extent necessary” should also investigate and prosecute crimes against humanity.

Even prior to the transition, domestic courts may, on occasion, prosecute and try individual perpetrators whom they happen to have in their custody by the exercise of universal jurisdiction or another legal basis. For example, the South Korean courts have convicted and sentenced ethnic Korean Chinese upon arresting them as undocumented workers in South Korea for collaborating in the abduction of ROK

nationals in China to the DPRK. Similarly, the pre-unification West German courts punished East German defectors who were responsible for the shooting of border-crossers before their own successful flight. It may also be noted that Japan has been conducting a criminal investigation on the abductions of its nationals to the DPRK and may also proceed to try and convict those responsible for the abductions in its own courts.

Transitional Justice in North Korea

Most of the many countries that have looked to a past marked by dictatorship, armed conflict, and large-scale serious crime have used multiple transitional justice measures, implemented simultaneously or gradually, to restore rights and dignity to victims, ensure that human rights violations are not repeated, consolidate democracy and sustainable peace, and lay the foundations for national reconciliation. Due to the many challenges present in seeking justice for the crimes believed to have been committed in the DPRK, it is crucial that a holistic policy of transitional justice be adopted when the conditions permit. The TJWG hopes that, by examining accountability strategies in advance of a transition, judicial procedures will be more effectively designed and implemented, so that they can play their important role in securing a just future for the people of North Korea.

For more information, please contact: Scott Stevens, Communications and

Administrative Director, Transitional Justice Working Group, #302, Koryo Building, 91 Saemunan-ro, Jongno-gu, Seoul, 03182, Republic of Korea; ph (82-2) 722-1162; fax (82-2) 722-1163; e-mail: scott.stevens@tjwg.org; www.tjwg.org.

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Issues and Tasks: Human Rights in Asian Business

Jefferson R. Plantilla

The recent workshop on “Business, Human Rights, and Access to Justice,” held in Mandaluyong City,¹ raised the serious need to use the “United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (UNGPR) as another tool in addressing human rights issues that have long been affecting the marginalized sections of societies in Asia. The workshop also emphasized the need to maximize the opportunities for resolving human rights concerns arising from companies and governments supporting this UN initiative.²

Persistent Issues

Workshop presenters from China, Korea, Mongolia, Japan, Nepal, Malaysia, and the Philippines discussed issues that have been lingering in the Asian region for decades.

Workers still suffer from a variety of problems including prohibition to stage strikes, bad working conditions, and illegal recruitment for migrant workers. The exploited, undocumented foreign migrant workers in the Malaysian palm plantations suffer even at the stage of deportation. Communities likewise continue to suffer from company operations especially those related to natural resources exploitation.

Effective labor movements hardly exist in China and Mongolia. The All-China Federation of Trade Unions (ACFTU) and other local unions are trying to promote collective bargaining in some pilot cases and projects, while the trade unions in Mongolia have not been functioning effectively. Also, labor contracts are not enforced to protect the interests of the Mongolian workers.

The Japanese labor bureau has been receiving complaints of bad working conditions. As Yasunobu Sato of the Human Security Forum (Tokyo University) reported:

In 2015, out of 5,173 cases investigated by the labor standards inspection office, violations of legislations related to labor standards were found in 3,695 cases (71.4%) and only 46 serious or vicious cases were sent to prosecutors. These violations pertain to working hours, among others.

Illegal recruitment of workers for jobs abroad remains rampant, while employers in the country of destination continue to exploit them. Daryll Delgado of Verité explained that “most of the problems lie in the operation of intermediaries — illegal recruiters such as sub-agents, brokers (independent or otherwise), and even human traffickers.”³

On the other hand, although big Asian companies, including state-owned enterprises in the case of China, have declared subscription to the UNGPR, many small and medium-sized enterprises, whose role in the over-all economy of countries is significant, are seemingly largely uninvolved. Many so-called “technical intern trainees” in Japan, who come mostly from China, Vietnam, Indonesia, and the Philippines, are being deployed to be “trained” at small and medium-sized enterprises where they suffer from labor exploitation and other problems.

Some Developments

In the case of Japan, the 2020 Tokyo Olympics provides the opportunity to introduce measures that would protect workers, foreign construction workers in particular, from being abused while they help construct facilities related to the games. Other human rights issues related to business (such as discrimination against non-Japanese) will have to be addressed, as well.

Urantsooj Gombusuren of the Centre for Human Rights and Development reported the following developments in Mongolian laws:⁴

- Granting of legal standing to non-governmental organizations (under the new General

Administration Law, July 2016) to enable them to file claims before the courts in public interest cases;

- Recognition of the participation of people in more than a hundred laws that have provisions on the rights to access information, participation in different decision-making processes, participation in the implementation processes (including monitoring), and filing of complaints to demand accountability with upper level government offices or the courts.

Zhong Huang of Wuhan University Public Interest and Development Law Institute (PIDLI) noted the improvement of environmental laws in China but remarked, “the crippling court costs deterred pro-environment NGOs from pursuing their advocacies, citing instances where they were ordered to pay expensive court fees.”⁵

Geeta Sangroula of the Kathmandu Law School noted the initiatives in India related to corporate social responsibility and the enactment or amendment of a number of laws, especially after the Bhopal Gas Disaster in 1984: the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in 2011; the corporate social responsibility provisions in the Company Act (2013), which affect Indian companies operating inside and outside of the country; the Model Bilateral Investment Treaty (BIT) in 2015;

and the court intervention in development projects.

Commissioner Jerald Joseph of the Human Rights Commission of Malaysia (SUHAKAM) cited its (SUHAKAM’s) Memorandum of Understanding (MOU) on business and human rights with the Federal Land Development Authority (FELDA) of Malaysia and Felda Global Ventures Holdings Berhad (FGV), which is the biggest palm plantation company in the world. The two-year MOU, according to the report in the FGV website,⁶

...offers mutual assistance and commits the parties to share knowledge and expertise relating to business and human rights in Malaysia, as well as to implement several initiatives including establishing a plan of action to ensure compliance and respect [for] human rights principles, to conduct stakeholders consultations and to implement capacity building programmes.

Necessary National Tasks

The United Nations recommends that governments adopt national action plan on business and human rights (BHR NAP) in collaboration with industry, labor, and other sectors of society. Current experiences show both progress and delays in adopting the BHR NAPs.

Pillkyu Hwang observed that the Korean government had not been consulting the labor sector and the civil society in drafting its NAP. The government seemed to be reluctant in

accepting the BHR NAP suggestions from the National Human Rights Commission of Korea. Also, the government avoided sensitive issues like underemployment and “precarious” labor in its NAP deliberations.

In the Philippines, the role of the Commission on Human Rights of the Philippines (CHRP) is crucial in promoting multi-sectoral deliberation on the BHR NAP. Commissioner Roberto Cadiz explained that the “guide to inform and assist” (GIA) framework developed by the CHRP was employed in holding a series of roundtable discussions (beginning in 2012) on the human rights impact assessment of mining communities and on consultative processes of the government towards the development of the Philippine BHR NAP. But still, he found the situation to be a “start-stop” process.

Commissioner Joseph reported that a Minister had been tasked to take care of the drafting of the BHR NAP of Malaysia, but finalizing it would take time because of the consultations with many groups and sectors. Way back in 2010, several rounds of consultations with various stakeholders, including government agencies, community-based organizations (CSOs), and business organizations, had been organized. The commissioner viewed BHR NAP as necessary in promoting policy coherence across the government bureaucracy, and in

- Creating a platform for policy cross-fertilization between states in Malaysia;
- Crystallizing leadership for business and human rights;
- Widening participation in NAP implementation;
- Facilitating dialogue and trust-building; and
- Promoting sustainable development.

The Philippine and Malaysian human rights commissioners emphasized that the process of drafting BHR NAP must be state-owned and state-led. However, governments must take serious consideration of the views and concerns of the stakeholders on what should be the content of the BHR NAP.

International support is likewise important, as shown in the case of the Philippines. The Philippine offices of the International Labour Organizations (ILO) and the United Nations Development Programme (UNDP) have been supporting the government in drafting its BHR NAP. Dianne Respass (Senior Programme Officer of ILO Manila) explained that the ILO promoted the Decent Work Agenda (with four pillars: rights and national standards, employment, social protection, and social dialogue) as a necessary framework in dealing with labor issues. Judith R. Fortin (Project Manager of CHR Projects: Nurturing a Culture of Human Rights and Empowering Citizens to Deepen Democracy), on the other hand, discussed how the UNDP facilitated discussion on policy reform. The UNDP has been supporting the integration of the

international human rights standards in national development plans and corporate laws. Aside from the UNGP, UNDP is also promoting the use of the United Nations Guiding Principles on Extreme Poverty and Human Rights⁷ in addressing business and human rights issues. The UNDP facilitated the government review of the *Philippine National Development Plan 2017-2022* to find areas of support for human rights and supported the drafting of proposed amendments to the Corporation Code.

Additional Tasks

The nature and impact of operations of big companies as well as the movement of workers require crossborder cooperation among governments, labor unions, and companies. The workshop participants discussed a number of tasks relevant to business and human rights issues that cross national borders.

A networking system among groups engaged in different fields of work – within and among countries – would help circulate information as well as collaboration on crossborder issues. A crossborder initiative for Southeast Asia can focus on the most vulnerable workers, such as those in the fishery, agriculture (i.e., palm oil), apparel, food manufacturing, electronics, and service sectors. Other crossborder issues concerning foreign workers should cover abuses by recruitment agencies (illegal collection of fees, unwarranted high fees, fraudulent labor contracts, etc.). Finally, a

crossborder networking system should help address human rights issues in the supply chains.

International support in resolving national issues is also important. In the humidifier disinfectant case in Korea, a UN Special Rapporteur on human rights and hazardous substances⁸ helped increase pressure on the company involved to resolve the issue. This pressure complemented a “public petition coupled with significant media coverage and eventually a court action [that] forced it (the company) to address the issue with a public apology and a compensation program.”⁹

A crossborder network can also engage in research and publication. The results of research can be subsequently used in lobbying for reforms at the national level, as well as in training workers and company officials. Verité’s research in Japan revealed how workers communicated among themselves, accessed remedy, and helped each other. Improved “communication,” however, also exposed them further to risks of illegal recruitment. The main challenges consisted of maximizing this model while avoiding negative impacts. Workers were encouraged to link fellow workers to organizations that could help them.¹⁰

Jefferson R. Plantilla presented the basic features and contents¹¹ of the training manual entitled *Business,*

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Anti-Discrimination Laws in Australia and Japan

Mai Mitsumori-Miller

The 24th of May marked the first anniversary of the introduction of Japan's anti-hate speech law. Anti-discrimination laws are a current topic of interest in Japan's trade-partner and regional ally, Australia. Despite the Australian law being over forty years older, it is clear that similar trends, issues, and points of debate arise in both jurisdictions. This article examines the anti-discrimination laws of Australia and Japan by comparing their operation, historical origins, and the current debate surrounding them.

The Laws: Scope and Operation

Although both nations' laws can be classified as anti-discrimination laws, there are some stark differences in their operation and scope. The Australian *Racial Discrimination Act 1975* (RDA) is broad and provides an effective process for people who want to make a complaint. Japan's *Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan* (The *Anti-Discriminatory Speech Act* or ADSA) however is more of a symbolic gesture than a legislative sanction on hate speech.

Australia's Racial Discrimination Act

In Australia, the RDA makes acts of racial discrimination

unlawful. Section 18C prohibits public actions that are likely to offend, insult, humiliate, or intimidate others based on their race, colour, nationality, or ethnic origin. The RDA also includes exceptions where actions that would usually be considered discriminatory under this law will be exempt, such as actions said or done as part of a performance, exhibition, or distribution of artistic work; or within the course of academic, scientific, or artistic academic debate; or genuine purposes for the public interest.

Although the legislation deems racial discrimination unlawful, it is not a criminal offence. Affected persons make a complaint through the Australian Human Rights Commission, which can investigate the complaint and try to resolve it by conciliation. Therefore, these complaints are not matters for Australian courts to decide; rather it is a process where both sides of the story are gathered and parties work together to resolve the complaint. If, after this stage, the matter has not been resolved, the complaint may be taken to Australia's Federal Court (though this accounts for less than 5 percent of cases).

Japan's Anti-Discriminatory Speech Act

In Japan, the Diet (Parliament) introduced the ADSA in May 2016, coming into effect in

June. The ADSA declares unfair, discriminatory speech and behavior against people legally living in Japan, but whose ancestors were from outside Japan, intolerable. Examples provided in the ADSA include openly speaking in a manner that harms the life, person, freedom, reputation, or property of such individuals as well as insults which have the objective of encouraging or inducing discriminatory feelings (Article 2). The ADSA does not have provisions for punishment, but it obliges local governments to implement hate speech elimination measures and respond to requests of victims for consultation (Articles 4 and 5). For example, in Osaka, the implementation of the law through a city ordinance required that any complaint filed be reviewed by a five-member Auxillary Council. Based on the views of the Council, the Mayor makes a decision as to whether to disclose the individual's names on their website as having engaged in hate-speech activities.

Context of Their Introduction

The contexts in which these laws were introduced into their respective societies are different, yet they have some important parallels. Both stem from a long history of race-based politics in the nation, widespread dissatisfaction with the lack of

protection in the law prior to the legislation being introduced, and calls from the international community to eliminate discrimination.

Australian Context

In the Australian context, two major factors prompted the introduction of the RDA.

(a) Cultural Shift

The RDA was introduced in Australia in 1975 during the country's shift into the immigration policy of "multiculturalism." From 1901 in the Australian Federation, only white, English-speaking immigrants were welcome under the "White Australia Policy." It was only in 1973 that this policy was officially abolished, and race was removed from immigration criteria. The cultural shift underpinning this change had slowly taken place since the end of the WWII when white European immigrants who did not speak English were allowed, and later when Vietnamese refugees from the Vietnam War were accepted. Hence, the decline of the white Australia ideal, coupled with the civil rights movement of the 1960-1970s, brought concerned attention to the suppression of racial difference in Australia.

(b) International Pressure

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) came into force in 1969. Australia ratified ICERD in 1973, and the progressive government of the day declared the "White Australia Policy" "dead and buried." The RDA

was the legislative expression of ICERD in Australia that ensured all Australians had equality before the law. The anti-discrimination provisions only form part of the RDA and were interwoven into legislation as part of Australia's cultural shift toward multiculturalism.

Japanese Context

In Japan over the last ten years "hate speech" towards people from a different ethnic origin (particularly the resident Koreans, called *Zainichi* Koreans) has increasingly become a social issue that has drawn the attention of the public and legislators. According to Professor Junichi Satou from the Osaka Sangyo University, there were three main reasons the new legislation was introduced last year: public momentum, condemnation from the international community, and shifting of jurisprudence around this issue.

(a) Public Momentum

In March 2016, the Japanese Ministry of Justice reported 1,152 confirmed incidents of hate speech between April 2012 and September 2015. These public demonstrations took place in areas where minority groups were concentrated. In 2014, the Mindan (Korean Residents Union) reported that these demonstrations created significant issues as they incited direct ethnic discrimination, posed a major threat to residents, and affected the mental health and opportunities of children and youth.¹ The Mindan report also noted the shame these words and actions

brought to Japanese society and referenced the motivations of those tolerant of such hate speech, such as "warped patriotism." This sense of shame and call to responsibility was also reflected in the Governor of Tokyo's, Yochi Masuzoe, opening speech to the Tokyo Metropolitan Assembly in 2015, where he reflected upon the heavy responsibility that Tokyo city bears as the host of the 2020 Olympics — a festival of peace.²

(b) International Pressure

The international legal community also expressed concern at the level of hate speech in Japan, which ratified the ICERD in 1995. The Acting Secretary-General of the International Movement Against All Forms of Discrimination and Racism, Megumi Komori, stated that, whenever the United Nations (UN) questioned the Japanese government about racial discrimination, the response was consistent — claiming that the situation was not serious enough to require legal prohibition. However, in mid-2014 the UN Committee on the Elimination of Racial Discrimination and the UN Human Rights Committee challenged this assertion, calling on Japan to adopt firm steps to combat hate speech and ensure perpetrators of hate speech were given appropriate sanctions — an unusually harsh warning from the UN.

(c) Shifting of Jurisprudence

In 2010 a Korean school in Kyoto sought damages from the far-right group, *Zaitokukai*, for their rallies throughout

2009-2010, during which they would threaten and vilify the students from outside the school grounds. While Japan did not have any anti-discrimination provisions in law at that time, the Kyoto District Court determined in 2013 that *Zaitokukai* committed acts of racial discrimination due to Japan's ratification of ICERD. The Osaka High Court affirmed the lower court decision in 2014. In the same year, the Supreme Court rejected the appeal of *Zaitokukai* and upheld the decision of the Osaka High Court.³ The courts clearly signalled to the Diet the necessity for legislative intervention, and built upon the pre-existing public and international pressure that instigated the introduction of the ADSA.

The Current Debate

In both jurisdictions the introduction of an anti-discrimination law was met with splintered support. Though there were endorsements from groups who had been calling for change, there were various comments about the law, ranging from disappointment as to the strength of the law, to fear of diminishing protection of free speech, and even to scepticism of the necessity of the law. These conversations are still occurring today.

Current Discrimination Debate in Australia

The RDA has always caused controversy. It took legislators four attempts to get the bill through parliament, due to heavily divided political and public opinion. The RDA

dominated political headlines in late-2016, when the current conservative government reignited the debate regarding the scope of section 18C. At the center of the debate is the balance between free speech and protection against racial hate speech. Commentators take differing opinions about what should happen to the 18C provision; some advocate its repeal or for partial change, while others argue that it should remain unchanged or be partially extended.

Those arguing for a partial change to narrow the provision believe that the arguably subjective terms "offend," "insult," and "humiliate" should be removed as they are too far reaching. The Prime Minister, Mr. Malcolm Turnbull, supports this position, and, in March 2017, he proposed that "offend," "insult" and "humiliate" be replaced by "harass" to clarify the law.⁴ Others argue that the operation of the law needs to send a stronger message of condemnation of discrimination by criminalizing the act so perpetrators can be taken to court for penal enforcement. Alternatively, some are calling for a review of the RDA in light of all relevant laws such as defamation, metadata, whistle blowing, and freedom of information laws,⁵ which are a higher priority than reform to the RDA.

Criticisms and Debates of Japan's Law

In the lead up and the immediate aftermath of the introduction of the ADSA, there was considerable reluctance to

outlaw hate-speech due to the potential limitation or conflict with freedom of speech, an entrenched right in Japan's Constitution (Article 21). Proponents of the law note that the UN International Covenant on Civil and Political Rights states that the freedom of speech should not violate the rights and reputation of others (Article 19(3)(a)).

Despite the introduction of the Act being a milestone in Japan's human rights sphere, experts and critics have expressed disappointment with the current provisions. Firstly, the ADSA did not impose sanctions for breaches. Similar to critiques of the Australian law, ADSA is criticized for "lacking teeth" and simply obliging each municipality to come up with its own policies, and there are no prescriptive sanctions or any strong enforcement mechanisms. It is a symbolic law with no clear consequences for breaches.

Secondly, the offence of "hate speech" is not made clear. Article 2 of the ADSA states that the law protects persons who originate from outside of Japan, and who lawfully reside in Japan, from significant insults and open announcements of harm to life, body, freedom, property, or reputation. However, this is a broad definition that makes it difficult to determine whether hate speech has occurred. Therefore, after demands for clarification from Kawasaki, Kyoto, Osaka, Kobe, and Fukuoka cities, the Ministry of Justice provided some concrete examples, such as: "go back to your home country," "kill people [from a

certain nation/ethnic group],” or describing people as “cockroaches.”

Finally, the groups afforded protection under the ADSA are too exclusive. ADSA only applies to individuals and therefore is difficult to use when ethnic minorities are being targeted as a whole. Furthermore, ADSA completely fails to protect vulnerable groups in Japanese society, such as refugees and illegal immigrants, who arguably face more discrimination than legal migrants from different backgrounds. Therefore, the ADSA is wholly inadequate, in that it does not apply to everyone, and only the narrow offence of hate speech is considered, rather than discrimination broadly.

Conclusion

It is clear that, despite the wide acceptance of human equality, anti-discrimination laws are controversial in both Australia and Japan. Although there is no evidence to suggest that banning discriminatory speech reduces bigotry, there is still a strong case for these laws to continue in order to build inclusive, modern communities. In Australia, racial discrimination is still an issue, with twenty percent of the population stating that they have experienced racial and religious discrimination, eleven percent believing they have been excluded from social activities or workplaces due to race, and five percent reporting physical assault due to their background.⁶

The laws in Japan can be criticized for many reasons, as stated earlier. However, even as a symbolic law, the law seems to have positive results, with the number of far-right rallies having halved in the first eleven months since its enactment, according to a survey conducted by the National Police Agency. This said, although the number of public demonstrations has declined, discrimination continues in alternative forms. Advocates are calling for a second phase of broader laws that aim to stamp out hate speech by targeting any messages of discrimination, including those against ethnicity, birth, or disability, which could only be a positive step towards social inclusivity.

Mai Mitsumori-Miller is a second year Juris Doctor candidate at the University of Melbourne, Australia and was an intern of HURIGHTS OSAKA during the December 2016-January 2017 period.

For further information, please contact: Mai Mitsumori-Miller at maimitsumorimiller@gmail.com.

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- 6 Scanlon Foundation, *Mapping Social Cohesion 2015: National Report*, <http://scanlonfoundation.org.au/wp-content/uploads/2015/10/2015-Mapping-Social-Cohesion-Report.pdf>.

South Korean Policy on Human Rights in North Korea

(Continued from page 4)

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- 1 Human Rights Watch, "UN: New Move on North Korea Crimes Human Rights Council Opens Door to Prosecution Strategies," www.hrw.org/news/2017/03/24/un-new-move-north-korea-crimes.
- 2 The "North Korean human rights movement" refers to groups and institutions in South Korea that work on the human rights situation in North Korea.

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Issues and Tasks: Human Rights in Asian Business

(Continued from page 10)

*Human Rights and Northeast Asia: A Facilitator's Training Manual.*¹²

Training and other educational activities on the integration of human rights in business operations are important tasks that have to be undertaken by all stakeholders.

Jefferson R. Plantilla is the Chief Researcher at HURIGHTS OSAKA.

For more information, please contact HURIGHTS OSAKA.

Endnotes

- 1 This workshop was jointly organized by the Asian Consortium for Human Rights-based Access to Justice, Go-Just Project-Commission on Human Rights of the

- Philippines (CHRP) and the Asia-Pacific Human Rights Information Center (HURIGHTS OSAKA) on 11-12 March 2017 at St. Francis Square, BSA Twin Towers, Ortigas Center, Mandaluyong City, Philippines.
- 2 The following discussion is based on the report entitled "Workshop on Business, Human Rights and Access to Justice – Workshop Report," Quezon City, 2017.
 - 3 Ibid., page 12.
 - 4 Ibid., page 11.
 - 5 Ibid., page 6.
 - 6 See "FGV, FELDA and SUHAKAM Collaborate to Promote Respect and Compliance for Human Rights in Business Operations," FELDA Global, www.feldaglobal.com/fgv-felda-and-suhakam-collaborate-to-promote-respect-and-compliance-for-human-rights-in-business-operations/#sthash.owLSFn9.dpuf.
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 - 9 "Workshop Report," op. cit., page 9.
 - 10 Ibid., page 14.
 - 11 See powerpoint presentation of Jefferson R. Plantilla entitled *Facilitator's Training Manual on Business and Human Rights*.
 - 12 Published by HURIGHTS OSAKA in 2016 in cooperation with the Northeast Asia members of the Asian Consortium for Human Rights-based Access to Justice (HRBA2J-Asia).

HURIGHTS OSAKA Calendar

HURIGHTS OSAKA will soon start collecting materials for the 8th volume of *Human Rights Education in Asia-Pacific*.



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HURIGHTS OSAKA, inspired by the Charter of the United Nations and the Universal Declaration of Human Rights, formally opened in December 1994. It has the following goals: 1) to promote human rights in the Asia-Pacific region; 2) to convey Asia-Pacific perspectives on human rights to the international community; 3) to ensure inclusion of human rights principles in Japanese international cooperative activities; and 4) to raise human rights awareness among the people in Japan in meeting its growing internationalization. In order to achieve these goals, HURIGHTS OSAKA has activities such as Information Handling, Research and Study, Education and Training, Publications, and Consultancy Services.

FOCUS Asia-Pacific is designed to highlight significant issues and activities relating to human rights in the Asia-Pacific. Relevant information and articles can be sent to HURIGHTS OSAKA for inclusion in the next editions of the newsletter.

Sender: HURIGHTS OSAKA

(Asia-Pacific Human Rights Information Center)

8F, CE Nishihonmachi Bldg., 1-7-7 Nishihonmachi, Nishi-ku, Osaka 550-0005
Japan

Phone: (816) 6543-7002

Fax: (816) 6543-7004

E-mail: webmail@hurights.or.jp

Website: www.hurights.or.jp



HURIGHTS OSAKA