

FOCUS

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Editorial

Role of Law

The purpose of law is to serve justice. Law is one of the many instruments of society towards achieving peace, progress and security.

History tells us that law has been used as a tool of the rich and the powerful to control wealth and politics, suppress those who dissent, and oppress the weak and the vulnerable.

The emergence of international legal standards is significant in providing a guide to determining how law could serve its purpose. The development of international human rights standards is important in broadening the discussion of law and justice, and providing stronger argument for the role of the people in determining the rules of society – mainly the laws that affect their daily lives and govern those entrusted with the power to serve both the individuals and the society.

The international human rights standards are still nebulous ideas to many people – despite the fact that their own governments adopted them. These standards provide concrete measures that States are expected to adapt into their laws and judicial processes. These standards are bases for people's demand for respect, protection and realization of their rights to peace, progress and security.

But there is still a long way to go. There is much work to do to make the law that subscribes to international human rights standards rule every society.

Farewell, Beida!

Statement by Guo Jianmei and Her Team

On 25 March, the Division of Social Sciences, Peking University (popularly known as Beida), published a Notice of Cancellation of Organizations on the University's official website. The Center for Women's Law & Legal Services was one of the four on the list. The days that followed were filled with calls of concern and support from the media, non-governmental organizations (NGOs), partners, the relevant authorities, friends and persons whom we have helped. We are touched, and we are grateful!

To an entity that has been single-minded in purpose and enterprise for the last fifteen years, expulsion from the Peking University family is a major and unexpected setback which affects more than just the entity itself. For the Center for Women's Law & Legal Services of Peking University is a symbol of deep significance. To the country, it is an industrious pair of hands that helps build social harmony. To the weak and the vulnerable, it is a ray of light that offers warmth and hope. To NGOs and our partners, it is a fellow comrade on the frontlines, enforcing the rule of law and advancing good for the civil society. To the people at large, it is a deliverer of social conscience and the spirit of law. And to every member of the Center, it is our common home.

As such, to those who have cared and still continue to care,



The screenshot shows a webpage with a header for 'NGO Legal Aid' and a navigation menu. The main content area features a group photo of the team and a statement titled '别了，北大' (Farewell, Peking University). The statement is dated 2010-4-2 and discusses the center's history and mission.

别了，北大

3月25日，北京大学官方网站发布了北京大学社会科学部的机构撤消公告，北京大学法学院妇女法律研究与服务中心是被撤消的四家机构之一。信息发布之后的几天以来，我们得到了媒体、NGO、合作伙伴、相关机构、朋友们以及被我们帮助过的当事人的关心和支持，我们深为感动，深表感谢！

对于一个15年一直在不懈努力 and 奋斗的机构，这是一个重大的变故，而产生的影响，不仅仅是对机构自身，因为“北京大学法学院妇女法律研究与服务中心”不仅仅是一个机构的名称，而是一个有深刻含义的符号。对国家而言，她为构建和谐社会做出了积极贡献，对弱势群体而言，她代表温暖和希望，对NGO和我们的合作伙伴而言，她是共同为中国法治和公民社会奋斗的战友；对社会公众而言，她体现了社会良心和法律精神；而对每一位中心的成员而言，她是我们共同的家。

因此，我们想对这个已成为历史的名字，想对所有关心她和我们的人说上几句：

一、15年来，我们从事的是“比太阳还要光辉”的事业。

1995年中心成立之时起，就以厉行法律援助，维护妇女权益，推动性别平等为目标，公平和正义成为中心、也成为中心每一位成员所奉行的理念和理想。作为中国第一家专门从事妇女法律援助的公益性机构，中心是中国民间法律援助最早的实践者之一，在弱势群体的巨大需求和政府法律援助资源不足的状况下，中心探索的民间法律援助模式成为政府法律援助的有益补充，也让近10万权益受害的妇女争取得了应有的权利。2004年，为了适应妇女权益保护多元化的发展需要，中心率先开展了妇女权益领域的公益诉讼，并成为中国公益法律活动的积极推动者。在中国公益诉讼制度尚未建立的情况下，中心实践先行，将妇女个体权益的保护和整体性权益的维护相结合，以推动法律政策完善与改革为目标，办理了大量典型性、影响性案件，范围涉及职场性别歧视、妇女的劳动权益、职场性骚扰、针对妇女的暴力、外来女工权益、农村妇女土地权益等等涉及妇女权益的重点和难点领域，并通过多种形式进行立法倡导，大大扩展了受益人群。

Statement on the Center's website

I would like to say a few last words about this name that has become history:

I. In fifteen years, we have lighted up more lives than the sun has.

Since the Center's inception in 1995, our aim was to provide legal aid, protect women's rights, and promote gender equality. Equity and justice were not only the Center's tenets, but the belief and ideal espoused by every member. As the first public interest organization in China that specializes in providing legal aid for women, we were one of the earliest private legal aid

practitioners. While demand for legal aid among the vulnerable was high, State legal resources were scarce. The Center thus became an efficient complement that plugged gaps in the government's legal aid services. It has since helped more than 100,000 women victims obtain recourse to justice.

In 2004, to meet the increasingly diverse needs in women's rights protection, the Center began providing public interest litigation services, and was soon to become an important force in public interest legal practice. Absent a public interest litigation

framework, the Center set itself to legal and policy improvement and reform by working on typical cases, incorporating the protection of the individual rights of women into the overall rights of citizens so as to ensure a deep and lasting impact. The cases involved important and difficult issues such as gender discrimination in the workplace, labor rights of women, sexual harassment in the workplace, violence against women, rights of female migrant workers, and rural women land rights. And by employing different approaches in legislative advocacy, the Center has expanded its beneficiary population.

Our efforts have rendered power to the law and to legal aid. A victim once told us, "the Center is like a lamp, glowing of equity and justice, exuding warmth in the cold, and shedding light on the darkness ahead." She spoke not only for the many weak and poor women, she spoke also for the meaning of our enterprise.

The Center has become a sphere of influence that motivated many later-comers. Consciously, it took on the responsibility of providing legal aid, conducting public interest litigation, organizing public interest legal advocacy, and training public interest lawyers. In 2002, a legal aid collaboration group was established, so as to enable more organizations and institutions to participate in the delivery of legal aid. In 2007, the Center founded the Public Interest Lawyers' Network for Women's Rights, and in 2009,

the name was changed to China Public Interest Lawyers' Network. The Network currently comprises more than 300 brilliant lawyers from more than twenty provinces and cities, providing legal aid for thousands of poor and vulnerable people. I still remember the Network's launch ceremony on 15 March 2009 at the Centennial Lecture Hall at Peking University, where leaders from authorities such as the Ministry of Justice's Department of Legal Aid, Center for Legal Assistance, All-China Lawyers' Association and the Beijing Lawyers' Association turned up to show their support. The speech given by Professor Zhu Suli, Dean of Peking University Law Department, remains vivid in my mind.

In September 2009, Ms Guo Jianmei, public interest lawyer and head of the Center founded Qian Qian Law Firm. Specializing in public interest law and public interest legal activities, and comprising professional public interest lawyers, Qian Qian has expanded its scope to benefit a broader spectrum of vulnerable persons such as those with disabilities, migrant workers and the elderly.

Fifteen years of innovative approaches and effective outputs have not only profited the poor and vulnerable women; the Center has also grown to become an influential and credible NGO. It has earned praises and won awards. In February 2006, in their congratulatory note to the Center's tenth anniversary, Professor Min Weifang, the Party Secretary of Peking

University, and Professor Xu Zhihong, President of Peking University, said, "the Center for Women's Law & Legal Services of Peking University has observed Peking University's glorious tradition of patriotism, progress, democracy and scientific approach. By seeking relentlessly, developing aggressively, and improving constantly, it has achieved commendable results, contributed to the progress and advancement of women's rights protection and legal aid delivery, and served its role in fostering harmony. Its work has won interest, support and tribute of the society and its peers, recognition and respect from women at large, and glory for Peking University!"

As Premier Wen Jiabao said, "Equity and justice glow brighter than the sun." Indeed, equity and justice are of supreme value and significance to every individual, every country, and every nation. The Center shall be a faithful and determined perpetuator of this worthy cause.

II. Hurdles deter us not, but spur us on

Cancellation by Peking University was not our first setback. The Center was nearly closed down during its initial days, only to be followed by one challenge after another. Funding was a major problem, as in those days, funding channels were few and funding systems unregulated. This shortage stymied NGO development, and was the major obstacle to the Center's growth.

Talent is another problem, especially when the Center, as a professional organization, was in need of well-qualified legal professionals. Attracting and retaining talent in a society of low public interest awareness and driven by utilitarianism was a huge difficulty. So were balancing ideals with reality, dedication and compensation, and spiritual fulfillment and material satisfaction.

Our work is also hampered by a deficient legal environment, flawed enforcement systems, administrative interference, local protectionist policies, industry protectionism, even corruptive practices within the judicial system. Persistent overwork leading to physical and mental stress of the Center's members is also a permanent problem.

Cancellation is also not the gravest difficulty we have faced. We were even threatened with physical harm. When angry villagers in that remote village let go of their tightly clasped sticks, convinced by our steady and determined gaze, we knew we could never be beaten. Because justice is what we pursue, and justice will always triumph.

Difficulty is only an excuse of the weak and the feeble. To go-getters with conviction, difficulty is an impetus to move mountains. Difficulty is but snowfall before the spring. And snow melts. Thereafter, a spring breeze will blow away, bringing forth myriad blossoms and an enchanting fragrance.

III. Farewell, Beida! But our pursuance of equity and justice

shall endure, and our belief in the rule of law shall prevail.

We have several members on our team who are Peking University graduates. They were inculcated with knowledge and intellectual depth, and nurtured with democratic sensibilities and humanistic values—the motivation for their choice of a public interest career. Cancellation was saddening to Guo Jianmei. This is not the Beida that she once knew. Guo Jianmei's resolute embarkation on a public interest career was guided by her Beida predecessors and the Beida spirit. She hopes that many will understand her sense of desolation and feeling of betrayal.

But desolation is one thing, Guo Jianmei and her team are as eager and as passionate as ever. They are convinced that legal aid and public interest work is what the people need, and what a harmonious society must have. These needs are revealed by the Center's work during the last 15 years, spoken by the sacks of millet and sweet potatoes, and the hundreds of thank-you banners from those poor and vulnerable clients, and proven by the numerous awards that the Center has won.

The Center may have become a chapter in history, Qian Qian is for now and the future.

The Center has devoted itself to serving women's rights, giving legal aid, and growing as an NGO. The least it has done is to have sent this message: Private legal aid organizations must and will play an indispensable role in China. Given the national circumstances,

charting new frontiers will require dedicated and valiant fighters, and they should be recognized and encouraged.

The future will be bright, and we will stick to our goal and continue on. The road may be treacherous, and the view along the way may not be always pleasant. But the meaning of life is about keeping our feet on the ground, undeterred, and making our way toward our ideals.

We have no complaint, we have no regret.

We thank every entity and every friend who cares for and who supports us. We have you, who will walk with us.

Formerly Center for Women's Law & Legal Services of Peking University

2 April 2010

NOTE

The original Chinese language text of this statement is available at the website of the Center for Women's Law & Legal Services (www.woman-legalaid.org.cn/detail.asp?id=1089). The Chinese text was translated by School of Feminism for Glocal Activists (SF)/Network for Global Activism (NGA) - http://www.sfseoul.org/sf/sf_nga_02.html?action=view&wid=184&boardcode=board7&mode=view&page=1&list_mode=&search_field=&search_text=&order_by=&desc=). The current text has been very slightly edited for style and spelling.

Law, Jurisprudence and Human Rights in Asia

HURIGHTS OSAKA

Decades of human rights standard-setting in the United Nations (UN) have not countered the misconception of human rights as “alien” or “abstract” ideas. A three-country survey of human rights awareness of Asian students found that teen-age students had a sense of what human rights meant but could not say exactly what they were.¹ Some Asian governments portray the idea of human rights as in conflict with the cultures in the region, or at least a luxury to be enjoyed under conditions that do not yet exist. A debate on whether the realization of human rights depended on a particular set of conditions (such as a certain “standard of living and level of economic development,” or a “stable system of government and a body of public officials discharging their duties with fairness and impartiality”) had already existed in the 1960s.²

This issue should have been settled with the 1993 Vienna Declaration and Programme of Action, which provided that

[D]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the

context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. (Article 8)

There is also another related provision in the VDPA that should apply to this issue:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. (Article 5)

And yet the debate has persisted.

Continuing Need for Human Rights Promotion

The debate largely ignores the laws and court decisions in various countries in Asia that uphold human rights.³ The varied histories of Asian law and jurisprudence provide a rich resource in determining the extent of development of legal principles and jurisprudence

that support human rights or directly invoke them. Many Asian Constitutions contain human rights principles that should guide laws and jurisprudence.⁴

But which laws and court decisions support human rights? How did they come about? What role did the people affected by human rights violations play in the enactment and implementation of these laws? What are the challenges in bolstering this nascent compliance with international human rights standards in Asia?

Closer scrutiny of laws and jurisprudence and their application of international human rights standards should help clarify issues in this debate. This exercise should also contribute to the promotion of human rights in the region. A research project⁵ involving eight Asian countries⁶ is probing the extent of subscription to international human rights standards by domestic laws and jurisprudence. The research project considers the distinct legal contexts in each country involved, as described below.⁷

South Asia

India ratified the International Covenant on Civil and Political Rights in 1979⁸ with several declarations.⁹ It also enacted anti-terrorism laws that were repealed after public protests, starting with the 1985 Terrorist

and Disruptive Activities Act and then the 2002 Prevention of Terrorism Act. The 2008 Unlawful Activities [Prevention] Act, however, has remained in effect with provisions that were harsher than the two previous anti-terrorism laws. The task of ensuring respect for human rights in light of the anti-terrorism law lies with the police, central and state governments, the courts, and the National Human Rights Commission of India. Private citizens, meanwhile, pressure the government to act. Judicial colloquiums are organized for people and jurists to express their opinions and demands.

Nepal has ratified numerous human rights instruments and enacted laws to support them.¹⁰ Nepali courts applied international human rights standards on cases involving personal liberty (petition for issuance of a writ of habeas corpus), women's rights, economic social and cultural rights, protection of minority rights, and child rights. Some court decisions, however, did not apply international human rights standards, particularly the case of *Mahesh Chamar v. HMG, Home Affairs* and others. The court there upheld the imprisonment of a juvenile who had turned sixteen. This decision ran contrary to reformatory approach in dealing with children in conflict with the law.

Southeast Asia

The human rights situation in Indonesia has improved through legislation,¹¹ ratification of human rights instruments, and the adoption of policies¹² that

refer to international human rights standards. The democratic political system has also played a part. Obstacles remain, however, particularly regarding the country's forty to sixty million Indigenous Peoples. While there is a constitutional recognition of Indigenous Peoples' rights, several laws negate these rights. Laws on natural resources and agriculture¹³ contradict the human rights law and also the Constitution. As a result, the existence of Indigenous Peoples communities has become dependent upon formal recognition under local ordinances. Moreover, traditional access and use of the forests and other natural resources by Indigenous Peoples have become criminal acts.

The Philippines has ratified numerous human rights instruments. Its Supreme Court has ruled in favor of domestic application of international human rights standards.¹⁴ The 1987 Philippine Constitution has provisions recognizing human rights, including the right to health. Specific constitutional provisions define the elements of this right¹⁵ while several laws implement it. One Supreme Court decision declared this right (as well as the right to a healthy environment) a basic right, assumed to have existed since the inception of humankind, that would not even require constitutional recognition.¹⁶ However, questions remain regarding the reliability of government indicators and statistics (e.g., sufficiency of health sector expenditure levels), devolution of health

services, disparate implementation of laws, privatization, cuts in subsidies for medical facilities, high cost of medicines, and patients' rights vis-à-vis the right to engage in health service business.

Thailand enacted the *Protection of Domestic Violence Victims Act, 2007*¹⁷ to protect victims of domestic violence, to create a reconciliation mechanism for the sake of harmony and stability of the family institution, and to provide non-criminal penalties (community service, etc.) for and rehabilitation of offenders. It also requires witnesses of domestic violence to report to the authorities and provides for an immediate police response. Its expedient enactment after the 2006 military coup, however, led to an inadequate focus on the rights of victims while emphasizing reconciliation between conflicting parties. The views of the women's rights movement were not included in the law. Furthermore, the law has not properly clarified the jurisdiction of courts over domestic violence cases. As a result, the criminal courts might not apply the anti-domestic violence law on serious domestic violence cases. Meanwhile, while domestic violence is still a family matter to most people, the police and public prosecutors use criminal laws rather than the domestic violence law in domestic violence cases. Nevertheless, the domestic violence law provides a resource to local communities in dealing with their own domestic violence problems.

Northeast Asia

Under the South Korean Constitution treaties have the same effect as domestic laws. If there is a conflict between domestic law and international instruments, the domestic law is amended. Though South Korea has no comprehensive human rights laws, the Constitution emphasizes basic rights and freedoms. The Supreme Court and Constitutional Court have not yet settled the question of application of international human rights instruments. They have cited international human rights instruments in some cases, but refused to apply them in others. Yet there have been changes in domestic laws that support human rights, such as the removal of capital punishment for some crimes (but not including political offenses). While the National Human Rights Commission of South Korea has an important role in human rights protection, a recent budget cut is likely to affect its independent status.¹⁸

In China, there is a prevailing notion that international law cannot be directly cited in court cases. Some Chinese lawyers, however, have begun using international human rights instruments in arguing their cases in court. A non-governmental “Roadmap to Participation of Civil Society in the Universal Periodic Review,” and the training of paralegals to address legal needs in rural areas where lawyers are lacking provide opportunities for people to be involved in human rights concerns. The first National Human Rights Action Plan, adopted by the Chinese government in 2009, provides a

basis for government-supported human rights programs. The rise of the middle-class, meanwhile, has led to protests against pollution and other issues. Issues regarding persons with disabilities and migrant workers are also becoming major concerns. In one instance, a court case was filed against the Ministry of Railways demanding train station facilities equipped to serve persons with disabilities. Yet, migrant workers, constituting around a hundred million people, still face many problems that have not been addressed.

Japan has ratified numerous international human rights instruments as domestic law. However, its criminal justice system is inconsistent with Japan’s obligations under the International Covenant on Civil and Political Rights. UN recommendations to reform the Japanese criminal justice system have been ignored. The Japanese courts likewise tend to refuse to recognize treaty body recommendations as bases for adjudication. The criminal justice system’s tendency to assume guilt rather than presume innocence leads to problems at the investigation stage (under the system of “substitute detention system” known as *Daiyo Kangoku*, suspects can be detained for up to twenty-three days in police detention facilities for investigation purposes with limited access to counsel¹⁹). This results in forced confessions, often with concomitant allegations of the use of force in securing them or their subsequent denial during court hearings. Moreover, defendants can be denied the

opportunity to examine the evidence against them. However, there have been recent changes in the Japanese criminal procedure, such as the videotaping of police interrogations and the introduction of the jury system.

Some Trends

From the perspective of human rights practitioners, laws and jurisprudence that apply international human rights standards should be utilized to address the concerns of affected populations. But considering the fluidity of the situation, with laws being enacted in violation of human rights or court decisions rejecting human rights principles, there is a need for continued advocacy regarding the realization of state obligations under ratified or acceded international human rights instruments. A major area of concern is the human rights consciousness of legislators and judges who have the power to repeal laws or reverse judicial doctrines that apply human rights standards. To some extent, such advocacy depends on the insistence of affected populations on the application of these standards in the public domain.

For further information, please contact HURIGHTS OSAKA.

Endnotes

¹ See *Educational Policies and Human Rights Awareness – Japan, India, the Philippines and Sri Lanka* (Delhi: Academic Excellence, 2008).

- ² See Seminar on Human Rights in Developing Countries (12-25 May 1964, Kabul) discussed in Hiroko Yamane, "Asia and Human Rights," in Karel Vasak, general editor, *The International Dimensions of Human Rights*, volume 2 (Westport: Greenwood Press, 1982) pages 653-654.
- ³ See for example Yuji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford: Clarendon Press, 1998); Alberto T. Muiyot, editor, *Philippine Law and Jurisprudence on Human Rights* (Quezon City: Institute of Human Rights, UP Law Center, 1999); Nihal Jayawickrama, *The Judicial Application of Human Rights Law - National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002). There are also some online resources such as the following: Asian Legal Resource Centre, *Human Rights Case Law - Sri Lanka* in www.ruleoflawsrilanka.org/cases/human-rights-case-law-sri-lanka, Commonwealth and International Human Rights Case Law Databases in <http://www.interights.org/databases-search/index.htm?keywords=Asia&start=1&finish=10&dir=databases&int1=&int2=on&match=any&orderby=rank&direction=DESC>
- ⁴ See Lawrence W. Beer, editor, *Constitutional Systems in late Twentieth Century Asia*, (Seattle: University of Washington Press, 1992) for discussions on this issue.
- ⁵ This project is supported by the United Nations Office of the High Commissioner for Human Rights under Project No: GLO/09/HC/25 B459 FOTCD Asia Pacific Unit, *Human Rights and Practical Needs: International Human Rights Standards in Domestic Laws and Jurisprudence in Asia* (December 2009-December 2010).
- ⁶ The following human rights centers are involved in the project: Human Rights Law Network (India), Center for Legal Research and Resource Development (Nepal), Association for Community and Ecologically Based Law Reform (Indonesia), Institute of Human Rights, University of the Philippines' Law Center, Center for Human Rights Studies and Social Development, Mahidol University (Thailand), MINBYUN-Lawyers for a Democratic Society (South Korea), The Public Interest and Development Law Institute in Wuhan University School of Law (Hubei, China), and Human Rights Now (Japan).
- ⁷ The discussion on national contexts is based on the proceedings of the meeting of the project research partners held in Bangkok on 25-26 March 2010.
- ⁸ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
- ⁹ One declaration relating to Article 9 of the ICCPR states that "[F]urther under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec.
- ¹⁰ These instruments cover rights relating to the following issues: anti-slavery, genocide, trafficking, women, apartheid, torture, racial discrimination, children, civil and political rights, and economic, social and cultural rights.
- ¹¹ E.g., Republic of Indonesia Act No. 39/1999 Concerning Human Rights.
- ¹² E.g., National Human Rights Action Plan, better known as RANHAM, and the access to justice policy.
- ¹³ E.g., Basic Agrarian Law No. 5/1960, Forestry Law No. 41/1999, Water Resources Law No. 7/2004, Plantation Act No. 18/2004, Coastal and Small Islands Act No. 27/2007.
- ¹⁴ E.g., the Universal Declaration of Human Rights.
- ¹⁵ These provisions are found mainly under the "Social Justice and Human Rights" chapter.
- ¹⁶ *Oposa v Factoran*, G.R. No. 101083 July 30, 1993.
- ¹⁷ Domestic Violence Victim Protection Act, B.E. 2550 (2007).
- ¹⁸ The National Human Rights Commission of Korea was reorganized in 2009 that led to the reduction of staff by 21 percent. See "NHRCK at a Crossroads" in National Human Rights Commission of Korea e-Newsletter (www.humanrights.go.kr/english/data/e-Newsletter/mail_090430.htm) accessed on 26 May 2010.
- ¹⁹ See paragraph 18 of the Concluding Observations of the Human Rights Committee, CCPR/C/JPN/CO/5, 18 December 2008. The United Nations Committee against Torture observed that the *Daiyo Kangoku* has been used for prolonged detention, see paragraph 15 of the 2007 Conclusions and recommendations of the United Nations Committee against Torture (CAT/C/JPN/CO/1, 7 August 2007).

Human Rights Based Approach to Access to Justice

Jefferson R. Plantilla

Poverty defines many communities in Asia, and a major cause of human rights violations. A 2005 explanation of this phenomenon still holds true:¹

[F]laws in the agenda for economic development, pursued by many states of the [Asian] region, are amply reflected in the growing poverty and social exclusion of large sectors of the population. Serious violations of economic, social and cultural rights have become engraved in actions of the state. Affected populations find that in the current environment of globalization their own governments are either unable or unwilling to redress the difficulties they confront. Exploitation of labor and depletion of the environment are some of the serious forms of violations resulting from the new economic arrangements. Indigenous populations are often particularly affected by such violations.

Governments, having the primary obligation of addressing the poverty issue, have failed to undertake measures that directly address the root causes of poverty. Governmental institutions, including the courts, have alienated the poor with their inefficient and corrupt systems. The poor find little opportunity to get justice under

this situation. Many law-oriented non-governmental institutions see the need to adopt a structural approach to help the poor. Though the legal system is generally problematic, they still consider it as an important resource to access justice.

Initiatives

The concept of access to justice has various forms in Asia. In the 1970s, organizations of lawyers and social development workers employed legal interventions that went beyond the usual notion of legal aid. They realized that legal aid as traditionally defined would not substantially resolve the suffering of the poor and the disadvantaged.² The court-oriented approach to obtaining justice was not enough. Laws, despite limitations, must be useful at the hands of the poor and the disadvantaged. Other structures in government and society should be utilized to fully address deep-rooted problems of the poor and the disadvantaged.

Indonesia's "structural legal aid," the Philippines' "developmental legal assistance" and India's legal resources approach are examples of legal interventions that were employed by legal professionals and para-professionals in Asia in the 1970s and 1980s.³ They all

focused on marginalized groups, operated under the principle that existing laws and legal systems were generally biased in favor of the rich and the powerful, combined legal work with social/community mobilization programs, emphasized the importance of empowering the poor and the disadvantaged, and engaged in law reform. In the 1990s such legal interventions have also been known as public interest litigation or social action litigation⁴ (particularly in South Asia) and alternative law practice in the Philippines.⁵

From the 1990s to the present, more institutions were established to address the access to justice question. More initiatives have been tried, some successfully implemented. These initiatives include the law and development programs that incorporate legal empowerment as a major component. Studies on the impact of legal empowerment activities largely show positive outcome, particularly on getting poor and disadvantaged communities to act on their problems.⁶

But access-to-justice law practitioners face numerous challenges. The 2008 Regional Conference on Lawyering for Social Justice and Human Rights⁷ recommended a number of measures to address common concerns and challenges of

these Asian law practitioners, namely,

- a. Networking and coalition-building among lawyers and law groups
- b. Judicial reform programs and (re)formulation of government policies, in order to improve access to justice by the poor
- c. Regional strategizing, such as setting the framework for integrating justice work with broad-based development work, developing regional jurisprudence regarding cases involving international human rights instruments, establishing database on best practices/documentation of successes and challenges, preparing regional human rights reports, and networking with other "communities" or actors (like national human rights institutions, corporations)
- d. Learning from the successes and failures in employing legal strategies by the communities
- e. Continuing capacity-building to popularize laws and international human rights instruments, maximize use of the media, train people on international human rights instruments and access to justice, and train paralegals
- f. Maximizing linkages and critically engaging international bodies and regional formations.

Recent initiatives in the region include the development of close cooperation between the access-to-justice law practitioners and members of the judiciary, the legislators, and the government officials.⁸

Access-to-justice programs constitute a significant part of the human rights work in Asia.

Asian Consortium

The United Nations Development Programme (UNDP) started the Asia-Pacific Rights and Justice Initiative in 2002 in line with its global program on building the capacity of national systems and institutions to promote and protect human rights, and on promoting the use of a human rights-based approach in development programming. This initiative advocates the 1) use of relevant human rights standards as roadmap for policy change; 2) the voice of the disadvantaged people; 3) the establishment of a clear framework for accountability in development; and 4) the analysis of conflict risks and power inequalities in development efforts.⁹

Under this initiative, UNDP supported the establishment of a regional 'community of practitioners'¹⁰ that led to the inauguration in the Philippines in November 2009 of the Asian Consortium on Human Rights-based Approach to Access to Justice (hrbaaj2).¹¹

A group of Philippine human rights institutions helped prepare the establishment of this Consortium in cooperation with UNDP and other institutions.¹²

The Consortium, composed of government institutions and civil society organizations, aims to¹³

share knowledge, including lessons learned, problems faced [on the application of the human-rights based approach to access to justice], and distil best practices and potential model reform experiences from the region as well as globally, into appropriate demand driven knowledge resources applying human rights principles and standards to facilitate access to justice.

It focuses on three major activities:

- a. Networking – creation of a pool of practitioners who are willing to support the work of the Consortium, and who can be resource persons in applying human-rights based approach to access to justice issues
- b. Capacity Development – development of training modules and other materials, and holding of training sessions on human-rights based approach to access to justice
- c. Advocacy – development of a regional advocacy agenda that support the promotion of human rights based approach to access to justice in Asia.

A region-wide dissemination of concrete experiences on the practice of human rights-based approach to access to justice is valuable. It leads to 1) recognition of the work of national/local groups undertaking difficult tasks within marginalized communities; 2) creation of a "virtual community" of like-minded institutions (both governmental and non-

governmental); 3) provision of bases for analysis and development of the principles and practices of human rights-based approach to access to justice; 4) development of working relationships among such institutions within countries and/or the region; and 5) creation of opportunities for staff development drawing from the rich collective experiences of the institutions. It is a concrete form of networking¹⁴ and advocacy in the region.

Regional Mapping

To further understand the existing access to justice programs in the region, the Consortium profiled an initial batch of thirty-one government and inter-governmental institutions, non-governmental organizations, people's organizations, academic institutions, and donor agencies in five subregions of Asia.¹⁵ The mapping exercise revealed the following key characteristics of these institutions:

- a. Research and training – They research on the legal system, legal aid, United Nations human rights instruments and mechanisms, women's rights, and rural or urban poor. Their training programs focus on the following major topics: legal system, women's rights, child rights, United Nations human rights instruments and mechanisms, traditional or indigenous justice system, legal aid, and the police.
- b. Partner beneficiaries - They mostly serve the following beneficiaries:
 - 1. People's organizations working on women,



Participants at the March 2010 conference of the Consortium

- children, indigenous peoples, small farmers/farm workers, migrant workers, and other issues
- 2. Academic institutions (universities and colleges, law schools, research institutions, non-formal education institutions)
- 3. Executive bodies (local or regional governmental authorities, governmental inter-agency mechanisms)
- 4. Independent bodies (national human rights institutions)
- 5. Security forces (police, military)
- 6. Judicial/Justice Sector (courts, judicial academies)
- 7. Legislative bodies (local and national)
- c. Resource allocation – They devote their resources mainly for law and policy reform advocacy, direct legal services, education and networking
- d. Major difficulties – They face the following difficulties: weak government partners' participation, lack of capacity-building materials, lack of trainers, differing human rights-based approaches/frameworks
- e. Niches – They do network-building, education and information dissemination

work, capacity-building, campaign/advocacy, policy research, and multi-stakeholder approach to programming.

The training materials produced by these institutions show the variety and quantity of resources useful to activities related to human rights-based approach to access to justice. These institutions agreed on the need to establish a regional network of institutions involved in access to justice work.

These institutions also suggested follow-up activities such as more exhaustive survey to cover more institutions, and provision of systems for feedback, exchange of information, and collaboration.

2010 Conference

The Consortium held its first regional conference in March 2010 in Manila to discuss the concept and application of the human rights based approach to access to justice, and its main focuses and plan for the next activities.

The participants recognized the access to justice field as an appropriate arena for the application of the human rights based approach. While they

seem to have a common understanding of the human rights based approach to access to justice, they saw varied applications of the concept due to different contexts in Asia.

Legal empowerment, seen as key to the application of the human rights based approach to access to justice, was considered crucial in addressing various forms of discrimination and in utilizing the difficult legal/judicial systems to address problems.

The participants also discussed the experiences in applying the human rights based approach to access to justice on issues regarding indigenous peoples, legal empowerment of the poor, gender equality, environmental protection, and peace-building and post-conflict situations.

As possible activities of the Consortium, the participants discussed capacity-building for duty-bearers and rights-holders, and the organizational requirements to undertake them.

Duty-bearers such as judges and government officials should undergo training workshops to sensitize them on the challenges faced by disadvantaged groups in accessing justice; to learn substantive equality and non-discrimination principles, civil/cultural/economic/political/social rights, "care" for the poor, and gender issues; and to learn how to incorporate methodologies on public participation in policy-making and legislative processes. Their training program should be suited to their national context

and include case studies, good practices and experiences, community exposure visits, and training of trainers. They should also have incentives for keeping positive attitude, fulfilling their obligations, and providing service through formal and informal justice systems. They should become familiar about norms or indicators that measure accountability.

The rights holders should become aware of basic human rights and know how to assert, claim, and access them. They should be provided legal assistance as well as be empowered to participate in policy-making, dialogue with the government and donors, and access funds.

Most participants explained the resources within their respective organizations that could be made available to support the activities of the Consortium. The conference ended with the discussion on membership, structure, standard operating procedures, programs, and resource mobilization of the Consortium.

Human Rights Defenders All

In mid-1980s in India, the human rights movement (also known as the civil rights/democratic rights movement) was seen as disconnected from the concerns of the communities. Human rights work was considered to be individual-oriented, state-centered, and court-centered. Human rights issues arose from citizen-state relations, and mainly covered civil and political rights. In sum, the human rights movement had

nothing to say about the oppression of the poor communities due to cultural and religious practices, as well as the incursion of "development" projects into their territories.¹⁶ To some extent, the same image of the human rights workers was true in other parts of Asia in the decade of the 1980s.

The 1993 non-governmental conference on human rights¹⁷ that brought together representatives of various types of non-governmental organizations signaled the widening scope of what was considered human rights work. As a result, the human rights agenda consisted of not only abuses by the state but also other causes of marginalization of communities and sectors in society. Human rights work covered cases of police/military abuse and also deprivation of the poor of food and shelter. The work included seeking specific remedy for individuals and also longer-term solutions to problems of communities. The people involved in these activities were all human rights defenders.

The 1999 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*¹⁸ provides that human rights defenders, among other services,

contribute to poverty alleviation, humanitarian assistance, post-conflict reconstruction, and to improving individual

indicators of development such as access to health care and adult literacy, among many other activities.

This statement is important in emphasizing the work on anti-poverty and access to justice as the work of human rights defenders. Human rights-based approach to access to justice, key to realizing the “larger freedom” of being free from want and fear and being free to live in dignity,¹⁹ is a particular tool for these human rights defenders.

For further information, please contact the Consortium secretariat c/o Institute of Human Rights, U.P. Law Center, Room 105, Bocobo Hall, University of the Philippines Campus, Diliman, Quezon City, Metro Manila 1101 Philippines; ph (632) 925-5854, 920-5514 local 204, 205; fax (632) 925-5854; e-mail: ihr.claw@up.edu.ph; ihr.claw@gmail.com; <http://law.upd.edu.ph/new/index.php/institutes/ihr>

Endnotes

¹ Hina Gilani, “Perils in the Defense of Human Rights,” *FOCUS Asia-Pacific*, 41/3. Ms. Gilani was the United Nations Secretary General’s Special Representative on Human Rights Defenders (2000-2008).

² See P.N. Bhagwati, “Judicial Activism and Social Action in Asia: The Challenges Ahead,” in Jose Ventura Aspiras, editor, *Law as Weapon - Alternate Approaches to Distributive Justice* (Makati: PROCESS, 1990), pages 106-108 on traditional legal aid inadequacies.

³ The existence of repressive governments during this period provided another impetus to develop these legal interventions.

⁴ Op cit., pages 108-116.

⁵ See Proceedings: *Alternative/ Developmental Law Workshop II* (Makati: Committee of Alternative Law Groups and Structural Alternative Legal Assistance for Grassroots, 1991) for a discussion on the concept and practice of “alternative lawyering” in the Philippines.

⁶ See for example the Asian Development Bank sponsored study *Lessons Learned from Successful Legal Empowerment Strategies* (Manila: ADB, 2001), Mary McClymont and Stephen Golub, *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees around the World* (New York: The Ford Foundation, 2000), and Patra M. Zen and Restu Mahyuni, editors, *Legal Empowerment of the Poor: Lessons Learned in Indonesia* (Jakarta: Indonesian Legal Aid Foundation, 2007). In late 1980s, a study of paralegal programs in a number of Asian countries revealed positive outcomes. The study became a basis for the development of *A Handbook on Training Paralegals*, (Geneva: International Commission of Jurists, 1989) edited by D.J. Ravindran.

⁷ Representatives of Asian institutions involved in social justice and human rights-oriented law programs attended the conference. The Alternative Law Groups (ALG), a Philippine network of nineteen non-governmental organizations engaged in alternative or social developmental law practice organized the conference. See *Proceedings of the Regional Conference on Lawyering for Social Justice and Human Rights* (Manila: Alternative Law Groups Inc., 2008).

⁸ See for example *Going CEDAW in the Philippines* (Bangkok: UNIFEM, 2009) and *Time for Action - Implementing CEDAW in Southeast Asia* (Bangkok: UNIFEM, 2009) for reports on

cooperation between non-governmental institutions and government agencies to ensure proper implementation of an international human rights instrument.

⁹ Hafiz Pasha and Shoji Nishimoto, Preface, *Programming for Justice: Access for All* (Bangkok: United Nations Development Programme, 2005) page v.

¹⁰ See Ana Patricia Graça, *The Asia-Pacific Rights and Justice Initiative – Regional Assessment* (Bangkok: UNDP, 2009), page 8.

¹¹ Earlier regional formations of institutions working on access to justice were the Asian Coalition of Human Rights Organizations (ACHRO) and the Regional Council on Human Rights in Asia.

¹² The group was composed of the following institutions (in alphabetical order): Alternative Law Group, Association of Schools of Public Administration in the Philippines, Ateneo Human Rights Center, Commission on Human Rights, Economic, Social and Cultural Rights-Asia, Lawyers League for Liberty, Philippine Judicial Academy, Supreme Court of the Philippines - Program Management Office, and the University of the Philippines - Institute of Human Rights. The Institute of Human Rights is currently hosting the secretariat of the Consortium.

¹³ *Declaration of Principles*, adopted during the Visioning Workshop for Regional Consortium on Human Rights Based Approach to Access to Justice (Tagaytay, Cavite, Philippines).

¹⁴ Hina Gilani promoted the idea of networking for the protection of human rights defenders. This is another concern for regional networking among institutions involved in human rights-based approach to access to justice. She wrote:

Creation of coalitions, national and regional networks for communication of information,

(Continued on page 14)

Human Rights Events in the Asia-Pacific

The Women's Fund for Peace and Human Rights is now accepting nominations for the 2010 Women's Human Rights Activities Award (Yayori Award) and the Yayori Journalist Award. The Yayori Award focuses on women activists, journalists, and artists who work with grassroots communities of the socially marginalized peoples in order to create a 21st century free from war and discrimination against women. Younger activists are especially encouraged to apply to support the development of future leaders. The nominees may either be individuals or groups from Asia (mainly). The Yayori Journalist Award focuses on women journalists and artists (individuals or groups) who vividly describe and transmit

the situation of women in the world with a gender perspective. The successful nominees in the two awards will receive an award certificate and 500,000 Yen each.

The submitted work of the winning nominee for the Yayori Journalist Award will be included in a Japanese publication later on. The nomination documents must be in Japanese language.

All nominations have to be submitted not later than 31 August 2010. Successful nominees will be announced on 1 November 2010, while the award ceremonies will be held on 4 December 2010.

For further information, please contact:

The Committee for the Yayori Award

C/O Asia-Japan Women's Resource Center 14-10-211 Sakuragaoka, Shibuya-ku, Tokyo 150-0031 Japan
ph (813) 3780 5245
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www.wfphr.org/yayori/English/top.html

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Access to Justice

(Continued from page 13)

monitoring groups and support groups is a development that is extremely reassuring. These networks are in themselves mechanisms for the protection of human rights defenders. Taking practical steps to protect persecuted defenders should be an important part of the responsibilities of coalitions. Urgent action networks are already functioning in the region and should be utilized more widely as a mechanism for the protection of human rights defenders. Regional initiatives to create monitoring groups and evacuation teams to respond immediately in situations where human rights defenders are in grave and imminent danger can

strengthen the element of protection.

Gilani, op. cit, page 5.

¹⁵See *Initial Results of the Regional Capacity Mapping Endeavour* [draft] (Manila: The Organizing Committee-Asian Consortium for the Human Rights Based Access to Justice, 2010). The institutions surveyed were from the following countries: Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Japan, South Korea, Lao PDR, Mongolia, Nepal, Pakistan, and the Philippines. The Economic, Social and Cultural Rights-Asia (ESCR-Asia) undertook the survey on behalf of the Consortium.

¹⁶For more discussion on this Indian experience see the October 1987 issue of *Lokayan*

Bulletin focusing on the politics of human rights. It featured a number of articles discussing this divide between the then human rights movement in India and the social-cultural and economic issues of the communities.

¹⁷This conference was held in Bangkok parallel to the regional inter-governmental conference being held in preparation for the 1993 World Conference on Human Rights.

¹⁸United Nations General Assembly resolution, A/RES/53/144, 8 March 1999.

¹⁹See *In larger freedom: towards development, security and human rights for all - Report of the United Nations Secretary-General* (2005).

Seminar on Japan's Report on ICERD

Nobuki Fujimoto

The United Nations Committee on Elimination of Racial Discrimination (CERD) discussed on 24-25 February 2010 the third to sixth periodic reports of the Japanese government regarding compliance with state obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Japanese government sent an eighteen-member delegation headed by Mr. Hideaki Ueda,¹ Ambassador in Charge of Human Rights and Humanitarian Affairs of the Ministry of Foreign Affairs. Representatives of Japanese non-governmental organizations² attended the session and provided relevant information to the CERD members.

CERD released on 16 March 2010 its thirty-five paragraph Concluding Observations regarding the situation of racial discrimination in Japan.³ CERD welcomed the support of Japan for the 2007 United Nations Declaration on the Rights of Indigenous Peoples, and the recognition of the Ainu people as indigenous people in 2008.

In view of this development, HURIGHTS OSAKA organized a seminar on 8 May 2010 in Osaka city on the proceedings of the CERD session. Professor Akira Maeda of Tokyo Zokei University and Ms. Setsuko Egashira of the Japan Federation of Bar Associations spoke during the seminar about the highlights

of the CERD session. They both lobbied the members of the CERD and observed the session.

Professor Maeda and Ms. Egashira narrated the impact of the stance made by a Japanese government official regarding North Korean students in Japan just before the CERD session began. Mr. Hiroshi Nakai, Minister in charge of the Issues of Abduction by North Korea, asked the Ministry of Education to bar schools with North Korean (*Chosen-Gakkou*) students from the planned tuition subsidy program. Mr. Nakai reportedly linked the tuition subsidy program to the unsolved issue of abduction of Japanese by North Korean agents some decades ago.

As a result, several members of the CERD raised this issue during the session. While they welcomed the government's initiative to have tuition subsidy for all children, they criticized the attitude of some government ministers and asked the Japanese government to look into this issue that would affect the right to education of North Korean children.

They also expressed concern regarding racist attacks and demonstrations against Korean schoolchildren and other foreign children by rightist groups, such as the Citizen's Group for the Abolition of the Privileges of Koreans in Japan (*Zaitoku-kai*). They urged the Japanese government to punish those who violate relevant laws

and take measures to prevent future attacks.

Professor Maeda and Ms. Egashira also pointed out that through the Concluding Observations the CERD:

- a. Reaffirmed the definition of the term "descent" in ICERD as not solely referring to "race" and thus ICERD covers descent-based discrimination such as Buraku discrimination
- b. Encouraged the Japanese government to establish a national human rights institution in accordance with the Paris Principles (General Assembly resolution 48/134)
- c. Encouraged the Japanese government to consider making the optional declaration provided for in Article 14 of ICERD recognizing the competence of the CERD to receive and consider individual complaints.

Endnotes

¹ Mr. Ueda's opening statement at the CERD session is available at http://www.mofa.go.jp/policy/human/pdfs/state_race_rep3.pdf

² Among the non-governmental organizations that sent representatives to the CERD session were Japan Federation of Bar Associations, the Ainu Association of Hokkaido, the Buraku Liberation League, the Solidarity Network with Migrants Japan, and the Japanese Network for the Institutionalization of Schools for Non-Japanese Nationals and Ethnic Minorities.

³ The Concluding Observations of CERD on the reports of Japan are available at: www2.ohchr.org/english/bodies/cerd/cerds76.htm

HURIGHTS OSAKA Calendar

HURIGHTS OSAKA is compiling a set of reports on experiences in teaching and learning human rights in the schools systems in Northeast Asia. Educators in Hong Kong, Mongolia, South Korea and Taiwan have prepared reports on the human rights education experiences in their respective school systems. This will be followed by the production of a material (likely a teaching manual) on human rights education for the Northeast Asian school systems. This material will be completed in 2011.



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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.

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