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Dynamics of International Human Rights Clinical Education in Japan: A Case at Kanagawa Law School

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The legal education at Japanese universities has undergone a fundamental change in the last decade. Most prominent is the creation of an American-type professional law school in 2004. A significant part of the process of educating lawyers is now entrusted to more than 70 law schools established throughout the country. Completion of the law school *curricula* qualifies one to take the national bar examination. As stated in the Statute on Attorneys (*Bengoshi hou*), lawyers are required to make a contribution to the realization of human rights and social justice. Thus, law schools are duly expected to provide human rights education to students who will serve as lawyers.

In ordinary legal settings, the Japanese Constitution (enacted in 1946) sets the basic parameters for human rights discussion. It sets forth a variety of fundamental rights and freedoms, covering both civil and political rights on the one hand and economic, social and cultural rights on the other. It provides that "fundamental human rights are conferred upon the people of this and future generations as eternal and inviolate rights" and that "the people shall not be prevented from enjoying any of the fundamental rights" (Article 11). Article 97 of the Constitution stresses trans-temporal human endeavors in constructing human rights; "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability". Clearly, this is the narrative of human rights commonly shared throughout the globe[1].

One characteristic of the Constitution is the enunciation of the principle of international cooperation. The Constitution of Japan provides in Article 98 (2): "Treaties concluded by Japan and established laws of nations shall be faithfully observed". By virtue of this provision, treaties con-

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1) Although originally written by members of the occupying American power and translated into Japanese, the Constitution has continued to enjoy overwhelming support from citizens throughout its history. Ongoing debates about revision of the Constitution are centered on Article 9, an article embodying the principle of pacifism. No substantial challenges have ever been launched against human rights protection although the last decade saw a tendency among conservative citizens to oppose gender equality clauses in Article 24 of the Constitution.

cluded by Japan automatically acquire the force of law in Japan. As has been repeatedly recognized by Japanese courts, binding customary international law is also part of the law of the land. Reflective of the principle of international cooperation, another fulcrum of the Constitution, binding international human rights documents enjoys a higher status in the Japanese domestic legal order; the dominant view is that it prevails over national statutes and is only inferior to the Constitution. Thus, it is a requirement of the Constitution that not only constitutional rights but also international human rights norms be properly taken heed of in making legal arguments on human rights[2].

It is in line with this spirit and letter of the Constitution that Kanagawa University founded the International Human Rights Clinic when the law school system was initiated. It is one of three clinical programs at Kanagawa Law School; two others are the Civil Law Clinic and the Local Government Law Clinic. As is well known, clinical legal education is a course of study combining classroom lectures with exposure to real cases or projects under the supervision of faculty staff. To the best of my knowledge, Kanagawa is the only Japanese law school where clinical activities are named "international" human rights law, although a number of reputed law schools have developed practical programs for the protection of foreigners' and refugees' rights. In this paper, I will describe some of the endeavours being undertaken at Kanagawa law school and review some of the fundamental problems facing human rights clinical education in Japan.

Three Conceptual Pillars

The purpose of Kanagawa's international human rights clinical education is threefold. The first is to educate law students to be well versed in international human rights law which has enjoyed unfailing legitimacy in the age of globalization. This is partly an attempt to rectify the current situation in which lawyers educated in the West are disproportionately represented and take the lead in the international human rights arena. Japanese lawyers have made too little a contribution to transnational peoples' interests and there was little, if any, discussion on the poor state of Japa-

2) Japan is a State party to the following major human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ratified in 1979), the International Covenant on Civil and Political Rights (ratified in 1979), the Convention on the Elimination of Discrimination Against Women (ratified in 1985), the International Convention on the Elimination of All Forms of Racial Discrimination (acceded to in 1995), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to in 1999), the Convention on the Rights of the Child (ratified in 1994), its two Optional Protocols on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (ratified in 2004), and the International Convention for the Protection of All Persons from Enforced Disappearances (ratified in 2009).

In addition, Japan acceded to the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees in 1981. Japan is also a State party to the four Geneva Conventions of 1949, their two Additional Protocols of 1977 and the Statute of the International Criminal Court.

As at the end of July 2011, Japan has signed but not yet ratified the Convention on the Rights of Persons with Disabilities. On the list of unsigned treaties are the Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Japan has not accepted the competence of any of the human rights treaty bodies to receive and consider individual complaints.

nese lawyers' commitment to global justice when the law school system was introduced. Kanagawa's clinic was launched to critically address these *lacunas*. Obviously, it is not a call for Japanese lawyers to join and strengthen the Enlightenment human rights tradition of the West. Rather, it is intended to accelerate the process to deconstruct Western knowledge and help liberate the international human rights discourse so that it genuinely embraces the lived experiences of the vast majority of people living in Japan and the rest of the world.

The second purpose is to provide an opportunity to nurture a sense of human rights and social justice required of every lawyer. As succinctly articulated by Warwick University professor Upendra Baxi, "[t] he single most critical source of human rights is the consciousness of peoples of the world, who have waged persistent struggles [against injustices]... Thus human rights cultures have long been in the making by the praxis of victims of violations, regardless of how rights are formulated, that is, regardless of the mode of production of human rights standards and instruments. Clearly, human rights education must begin by commissioning a world history of peoples' struggles for right and against injustice and tyranny."[3] It is always the socially vulnerable and not the socially powerful who animate international human rights law with a hope to restore justice. Exposure to their voices gives law students valuable opportunities to reconsider what human rights law is all about.

The clinical approach is all the more valuable from the perspective of human rights education. Rather than taking a conventional top-down approach - one that sees human rights as having been fixed by some authority through normative documents - it starts with people's daily pains and disappointments and then "seeks to use 'rights language'" to articulate their experience of the denial of their humanity in a way that asserts their rights, defined in their own way, and their claims on others (including the state) to help protect and realize those rights"[4]. It encourages students to contemplate how to deconstruct and contextualize otherwise objective and fit-for-all legal rules/institutions for the protection of human rights. Supervisors are not the traditional type of teachers representing academic authority but instead are there to encourage students to help people speak up on their own behalf. Our clinical program is intended to ensure that people are not deprived of their voices only to empower professional lawyers, which is often the case in advocacy work[5].

Thirdly, our clinical education is aimed at deconstructing the dominant discourses permeating law schools. Law school education is generally based upon three centrisms: the domestic law centrism, the tribunal centrism, and the rule interpretation centrism. These centrisms are founded upon the system of binary dualistic thinking with the effect of excluding the oppositional elements to the periphery of discussion. The excluded opposites are international law in the domestic law centrism, the alternative dispute resolution mechanism in the tribunal centrism, and the social mobilization in the rule interpretation centrism. By calling these neglected opposites to ap-

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3) Upendra Baxi, "Human Rights Education: The promise of the Third Millennium?", in *Human Rights Education for the Twenty-First Century* (George J. Andreopoulos and Richard Pierre Claude eds., 1997), p. 142

4) Jim Ife, *Human Rights From Below: Achieving Rights Through Community Development* (2010), p. 203.

5) See *id.* p. 201.

pear in the forefront of discussion, the International Human Rights Clinic invites students to be aware of the dominant binaries and explore the frontiers to critically challenge existing law and institutions.

The importance of domestic law, tribunals and the rule interpretation is in no way to be neglected. The clinical program, however, gives at least equal weight to other mechanisms otherwise invisible in law school curricula. Indeed, the international human rights mechanism, which is unique to international human rights law, is clearly of an international law and non-tribunal nature. Involvement in the works of state periodic reporting procedures and individual petitions to human rights treaty bodies inevitably makes students sensitive to non-domestic and non-tribunal aspects of human rights protection.

Students are also made aware of the dynamics of social mobilization. This is particularly so when they are engaged in lobbying activities with the government in an attempt to call for a change of policies and legislations relevant to human rights protection. Working with concerned citizens and people, not only do students experience opportunities of helping people exercise human rights, but more importantly they witness moments of "the definition and affirmation of what are to count as human rights"[6]. This is a valuable asset obtained through the clinical human rights program. They feel a sense of generating and re/constructing, and not merely applying pre-defined, human rights. This is none other than a practice of participatory democracy, a key element of human rights education specifically stressed in relevant UN documents[7].

The Clinical Education in Operation

As Director of the International Human Rights Law Clinic, among my first duties was the employment of practitioner-supervisors who share this kind of critical thinking with us and was also familiar with international human rights law. In Japan each prefecture has its own bar association except for Tokyo Metropolis and northernmost Hokkaido, each of which are home to more than three bar associations. Kanagawa Law School is located in Yokohama, the second largest city in Japan, and an increasing number of attorneys register for the local bar association herein. It is fortunate that the adjunct position for the clinical program has been held by a Yokohama lawyer who specialized in international human rights law while studying at a university in the UK after passing Japan's bar examination.

The program, however, has run into not a few hardships. The most serious among them is the declining passing rate of the national bar examination. It was officially announced when the law school system was launched that the passing rate would be set around 70-80%. Owing to the emerging political turf battle in governmental decision-making processes, however, it has never reached that level. On the contrary, the passing rate of the most recent bar exam (of the year 2010) was as low as 25%, meaning only one out of four law school graduates was allowed to pass

6) *Id.*, p. 135.
7) OHCHR, *Plan of Action for the First Phase (2005-2007) of the World Programme for Human Rights Education*, UN Doc A/59/525/Rev. 1 (2 March 2005) [3].

the door to the bar. It is predicted that students will encounter worse passing rates in the years to come. It is no wonder that they wish to concentrate on classes which are directly relevant to the bar examination. Thus, even the best intentioned students feel constraints in allocating their time for international human rights clinical activities.

Another problem is related to language. Japanese, which is the official language of Japan, has not been among the authentic texts of international human rights documents. Since Japanese law school education is conducted mostly in Japanese, and law students are not necessarily proficient speakers of UN official languages, translation is a must for the class discussion. While normative documents to which Japan is a party and the Concluding Observations issued after the examination of Japan's periodic reports in the treaty bodies are translated by the government into Japanese and officially distributed, no such endeavors are made with regard to other documents. Thus, when it comes to General Comments/Recommendations of treaty bodies and other soft law documents, instructors must look for unofficial translation or simply rely on students' command of foreign languages, in particular English.

Language is a tremendous barrier for students of international human rights law in Japan and perhaps in many other countries where non-UN languages are daily spoken. This is not merely a matter of language *per se* but it has cultural and institutional implications in the international fora. The dominance of the West and the elite is no doubt maintained and deepened through the medium of communication, language. In learning international human rights law, Japanese speaking people must bear a disadvantageous position. With the rapidly declining passing rate of the bar examination, the language barrier further causes law students to be cautious of spending their time on the international human rights law clinical program.

It is a relief and a source of pride that against the above mentioned adversities, there are a number of qualified students willing to be exposed to international human rights clinical education. Since Yokohama is a city of diverse ethnicities and nationalities, human rights abuses are likely to occur against non-citizens. Most vulnerable are irregular migrants and asylum-seekers who lack immigration status. When they have a family, the problem is further complicated. Since the launching of the program, the clinic has received a number of calls for help from them. There are cases where brief legal advice about the immigration and naturalization procedures will do. However, difficulties faced by many of our clients are so grave as to require our continuing commitment. This is particularly so with regard to undocumented families with children.

The Constitution of Japan confines the subject of human rights protection to "Kokumin", which literally means Japanese nationals. Although expressed as "the people" in English version, the authentic text of the Constitution indicates otherwise. In one of the most disputed Constitutional cases, the Supreme Court opined that "except for those which by nature of rights are considered applicable only to Japanese nationals, guarantees of fundamental human rights should be understood to be equally extended to aliens residing in Japan"[8]. This apparently liberal interpretation was substantially compromised, however, when the Court decisively held in the same rul-

8) Supreme Court, Judgment, October 3, 1978.

ing: "It is appropriate to consider that fundamental human rights in the Constitution are only guaranteed to aliens within the framework of the resident status system". Following the lead of the Supreme Court, lower courts have subsequently delivered a line of decisions to the effect that "immigration status" as opposed to "being human" determines the extent of human rights protection afforded to aliens in Japan, though, as mentioned below, this view is fundamentally at odds with that of human rights treaty bodies.

The Immigration Control and Refugee Recognition Act of 1981 stipulates that the Minister of Justice may exercise discretion and give special permit to stay to irregular migrants. When the case in issue is strong, such as one in which parents have spent an extended period of time in Japan with children firmly integrated into local communities, the clinic employs strategies which are reasonably expected to lead to the exercise of the Minister's discretion to legalize their status. This is in no way extralegal; it is in accordance with the statutory immigration procedures and above all in conformity with international human rights law which requires respect of family and the best interests of the child even in the immigration context. There is no guarantee that it will work, but this activity serves as a golden opportunity for law students who collaborate with client non-citizens to learn what the State is for and what human rights law is all about. Equally important, the entire process is conducive to the empowerment of our clients who are otherwise left in a legal limbo and powerless.

Kanagawa's International Human Rights Clinic is yet to be fully linked to the procedures of international human rights mechanisms except on the occasion of preparation of state periodic reports under the human rights treaties. It should be noted that Japan has not accepted the competence of any of the human rights treaty bodies to receive and consider individual complaints. The recent official reason for non-acceptance is the concern that such acceptance may give rise to problems with regard to judicial independence. The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights (ICCPR), has repeatedly recommended that the Government of Japan reconsider its position. In its most recent Concluding Observation addressed to Japan it recommended: "The State party should consider ratifying the Optional Protocol taking into account the Committee's consistent jurisprudence that it is not a fourth instance of appeal and that it is, in principle, precluded from reviewing the evaluation of facts and evidence or the application and interpretation of domestic legislation by national courts"[9]. The political will, however, seems to be garnered for Japan to join the international petition regime. When the time comes for our country to be part of the regime, our clinic will be duly involved in the process.

Need for Human Rights Education to Professionals

When the UN Decade for Human Rights Education came to an end in 2004, the General Assembly decided to continue the effort to promote human rights education and adopted the World Pro-

9) UN Doc. CCPR/C/JPN/CO/5, 30 October 2008, para. 8.

gram for Human Rights Education[10].The Program operates in phases and in 2009 the Human Rights Council proclaimed that the Second Phase of the Program would focus on human rights education for higher education and on human rights training programs for professionals[11]. Human rights education is now required not only for law students but also for professional people. For the International Human Rights Clinic and people in need of protection, one critical problem is a lack of human rights-sensitive attitudes on the part of professionals, immigration officials, public officials, school teachers, the police and the military (the Self-Defense Forces). Attorneys and prosecutors should be the primary targets of intensive human rights education. Judges are no exception. For the realization of human rights, particularly international human rights law, the role of judges is not small. It is very unfortunate from the perspective of human rights that the Japanese judiciary is to all appearances insensitive to the lived experiences of the socially vulnerable, particulary human rights of irregular migrants and asylum-seekers.

A quick survey reveals that the overwhelming majority of judicial decisions show indifference if not antagonism to international human rights activities. For example, following the dominant attitude of the judiciary in general, a district court denied the legal significance of the General Comment on Article 17 of the ICCPR and held: "Interpretation by the Human Rights Committee, though official, is different from the text of the Covenant and has not been ratified as a treaty. Accordingly, regardless of the interpretation [of the Committee in the General Comments], the claim of violation of the said Article may not be adopted"[12]. There is no lack of decisions such as the above-mentioned one, which disregard the interpretation of human rights treaty bodies. This is particularly so with regard to cases on immigration and economic, social and cultural rights.

Japanese courts continue to reject the view, repeatedly expressed by international monitoring bodies, that human rights treaties are to be extended to non-citizens regardless of their status. "'The best interests of the child' and 'respect for family rights' are only considered within the framework of their resident status", so said the Tokyo District Court in a case where the deportation of a family including a child born in Japan was at issue[13], a decision endorsed by the Tokyo High Court[14]. The treaty interpretation by the monitoring body of the International Covenant on Economic, Social and Cultural Rights tends to be simply unheeded in Japanese judicial settings[15].

As regards decisions of the Supreme Court, reference to international human rights documents is, to say the least, rare. In a case where the prohibition of courtroom note-taking was challenged, the Supreme Court was apparently informed by Article 19 of the ICCPR and declared that the prohibition was unreasonable[16]. Five judges, expressing their joint dissenting opinion in

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10) *World Programme for Human Rights Education*, GA Res 19/113B (5 August 2005).
11) UN Doc A/HRC/RES/6/24 (28 September 2007).
12) Sapporo District Court, Judgment, May 15, 1997.
13) Tokyo District Court, Judgment, January17, 2008.
14) Tokyo High Court, Judgment, May 29, 2008.
15) *E.g.*, Osaka High Court, Judgment, May 19, 2008.
16) Supreme Court, Judgment March 8, 1989.

a case where the right to inheritance of a person born out of wedlock was at issue, directly invoked Article 26 of the ICCPR and Article 2 (1) of the Convention on the Rights of the Child in declaring the unconstitutionality of an apparently discriminatory provision of the Civil Code[17]. In the same judgment, two of the ten justices on the majority, while finding the differential treatment of children born out of wedlock constitutional, made reference to relevant articles of the ICCPR and the Convention on the Rights of the Child in encouraging the revision of the Civil Code.

In a rare display of judicial activism, the Supreme Court found part of the Nationality Act unconstitutional, wherein recourse was had to the ICCPR and the Convention on the Rights of the Child[18]. The Court, however, only referred to these treaties as implying the move worldwide to remedy the discriminatory treatment against illegitimate children. It should be recalled that treaties concluded by Japan are in fact part of domestic law and are superior to the Nationality Act.

Overall, international human rights documents and the treaty interpretation by human rights treaty bodies are not given due respect in Japanese domestic courts. Notably, there has been a widespread tendency in the Japanese judiciary to avoid the "autonomous interpretation" of treaty provisions and subsume them into the Constitutional interpretation. In a number of cases, the courts concluded that there was no violation of international human rights treaties simply because there was no violation of the Constitution. Typically, in a case where the fingerprinting system imposed on foreigners was challenged, the court abruptly held that "since [the fingerprinting system] is not repugnant to Article 14 of the Constitution, it is obviously not repugnant to Article 26 of the ICCPR"[19]. A different court stated without any substantial analysis of the ICCPR: "[T]he principle of equality provided for in the Covenants is basically the same as in Article 14 of the Constitution, and what was previously determined [with regard to Article 14] can be applied as well."[20]

More recent judgments are not so blunt, yet the basic attitude of the judiciary seems unchanged. In a criminal case where freedom of expression of a public employee was at issue, the court first determined the constitutionality of the indictment and then went on to interpret the relevant articles of the ICCPR only to confirm the Constitutional interpretation. That the court apparently interpreted the ICCPR independently from the Constitution is a welcome development. However, by all appearances the treaty interpretation was subjected to Constitutional interpretation in order to come to the finding that the indictment was not in contravention of freedom of expression[21].

Curiously, there are not a few court decisions which simply put aside the question of treaty interpretation. The Convention on the Elimination of Discrimination against Women (CEDAW) being no exception, its monitoring body, the Committee on the Elimination of Discrimination

17) Supreme Court, Judgment, July, 5, 1995.
18) Supreme Court, Judgment, June 4, 2008.
19) Tokyo District Court, Judgment, August 29, 1984.
20) Osaka District Court, Judgment, October 11, 1995.
21) Tokyo District Court, Judgment, July 20, 2006.

against Women, stated in its Concluding Observation after the consideration of Japan's sixth periodic report; "The Committee is concerned that the Convention has not been given central importance as a binding human rights instrument and as a basis for the elimination of all forms of discrimination against women and the advancement of women in the State party. In this connection, while noting that article 98, paragraph 2, of the Constitution stipulates that treaties that are ratified and promulgated have legal effect as part of the State party's internal law, the Committee is concerned that the provisions of the Convention are non-self-executing and are not directly applicable in court proceedings"[22]. The Committee stressed that Japan should "increase its efforts to raise awareness about the Convention and the Committee's general recommendations among judges, prosecutors and lawyers so as to ensure that the spirit, objectives and provisions of the Convention are well known and used in judicial processes"[23].

The CEDAW Committee's concern was reminiscent of a similar statement made by another treaty body, the Human Rights Committee, which recommended that "[Japan] should ensure that the application and interpretation of the Covenant form part of the professional training for judges, prosecutors and lawyers and that information about the Covenant is disseminated at all levels of the judiciary, including the lower courts"[24].

Kanagawa's clinical education is not intended to imprint the idea that lawyers and the judiciary monopolize leadership roles in the field of human rights. In no way do we insist that international human rights documents exemplify the final truth. Still, we are of the view that law has a symbolic significance and, if employed properly, may serve as a powerful tool to realize human dignity. The existence of a human rights-conscious judiciary would effectively contribute to the construction of a human rights culture in society. It is in this sense that the contemporary Japanese judiciary clearly needs human rights training as recommended by human rights treaty bodies. The Japanese judiciary now constitutes important part of the global regime for the promotion and protection of human rights and it is to be expected that their duly contextualized human rights conscious judgments will assist in making the regime genuinely universal and people-oriented. However small its impact may be, Kanagawa's clinical program hopefully will facilitate its process.

Concluding Remarks

It is generally agreed in the Japanese legal academy and profession that human dignity is a supreme value and that the individual should be placed in the center of activities of state and international institutions. Among international scholarships, the Vienna Declaration adopted in the Second World Conference of Human Rights in 1993 is often referred to as an eloquent testimony of the universal nature of human rights as well as the Universal Declaration of Human Rights. The officially pronounced position of the Japanese government is also constructed upon the pre-

22) UN Doc. CEDAW/C/JPN/CO/6, August 7, 2009, para. 19.
23) *Id.*, para. 20.
24) UN Doc. CCPR/C/JPN/CO/5, 30 October 2008, para. 7.

sumption that human rights are universal, a position carved in none other than the Constitution[25].

With regard to the implementation of human rights standards, however, as described above, there still appears to be a long way to go in making the faithful application of international human rights in domestic courts a dominant paradigm. Moreover, the academic and official position approving the fundamental nature of human rights is far from firmly reflected in daily governmental functions. In civil society, too, human rights insensitive attitudes such as patriarchal stereotypes regarding the roles and responsibilities of women and men doggedly persist. It may be submitted that the persistence of gender biased perceptions in society is, at least partly, behind the government's intransigent attitude against taking legal responsibility for "comfort women" issues.

Since the state is no longer considered the primary abuser and is increasingly held responsible for a failure to prevent and remedy the behavior of private persons, it is important to ensure that the local population feels a sense of ownership of human rights and human rights documents, a condition that is yet to fully come into being in Japan. Education to sensitize the local populace to embrace "enlightened" human rights philosophy is not an effective guarantee of grass-roots support of human rights. Rather, in pursuing the full potentialities of human rights, one should be courageous enough to contemplate that there might be alternative visions to the human rights paradigm in obtaining the real good. Such diametric approaches as opposed to enlightenment ones may paradoxically assist in the recognition of the validity of human rights.

Though precise definitions of human rights education vary, one element commonly incorporated in each and every of them is an aspiration for social change. After all human rights are not something simply to be taught from "above"; they are something to empower people to take action to address and eradicate social injustices inflicted upon them. It is our desire that Kanagawa's International Human Rights Clinic, allying with active partners in a broader community of human rights education and basing its activities on local contexts, will engage itself with relevant public agencies and general citizens to build a society which is dynamic and truly sensitive to human lives.

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25) I note that there is a strong criticism among progressive circles in Japan regarding current global situations in which the terminology of human rights is effectively co-opted by certain political and economic forces to justify and enforce their interventionary policies.