

Access to Justice in Small States: Reflections on Japan's Official Development Assistance (ODA) for Legal Empowerment

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Venue: Room 825, Faculty of Law, Cheng Yu Tung Building, The University of Hong Kong

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Profile of Speaker:

Mana Takahashi is pursuing a PhD degree in comparative law, at the Program on Cross-border Legal Institution Design, Graduate School of Law, Nagoya University.

Mana holds a MA in international development from Nagoya University in 2009, majoring in law and development, law and justice assistance, access to justice, and project management method. Mana previously worked as a project management officer in the field of IT, at IBM Japan Ltd located in Tokyo, Japan, and as a consultant at the United Nations Commission on International Trade Law (UNCITRAL), Regional Centre for Asia and the Pacific located in Incheon, Republic of Korea.

Research Interests

Law and development; Law and justice assistance; Legal pluralism; Access to justice; Method of project management; Small Island Developing States (SIDS); the Pacific regional study; Law and justice assistance in Solomon Islands

Research Topic

Role of legal technical assistance for enhancing people's access to justice in Small Island Developing States (SIDS): Hints and tips from experience of Solomon Islands

Research Projects

- Joint Research Project on “Strengthening Local Governance to Combat Overfishing: The case of Samut Sakhon province, Thailand” (April 2015 to current)
- Joint Research Project on “Comparative analysis on legal technical assistance for enhancing access to justice in informal justice sector” (July 2015 to current)

The Japanese Government began implementing international legal technical assistance projects in the early 1990s. Initially, it concentrated on transitional states. But recently the ODA Charter mandate has been broadened to enable assistance to be provided to regions emerging from civil conflict.

This seminar will draw on the data available from Japan's ODA experience. It will consider the need for donor countries (such as Japan), when engaging in international peace-building projects, to take account of the possibly complex social patterns that exist domestically in a state or region. By way of case study, the seminar will focus on Japan's ODA experience in relation to enhancing dispute resolution systems in Aceh (Indonesia) and access to justice in the Ivory Coast.

Part I: Introduction

Access to Justice is one of the fundamental human rights. It starts with a legal problem faced by the applicant, the access to law, understanding the law, making a legal strategy, carry out the strategy and finally resolution of the legal problem. (Hagan, 2015)

The concept of "Access to Justice" has multiple definitions.

Each practitioner define the concept depending on different historical and social contexts.

Firstly, "the ability of groups and individuals to be able to bring an alleged rights violation to the attention of a court and to have that court adjudicate the claim in a fair and impartial fashion on the basis of the evidence and according to the applicable rules of law." (Baumgartner, 2011) Secondly, "the ability of citizens and communities to make use of courts" (World Bank, 2010) Thirdly, "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards" (Global Alliance Against Traffic in Women, 2015)

The significant elements of access to justice is stipulated in the Article 8 of The Universal Declaration of Human Rights. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Access to Justice has two dimensions, namely, procedural access and substantive justice. Procedural access refers to the process of having a fair hearing before a tribunal; while substantive justice refers to receiving a fair and just remedy for a violation of one's rights.

The need of Legal Technical Assistance (“LTA”) arises under circumstances such as, e.g. the justice system cannot be utilised in the society; the government does not have enough capacity to guarantee access to justice; the applicants do not have any methods to utilise the stable justice system; and the states have no social context and history to understand access to justice, and etc. Therefore, there is a need to be supported by external assistance by borrowing the idea from “outside” to enhance domestic condition.

In such circumstances, the questions posed for the donor organisations in LTA is , how the LTA programme should be designed to enhance the right of Access to Justice among local people in a recipient country? In other words, what are the essential elements that need to be considered in LTA projects?

Part II: What is “Legal Technical Assistance”?

Legal Technical Assistance aims to assist developing countries in establishing efficient and effective justice systems. One of the international development assistance for legal reform conducted by donor organisations includes multilateral and bilateral development agencies.

The history of the LTA system dated back to 1960s. From 1960s- 1970s, United States and Japan started the Law and Development Movement (“LDM”),aiming to transform the legal culture through reform. It was designed to apply the Western legal system to Latin America and other developing countries for achieving economic growth. However, the movement did not respond sufficiently and adequately to the needs of the recipient societies, enforcement was ineffective, and rules were not adopted appropriately in specific contexts of the recipient societies. As a result, the movement failed.

Since 1990s, during the post-war period, a new movement, New Law and Development Movement (“NLDM”) was initiated. It focuses on multidimensional legal system including transitional states, international cooperation, and conflict management. The goal of NLDM is to establish the rule of law in the society as essential elements of good governance, to enhance human rights and democratisation.

NLDM was distinguished from the former movement, including international system and corporate management. NLDM is tailor-made; while the former LDM system

ignored the specific historical and social contexts of the recipient countries, resulting in incompatibility between the assistance provided and the problem that need to be addressed. The specific context approach in NLDM becomes major method in developing legal assistance projects.

Donors consist of five categories: (1) International Organizations; (2) Regional Organizations; (3) Bilateral Organizations; (4) Non-governmental organizations, and Research Institutions .

There are three main categories of recipients identified which need legal technical assistance, such as Transitional States (e.g. Former Soviet union), Failed States (e.g. East Timor, Afghanistan), and New Independent States (e.g. Pacific Islands). They all lack a capacity of drafting and enforcing legislation, due to their tradition, culture, history and social contexts.

The target area of LTA consists of four parts. Firstly, drafting laws and promoting legislation. Secondly, improving legal systems to enforce and operate laws to enhance enforcement body and dispute resolution mechanisms. Thirdly, capacity building involves providing judicial training for lawyers, legal officers and law students, in order to enhance legal infrastructure and information system. Fourthly, raising legal awareness and legal empowerment aims to enhance access to justice by providing legal aid and promoting understanding of law among the public. (The Japanese Ministry of Justice, 2014) The area on Legal awareness and legal empowerment is considered as the substance to increase access to justice of people in recipient societies.

The concept of access to justice has become a big trend in the world. At the World Summit in 2005, the United Nations Resolution adopted was “Rule of law and access to justice lie at the center of UNDP’s mandate as essential to human development and the reduction of poverty.” Further, there is international recognition for promoting access to justice, it has reached maturity in current development assistance context. This is shown in the goal 16 of the Sustainable development goals (“SDGs”) in the 2030 Agenda by the UN General Assembly in 2015,

“Goal 16: Peace and Justice

Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

There are many cases of legal assistance in enhancing justice to people, which includes helping marginalised group in the recipient societies. The concept of access to justice is broad and covers diverse perspectives, based on the social contexts, which may depend on each societies' history, culture, and religion.

Different donor organisations, having different concepts of access to justice, aims to achieve different goals through different means. UNDP aims to contribute much more than improving an individual's access to courts, or guaranteeing legal representation through normative protection, building capacity to seek an effective remedy. The World Bank aims to improve on the ability of citizens and communities to make use of courts through court reform, legal services and legal aid, providing information dissemination and education, providing alternative dispute resolution ("ADR") and to make the public sector of the recipient countries more accountable to its people. IDO believes that access to justice is a matter of supply and demand. It aims to contribute to capacity building in the judicial sector and to empower grassroots legally. AusAID has two objectives- stabilizing conflict in affected societies and promoting access to justice as a development goal in its own right. It has conducted projects of J4P jointly with the World Bank and main components are based on the World Bank concept. JICA aims to overcome obstacles of accessing judicial system and legal information among people. Rules should be well understood by people for being standard on dispute resolution and that people should be able to access to judicial system regardless of attribute. Its three components to achieve such goals are enhancing the access to judicial and dispute resolution system, enhancing and promoting the access to legal service, and promoting legal awareness and legal education.

Besides formal justice, Informal Justice has a standing point too. It is a "non-states" justice system, such as customary court or local courts. In the developing countries, Informal Justice is a significant body to assume delivering justice and resolving legal issues in the society.

Part III: Legal Technical Assistance in Japanese ODA Context

What is the situation for Japan as an emerging donor of LTA? Can "East-Asian Style" be an alternative of Western donor? To what extent can Japanese legal technical assistance contribute to enhance the rule of law of recipient countries?

Japan does not replicate the high degree of commonality of five major donors which

are USA, EU, Germany, France and the United Kingdom. Japan can provide an alternative to traditional Western approaches to legal reform or rule of law promotion. (Nicholson and Hinderling, 2013)

Definition of ODA

The DAC defines ODA as “those flows to countries and territories on the DAC list of ODA Recipients and to multilateral institutions which are:

- i. provided by official agencies, including state and local governments, or by their executive agencies; and
- ii. Each transaction of which:
 - a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and
 - b) is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10 per cent).” (OECD)

The key objectives of Japanese ODA is to practise “proactive contribution to peace” and implement significant measures for diplomatic policy. (Japan International Cooperation Agency) There are two types of ODA, which are bilateral aid and multilateral aid. Japan is one of the top 7 countries which offer disbursement of ODA. However, when considering the ratio of ODA to GNI (Gross National Income) among OECD countries, the figure of Japan is relatively low, which is 0.23. (The Japanese Ministry of Foreign Affairs, 2013)

There is a transition in objectives of Japanese ODA over time. In 1946, Japan was an ODA recipient country as she got a loan from the US and the World Bank. Since 1960s, Japan offered ODA as a war compensation after WWII. Targets were countries in Asia and Micronesia. Since 1970s, Japan saw ODA as a form of International Cooperation. ODA was a development assistance tool for diplomatic policy. Japan became the top donor in the world. In 1992, the first ODA Charter was formed. Since 2000s, Japan has used ODA for international peace, security and building good governance. (The Japanese Ministry of Foreign Affairs, 2015; Fukushima, 2015)

Three transitions in Japanese ODA Charter had taken place. In 1992, the ODA Charter clarified its diplomatic policy and launched the first LTA project in Vietnam in 1994. Since 2003, there was an ODA Charter Revision (“self-help” as ODA philosophy). In 2005, there was the first discussion on establishing “Democracy” and “Rule of Law” in JICA report. Since 2015 February, ODA Charter was renamed as the Development

Cooperation Charter, which aimed at extended the scope of cooperation between donor and recipient countries, strengthening collaboration with diverse stakeholders including the private sector, NGOs and PKO. This change is needed following globalization as there is a need for international cooperation including the developing countries to ensure peace and prosperity in the world. (The Japanese Ministry of Foreign Affairs, 2015; Nicholson and Hinderling, 2013)

The LTA in the new Charter sees development cooperation in a new era and sets a post 2015 agenda. It aims to share universal values and to realise a peaceful and secure society as the foundations for development. The values are: rule of law, good governance, basic human rights, democratisation, peacebuilding, capacity building of law enforcement and anti-terrorism. Such goals are to be achieved by cooperation aimed at self-reliant development through assistance for self-help efforts as well as dialogue and collaboration based on Japan's experience and expertise. Japan will attach importance to building the foundations of self-help efforts and self-reliant development such as human resources, socio-economic infrastructure, regulations and institutions. Hence, the significance of legal technical assistance is increased. (The Japanese Ministry of Foreign Affairs, 2015)

Japan has had several experiences of Legal Technical Assistance in the Asia, namely, Vietnam since 1994, Cambodia since 1996, Laos since 1999, Uzbekistan and Indonesia since 2002, China since 2007, Mongolia since 2012, Nepal since 2013, and Ivory Coast since 2014. (Inaba. ICD news no.39 (2009), JICA) As illustrated, the target countries of Japanese LTA are transitional States in South-east Asia and Central Asia. The spirit of the LTA is self-help, sharing the experiences of Japanese Development with mixed legislation, from the continental law and the common law. It aims to help recipient countries in drafting laws, improving legal system to enforce and operate laws, and building capacity.

On the other hand, the Japanese LTA has received much criticisms from the international society for her lack of attention to peace and human rights perspective, lack of considerations for international standard, and the lack of attention to "legal empowerment". In response to this, Japanese LTA has identified several countries to achieve the goal of legal empowerment, one of the new targets under the development cooperation charter. They are, Indonesia, Vietnam, Myanmar, Mongolia, Cambodia, Laos, Uzbekistan, and Bangladesh. As a side note, Bangladesh, whose jurisdiction system is based on the common law, is unclear why it has been identified by the Japanese as one of the target countries, which brings about speculation and suspicion

of the soft-power diplomatic policies of Japan. It is also skeptical whether Japan has such capacity and experiences for implementing access to justice project in a common-law country, which further increases the difficulty to convince international society to become a big donor.

One of the Japanese LTA projects took place in Aceh, Indonesia. On 26th December, 2004, a deadly earthquake of 9.3 magnitude and tsunami hit Aceh province of Indonesia. There were 130,000 victims in Aceh province. There was a significant change in the social context pre- and post-incident. Before the tragedy took place, there was a strong Muslim Culture and local people would follow customary and Islamic law. After the Tsunami, many possible disputes broke out and the number of disputes went beyond the local capacity, calling international aid for enhancing dispute resolution system including the community ADR, which was known as the ADR Seminar for Tsunami affected people in Aceh. It was a remote seminar by JICA-Net, which lasted till March 2006. Implementers included JICA, Japan Bar Association, Ministry of Justice and the Indonesian Government. The target was to provide seminars on Japanese ADR system and procedure to potential ADR practitioners, thus achieving the goal of “legal empowerment”.

Despite success in some of the LTA projects, there are still challenges for the future commitment. The project approach toward “enhancing access to justice” would be a key for showing Japanese effort to international society and attracting recipients as targets.

The role of Japan as an “alternative” as a donor of LTA has alerted some issues for the Japanese government that she should design a Japanese model for access to justice, to overcome the limitation as Japanese as the Japanese legal system is homogenic. More inter-donor coordination should be promoted as well.

When comparing the Japanese LTA and the Western donors, in terms of aid structure, Japan is strongly centralised whereas USA is decentralised, and France is partly decentralised. Japan does not state a clear idea of “rule of law”, which the notion of “access to justice” is largely premised on. The methodology adopted by Japan is “unforced legal technical assistance” through the ideology of self-help and local ownership, underpinning Japan’s significance; whereas for western donors, they generally adopt a top-down approach. The Japanese aid actors are legal professionals, while the Western donors include not only legal professionals, but also aid practitioners.

(Nicholson and Hinderling, 2013; Nicholson and Kuong, 2014; Simion and Taylor, 2015)

There are three aspects of limitation of Japanese LTA in the context of Access to Justice. Firstly, the concept of “big umbrella”. Japan states very vague concept for the key idea of LTA. Secondly, there is lack of “practical viewpoint”. There is less diversity of aid practitioners, when compared to the western donors, who are more able to understand the social context of recipient countries and aid effectiveness of LTA projects in the recipient countries. Thirdly, the process of designing the project shows that there is a limitation of the idea “self-help” and “local ownership” promoted by Japan as these ideas sometimes may contradict with the global standard.

Part IV: How to design the project for “Access to Justice”

The four key elements of LTA for Access to Justice are (1) Legal Pluralism (Legislation and legal bases); (2) Resources (people, budget, dispute resolution system); (3) Social Context of the Target (geography and tradition); and (4) Maturity of democracy.

For instance, it is interesting to note the relationship and the influence of “geographical characteristics” as small states on designing process of LTA. In a Pacific Small Island Context, there are quantitative issues (lack of human resource and institutional resource) and qualitative issues (impartiality and transparency are not guaranteed). Therefore, it is an issue for the donor organisations in taking into account of such elements. (Paterson, 2000)

The Way Forward

A “Hybrid Justice System” is suggested. There should be ways of harmonisation between formal and informal justice system so that the needs of small islands with traditions and customary law can be addressed.

Q&A

1. Moderator: Some may suggest that the LAT project of Japan as a diplomatic policy to enhance her soft-power, thereby increasing her influence in the Asia-Pacific, what is your opinion on that?

Speaker: Yes.

2. What is the specific project that Japan has launched in China?

Speaker: on environmental law.