

Human Rights-based Approach to Law Development

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Abstract: *In the last two decades, human rights-based approach in the process of legal policy making has become a global trend. This method not only focuses on the output but also the implementation process. It thus ensures the rights of those affected directly by the laws that are being developed and requires implementation obligations from the State. In Vietnam, the human rights-based approach in law development has begun to arouse interest in recent years. Yet, the ambiguity and inadequacies in the implementation process requires proper changes to be made in the coming time.*

Keywords: Rights-based Approach, Human Rights-based Approach, Human Rights, Law Making

Introduction

There has been an inclination in the recent two decades to adopt human rights-based approach in legal policy making and development process in international institutions and countries in the world. Through its development programs in 1997-1998, UNDP issued its policy of “integrating human rights with sustainable development”, which was later reflected in its Human Development Report (2000) with the view of development as a means to realize human rights and human rights as an intrinsic part of human development. UN agencies in 2003 reached a common understanding of rights-based approach which promotes “rights-based approach to programming and development

cooperation” with “the aim of all activities is to contribute directly to the realization of one or several human rights” (United Nations, 2003). Ever since, the rights-based approach has been applied by UN agencies for their development programs and also become mandatory in many countries in the process of formulating and implementing policies, including legal policies.

1. Human rights-based approach

Human rights- or rights-based approach (HRBA) is a method applied by international institutions in formulating and realizing their development programs. It has been widely used by many countries in their legal policy making and development process.

HRBA could be comprehended as the adoption of human rights standards and

principles as a basis for the objectives and operation modes of policies, programs, and development projects. This approach focuses on the relationship between rights holders and duty bearers, among those the state is the primary duty bearer to guarantee and protect human rights. HRBA, therefore, not only ensures the rights of individuals associated with policies and development projects but the implementation obligations of the state as well. Whereas, the conventional approach which concerns ultimate goals has been attributed to the neglect of many groups of people whose rights are not exercised or even infringed without adequate attention or compensation. HRBA instead emphasizes human rights as well as responsibilities and obligations among involved parties with clear definitions of their roles and in a transparent and nondiscriminatory manner, thereby promoting people's participation in different stages of programs and projects. HRBA is thus seen as the first step towards empowerment, through which rights holders would be able to request the state to fulfill its obligations and to participate in the decision-making process regarding the issues that may affect their rights. It means also the recognition, respect, and guarantee of stakeholders' rights from duty bearers must be borne in mind.

Currently in many countries, HRBA has been of much interest and applied for its appreciation of not only the set targets but the whole implementation process. This process involves all stakeholders and relevant factors and ensures the people's active participation as well as the rights of vulnerable groups. HRBA, therefore, appears to be a proper and appealing

approach from both legal and ethical perspectives for countries in the world (Vu Cong Giao, 2019).

2. Human rights-based approach in legislation

Principles and norms that form International Human Rights Law have been more clearly defined and explained in recent years. It is not only attributable to the state's passive obligations (i.e. what refrain the state from human rights infringement) but the state's active obligations (i.e. what the state needs to do to ensure human rights). In that sense, human rights could be regarded as "a programme that can guide or orient the public policies of States and help to strengthen democratic institutions, particularly during transitions or in incomplete or weak democracies" (Victor, 2006: 36).

In such fashion, HRBA is a means to ensure the execution of legal obligations set by international conventions on human rights and in the constitutions of many countries in the world. At the same time, the application of HRBA would also guarantee the sustainability and rationality of project outputs, including ones for legislation. Those whose rights are subjected to legal documents that are being developed would be able to partake in the decision-making process in a fair and non-discrimination manner. Concurrently, state agencies in charge of legislative work have to anticipate relevant rights holders, possible impacts, and viable solutions accordingly. These must be required as part of the law-making process.

During the process of revising Criminal Code, for instance, in many countries including Vietnam, a constant question

raised is the capital punishment should be upheld or abolished. As traditionally approached, the regular answer is to retain the death sentence as it appears to best serve the ultimate goal of punishing criminals and maintaining social order. HRBA, however, allows lawmakers to take into account the people involved in upholding the death penalty. It is about the rights of judges who are entitled to make legal decisions: do they have the right to reject a capital punishment that falls within the law but outside their religious rules? It is about the rights of executioners who are tied with their obligations but executing at times is against their will. It is about the rights of the sentenced person: what if he or she was wrongly convicted? There are many others, like the offender's families, the victims and their relatives (if any), lawyers, and so forth, whose rights need to be taken into consideration as well. All such people must be counted when formulating a legal norm. By adopting HRBA, many countries around the world today have eliminated the death sentence and Vietnam is also moving towards a gradual reduction of death penalties with each revision of its Penal Code.

3. HRBA principles in legislation

HRBA principles in general are also applied in legislation. They are as follows¹:

- *Participation*: The right to participation is a basic human right. Everyone has the right to participate in social activities at his or her highest potential. Participation is both an end and a means of development, involving democracy and promotion of

critical thinking. Participation in decision-making processes is an essential element for the formation of active citizenship.

HRBA to legislation ensures the concerned parties to be informed of, to participate in and to provide comments on the law-making process in a substantive manner. It as well emphasizes the importance of the involvement of the poor, marginalized, and vulnerable people in the making and monitoring of legal policy development.

- *Accountability*: This principle stresses on the realization of human rights guaranteed by the state and other duty bearers in accordance with international standards.

HRBA must be seen from the view that each person is a rights holder and an active participant in the development process in a normative relationship with duty bearers. Rights holders, as per this principle, can demand implementation obligations from the state, which must not be mistaken as a 'charitable' or 'patronizing' state. In this way, HRBA to legislation promotes transparency in the process of policy designing and plan formulation and puts forward sustainable development thereby.

- *Equality, fairness, and non-discrimination*: HRBA ensures greater equality, which means all individuals in society can enjoy equal access to goods and services and to the same fundamental human rights. Prohibition of discrimination is not just a rule of law but must be strongly enforced and guaranteed by public authorities in all areas of social life.

Non-discrimination must be practiced in the process of legal policy development. In other words, legislation must not bring about favorable conditions to one but create discrimination against another.

¹ Author's synthesis based on ENNHRI (2019); OHCHR (2006); UNICEF (2004).

Thus, the law-making process must be a consideration process of equality of rights among different possessors.

- *Dependency and indivisibility*: These are in fact the attributes of both human rights and HRBA. This principle is rooted from and attached to human dignity, that is all rights have the same value and the enjoyment of one right depends on the realization of other rights.

All human rights, including civil, political, economic, social, and cultural rights, must be treated equally. Therefore, legal policies must be built on the indivisibility of rights to avoid creating basis for exercising one right but depriving other rights.

In brief, HRBA requires at least two levels of implementation from the state: (1) the design and enforcement of policies must respect human rights and human rights standards; and (2) the promotion and realization of judicial and administrative instruments must be ensured for the availability of settlement mechanisms in case violations are committed.

4. Questions to be answered in HRBA applied legislation

The adoption of HRBA in the implementation process of a project (including legislative projects) signifies the importance of rights exercising as much as of project outputs. While other approaches aim solely at outputs, HRBA stresses on the process of implementation as well.

HRBA application in legislation is divided into three stages, namely case analysis, human rights-based design and planning for implementation, and enforcement and monitoring.

Firstly, case analysis and assessment of potential impacts on human rights need

to be carried out by legislative drafters at the beginning of the legislative process. Legislative drafters must accept and acknowledge human rights principles and standards in order to guarantee the application of those principles and standards, like participation, non-discrimination, and so forth, in the process. This stage requires propagation and dissemination of information to people and must be designed to involve them in the law-making process.

Secondly, human rights must be seen as the core of the legal document during its process of design, planning, and implementation. Law drafters have to take into consideration necessary means to be used in order to achieve the results and resolve any problems that may arise. Thereby, the application of human rights principles and standards would help to ensure the goals to be reached in a fair and sustainable manner.

Thirdly, monitoring is implemented following traditional practices that allows supervision and timely intervention in case of violations.

Thus, key questions that need to be answered in order to ensure the application of HRBA in legislative process are as follows:

Firstly, rights related questions:

- What rights will relate to this issue? Relevant to what extent? Which rights are affected or denied in this situation?
- What is the causal relationship between the legal policy and the rights affected?
- Is there divisibility of rights?
- Has there been any relevant legal mechanism? Are there any protective regulations? If any, how do they work? Should there be any legal issues involving the safeguard of this right?

- What are positive and negative impacts on the right?

Secondly, rights owners related questions:

- Who will this legal document relate to? Number of people involved? Who are they?

(i.e. assigning them into groups based on different criteria, such as gender, age, ethnicity, occupation, residential location, marital status, physical status, religion, etc.) Should there any group/people be affected more than the others? Are there people who need to be prioritized? Whether there is an order of prioritization or not?

- Is there any mechanism to ensure their participation? If not, how to resolve the issue? If so, how does the mechanism work? Who among them will participate? How to choose participants?

- Are social organizations involved in the process? Who are they? What are their activities? How their involvement would be ensured? Are they genuine or representative?

- Has discrimination occurred among rights owners during the legislative process?

- Who will be vulnerable or marginalized when implementing the legal policy?

Thirdly, duty bearers related questions:

- Who will be responsible for the implementation of this legal policy? What are their roles and functions?

- What is the level of responsibility of local governments?

- What are the obligations? To respect, fulfil, or protect?

- How does the national legal framework regulate this issue?

The above listed questions might not cover all but could be considered as key questions for the legislative process. The development of a legal document based

on HRBA requires a change in both law making and law enforcement mindset towards ensuring the highest attainability and enjoyment of human rights rather than the highest facilitation of management for state agencies.

5. HRBA application in Vietnam's legislation

The application of HRBA in Vietnam has gradually gained popularity over the last decade, particularly since the 2013 Constitution. Lawmakers in the country have also become interested in adopting HRBA in legislative work. In recent years, great efforts have been made in judicial reform, development of poverty reduction policies, amendments to critical laws and codes, such as Civil Code, Penal Code, Labor Code, Children's Law, Education law, Press Law, and so forth following HRBA.

HRBA is mentioned in the provisions under the 2015 Law on Promulgation of Legislative Documents, including regulations on contributing comments to draft legal documents (Article 6), requiring the drafting board to provide explanation and incorporate comments (Article 54), a publication of legal documents in the Official Gazette (Article 150), and posting and publishing legislative documents (Article 157). As prescribed by the Law, consultation is a mandatory procedure in both stages of policy proposal and drafting. In addition to collecting opinions of people directly affected by the legal document, it is required also to consult the Ministry of Finance, Ministry of Home Affairs, Ministry of Foreign Affairs, Ministry of Justice, and relevant agencies regarding the financial and human resources, the compatibility with international treaties to

which Vietnam is a signatory, as well as the constitutionality, legality, and uniformity of the proposed legislative document.

Legislative drafters during the drafting and legislative process have to provide review reports, regulatory impact assessments (RIA) together with policy or ordinance proposals for the publication on the portals of the National Assembly, the government, and the agencies that propose the policy formulation (Article 36).

Thus, HRBA from the view of the 2015 Law on Promulgation of Legislative Documents has been reflected in two important steps of RIA and consultation of concerned individuals and organizations. The actual realization of these requirements, however, remains limited, particularly for RIA as an obligation to assist legislative drafters in identifying appropriate policy for affected people. RIA reports in many cases are prepared in an overdue manner, that is after the completion of the draft policy, based on which RIA is tailored accordingly (Vu Cong Giao, 2019). While it is important to adopt HRBA in RIA reports, this step fails to satisfy a legal requirement of the legislative process. As a result, legal documents are often promulgated with impracticality, low feasibility, and even infringement of people's rights. In other words, the unconstitutionality of many legal documents still prevails. By contrasting with the above mentioned HRBA principles and key questions, the legislative process in Vietnam exposes its inadequacies and superficiality in the adoption of HRBA.

Many causes contribute to such limitations: *Firstly*, HRBA in law making is relatively new in many countries, particularly in

developing nations. Although the method has been promoted through UN projects for more than two decades, some countries, including Vietnam, are still latecomers in adopting it. *Secondly*, the old-fashioned thinking in law making which prefers the ease of legislative process for lawmakers remains its strong presence in Vietnam. The adoption of such mindset might facilitate and accelerate the legislative process but, at the same time, hamper the viability and practicality of legal documents. The endurance of those policies is therefore not guaranteed since they do not reflect the interest of the concerned entities. *Thirdly*, thinking of human rights as a sensitive issue in "combating with hostile forces" has undermined the elements of human rights in the process of developing legal documents. *Fourthly*, the limited understanding and knowledge of public officers, particularly legislative drafters, about human rights and human rights standards has also prevented the application of HRBA in the law making. *Fifthly*, many countries have established their national agencies for promoting and monitoring the implementation of human rights. Such agencies also supervise the application of HRBA in the law-making process. Yet, no similar institution is found in Vietnam. Thus, there lacks an effective instrument in promoting and supervising the use of this method. *Sixthly*, the absence of mandatory HRBA-based sanctions and mechanisms in drafting and formulating legal policies also contributes to the less frequent, inconsistent and ineffective practice of this method.

Therefore, in order to promote HRBA in Vietnam's legislation, there should be comprehensive solutions in the coming

time. It could start with the revision of the Law on Promulgation of Legislative Documents and the compulsory requirement of HRBA adoption in the law-making process, following by educational solutions of human rights that target relevant stakeholders and, in a longer term, an establishment of the national human rights agency in accordance with international norms and standards.

Conclusion

The application of HRBA has become a common practice in the process of developing legal policies in many countries in the world today. The HRBA to legislation is a way of making laws in a civilized and democratic state. This method also allows the anticipation of the rights which are potentially affected and at what level and the development of an appropriate compensation mechanism accordingly. Hence, the HRBA-based thinking in law making would promote the legislation towards sustainable development and highest attainability of human rights in accordance with the Constitution and international standards. As a result, HRBA-based legal policies would stay more viable and enduring in social life, generating higher values for the society than the legal documents that are developed based on one-sided justification and imposed rationality □

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