

**Towards a Human Rights System in the Asian Region ?**

Asia is the most populous continent of the globe. It is a region of marked contrasts ranging from vast countries with enormous populations to tiny countries with minute communities. It is the seat of great religions and philosophies, and a multitude of rich traditions emphasizing not only the preferred material side of life but also the spiritual elements of existence.

It is also a region of noted contradictions in terms of politics, culture and respect for human rights. Geographically, several democratic countries are seated next to authoritarian regimes. Many parts of Asia are havens of peace, but other corners are plagued by war, violence and/or insecurity. In this new millennium, flashpoints of great turmoil and turbulence include Afghanistan, Iraq and Nepal. The peaceful co-existence between different communities in many countries has been ruptured by ethnic discord, and the big “T” word – terrorism – has arrived in the region in full force. While many countries are now enjoying stability and economic resurgence after a cataclysmic economic crash in 1997, parts of the region, particularly in South Asia, are reeling from rampant poverty, while other parts are peppered by instability, including the threat of nuclearization, most notably the North-east Asian region. The issue of occupied territories in the Middle-east continues a longstanding challenge for resolution.

From a human rights perspective, the record of the region is likely to be – and actually is – highly diverse. Some countries perform well while others fare very poorly. A critical look at the countries that seem to be doing well also reveals various lacunae – while some civil and political rights may be flourishing, economic, social and cultural rights might not be faring so well, and vice versa. A poignant question pertaining to all countries of the region is this: if the national setting is unable or unwilling to promote and protect human rights, is there an inter-governmental system at the Asian regional level to provide access to justice in the pursuit of human rights ? If not, should there be one ?

To date, the answer of Asia – at least from the governmental position - has been No. There is no such system covering the whole of the Asian region, unlike the systems which exist in Europe, the Americas and Africa. The latter three regions have regional treaties which set the standards for human rights and provide various inter-governmental mechanisms to offer redress to individuals and others where the national setting is unable or unwilling to act. The reasons why Asia has distanced itself from the possibility of a region-wide system are multifarious. First, Asia is a very heterogeneous region – it may be too large and diverse to have a unified system to respond at the Asian level. Second, the political will has been lacking. This is evidenced by the fact that many Asian countries are reluctant to become parties to international human rights treaties. The only treaty to which they are all parties is the Convention on the Rights of the Child 1989. Even when countries become parties to human rights treaties, they tend to enter broad reservations repudiating many provisions guaranteeing human rights.

Third, many Asian countries put great emphasis on safeguarding their sovereignty. They often claim that advocacy of human rights, particularly by outsiders in regard to the happenings in Asia, encroaches upon national sovereignty and is a matter of interference in their internal affairs. This conflicts with the international position that envisions human rights advocacy as part of international law and jurisdiction – promotion and protection of human rights cannot be seen as interfering in the internal affairs of a State, since the international community must protect the innocent where the nation State is unable or unwilling to act. Fourth, some Asian Governments are uncomfortable with the notion of universality and indivisibility of human rights. They have a tendency to claim that the universality of human rights should be subjected to national and regional “particularities”, while, for them, human rights are in practice divisible - in the sense that they tend to prefer economic, social and cultural rights over civil and political rights: “bread” rather than “ballots”.

Fifth, while it has somewhat receded since the economic crash of 1997, the notion of “Asian values” has been touted by some less than democratic Governments as qualifying human rights. This notion places emphasis on the primordial position of the State and community over the individual, economic rights rather than political rights, and obedience to authority rather than respect for the rights of individuals in keeping with international standards. In today’s world replete with fears of terrorism, there is a propensity to safeguard the State, first and foremost, by introducing drastic new security laws and or applying existing security laws stringently.

Yet, in the above setting, some initiatives to promote and protect human right are possible. Two levels may be examined, in particular: regional and sub-regional.

### **Regional Developments:**

While there is no inter-governmental human rights treaty and system in Asia, the United Nations (UN) has propelled a framework for engaging Governments with the aim of promoting human rights “arrangement(s)” for the past decade. Currently, there is an Asia-Pacific framework supported by Asia-Pacific Governments, bolstered by the Office of the UN High Commissioner for Human Rights (OHCHR), under which all the participating Governments agree to promote four pillars as “building blocks”:

- national human rights institutions, particularly national human rights commissions;
- human rights education;
- national human rights action plans;
- the realization of economic, social and cultural rights and the right to development.

There is an annual Asia-Pacific workshop supported by the OHCHR which traces developments concerning these pillars, the most recent of which was in Doha(Qatar) in 2004. The most effective implementation of these four pillars has been in regard to national human rights institutions. Some fifteen Asia-Pacific countries have set up national human rights commissions, and their work helps to promote and protect human rights at the national level, sometimes in unexpected areas. While most Commissions will deal with - or have dealt with - some aspects of political rights,

such as the role of law enforcers and the impact of national security law on human rights, some have stepped wider afield. For instance, the Indian National Human Rights Commission has delved into such matters as the protection of child labourers, action against gender-based and racial discrimination, and the issues of human trafficking and scavenging. It has also branched out by having various State Commissions which complement the work of the main Commission at the federal level. A variation for national institutions is the establishment of Ombudspersons for human rights. Timor Leste has now established such post. Auspiciously, several West Asian, Middle-east and Gulf countries are now interested in setting up national institutions. For instance, Qatar has established a national human rights committee. Afghanistan and Palestine have also an equivalent body.

Developments in regard to the other three pillars have varied in impact. Some countries have active human rights education campaigns – but these would have taken place most probably even without the “building blocks” approach. Some have evolved national human rights education plans. It should be noted that such activities should be synchronized with international planning strategies. For instance, 2005 is the beginning of the new World Human Rights Education Programme of Action which emphasizes mainstreaming human rights into primary and secondary levels of education.

With regard to national human rights action plans, a small number of countries have now adopted them, the most recent being Mongolia. These plans help to provide a time frame for reforms, e.g. reform of the national security law within five years, and target government ministries to work together, at times with civil society partners. However, generally it may be said that the preparation process has been better than the implementation process. Several countries which have evolved these plans, e.g. Thailand, the Philippines and Mongolia, have used very participatory methods for preparing the plans, such as through public hearings involving a variety of actors, but often, once the plans have been finalized, implementation leaves much to be desired.

Perhaps the least effective of the four pillars has been the angle of economic, social and cultural rights and the right to development. The OHCHR has supported a number of sub-regional workshops on the issue of justiciability of these rights, but the impact has tended to remain at the workshop level, with little follow up.

At another level, there now exists a network of national human rights commissions in the form of the Asia-Pacific Forum of National Human Rights Institutions whose secretariat is in Australia. Currently, some fifteen national institutions are members and the criteria for membership are known as the Paris Principles – principles evolved with the backing of the UN based upon independence of the national body and pluralism of composition. The Forum holds annual meetings, most recently in the Republic of Korea in 2004. This is a supportive network which provides for training such as on investigation techniques, exchange of personnel, and institutional back-up. The Forum has set up an advisory body – the Advisory Council of Jurists with members designated from the member national institutions - to advise on key human rights issues. The Council helps to evolve a certain jurisprudence from the Asia-Pacific region; its most recent advice given was on the rule of law and the issue of terrorism. In 2005, both the Forum and the Council are due to meet in Mongolia, and the advisory opinion from the Council will be on the issue of torture and human

rights. Once the advice has been given, member national institutions are supposed to follow-up and report back at the next session, providing an innovative rhythm for reviewing the promotion and protection human rights in the Asian region – transcending the national setting.

Apart from that, there has been little in the form of regional initiatives to promote an inter-governmental system. A few years ago, some parliamentarians from the Asian region - the Association of Parliamentarians for Peace - came together to try to draft an Asian Human Rights Charter, with the possibility of setting up an Asian Human Rights Commission appointed by those national parliaments which are members the Association, but it was criticized for failing to be consistent with international human rights standards. The initiative has somewhat faded from view.

On another front, it is interesting to note that in recent years the OHCHR has increased its physical presence in the region. It now has a regional office for the Asian region based in Bangkok, a regional office for the Arab region based in Beirut, and it is due to establish a sub-regional office in Fiji for the Pacific islands. The representatives of the OHCHR in these offices provide a catalytic role in promoting and protecting human rights. At times, they are involved in monitoring the situation. At times, they provide capacity-building such as to support workshops on human rights. The Bangkok office has initiated a Practitioners' Forum to share experiences between UN and other agencies on the rights-based approach to development programming. There is a country office in Cambodia, and a number of technical programmes on human rights, such as training of law enforcers and prison reform, supported by the OHCHR, at times in cooperation with UN partners, exist in various countries, such as the People's Republic of China, Yemen and Timor Leste.

The OHCHR has also started to station national advisers from the OHCHR in various countries, notably Nepal, Sri Lanka and Mongolia. They help to advise UN agencies as part of UN country teams on how to integrate human rights into their work, in addition to capacity-building with Governments and civil society. This is an important means of implementing human rights standards, including the various recommendations emerging from international human rights treaties, related treaty bodies and special procedures such as UN Special Rapporteurs. The Secretary-General of the UN has been propelling this implementation process under the name "Action 2", implying a package of measures involving the UN country teams and relevant partners based upon the international human rights framework. These should be linked with current trends to promote UN reform.

### **Sub-regional Developments:**

Given the size and complexity of Asia, while it may be difficult to promote a regional human rights system, the sub-regional perspective holds more promise. There are possibly four sub-regions with burgeoning human rights initiatives today – West Asia, South Asia, South-east Asia and the Pacific. An entry point for engaging these sub-regions is to work with various sub-regional organizations, as mentioned below. These organizations were not established specifically on human rights, but were more geared to political and economic cooperation. Yet, they can be a window to be explored to mainstream human rights into the sub-region, especially where the national setting is inadequate to respond to the call for access to justice and remedies.

A while ago, with the help of the League of Arab States, the west Asian sub-region witnessed the birth of the Arab Charter of Human Rights in 1994. It provided for the possible establishment of an Arab Human Rights Committee. However, the original Charter was criticized by many for lowering human rights standards. For example, the Charter tended to talk about the rights of citizens rather than the rights of everyone – the former representing a rather particularistic approach, while the latter epitomizes the universalistic approach. It was unclear on what derogations would be permitted to human rights and what constraints on the exercise of human rights. There was also an issue concerning whether the right to freedom of religion under the Charter would cover the right to change one's religion.

The Charter has now been amended and the latest draft was adopted by the League of Arab States in 2004. It provides many improvements, e.g. the constraints on human rights are more clearly defined than before. However, the new version of the Charter is still not wholly consistent with international standards. For instance, various provisions still refer to the rights of citizens rather than the rights of everyone. Moreover, at least one provision in the new draft seems to be lower than the standards set by a treaty to which all Arab countries are parties – the Convention on the Rights of the Child. The Arab Charter does not prohibit the death penalty absolutely for children – under 18 years of age, whereas the Convention on the Rights of the Child does. A regional human rights centre to complement this Charter has now been proposed, and it is possible that Qatar will host it.

With regard to the South Asian region, there is the South Asian Association for Regional Cooperation (SAARC). It has adopted a focused approach on human rights. Instead of concretizing broad treaties on human rights, it has more specific treaties. It has adopted the SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution 2002 to promote cooperation against the phenomenon. There is also the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia 2002 which opens the door to sub-regional cooperation, such as through joint training programmes and exchange of information and expertise for child rights. In 2004 SAARC adopted the Social Charter to strengthen action particularly against poverty. There are reports that a SAARC Commission on Women and Child Rights is to be set up. The sub-regional action can be complemented by bilateral action, such as a bilateral Memorandum of Understanding proposed between India and Nepal against human trafficking.

South-east Asia is represented by the Association of South-east Asian Nations (ASEAN). In 1993 the Foreign Ministers of ASEAN referred to the possibility of a mechanism on human rights, but this was almost waylaid, until a group of civil society actors set up the Working Group for an ASEAN Human Rights Mechanism to press for such mechanism. Initially the Working Group tendered the idea to invite Governments to set up an ASEAN Human Rights Commission vested with a variety of powers, including to investigate complaints and receive communications from individuals and other actors where the national setting is unable to deliver justice. Many ASEAN Governments were very reluctant to respond to the proposal from the Working Group. However, some Governments in cooperation with the Working Group started to stage annual workshops as an informal discourse between Governments and civil society to nurture closer understanding between them,

particularly on the issue of what shape and form an inter-governmental sub-regional human rights system could/would take.

Gradually, the idea of a broad ASEAN Human Rights Commission was modified to become an ASEAN Commission on Women's and Children's Rights. Auspiciously, the possibility of such Commission has now been blessed formally by its inclusion in the ASEAN Security Community Plan of Action adopted at the most recent summit of heads of Government in Vientiane (Laos) in 2004. This is a formal breakthrough, and the next step is to concretize the role, function and mandate of the proposed ASEAN Commission on Women's and Children's Rights. To what extent its powers will parallel commissions in other regions and sub-regions remains to be seen, especially in relation to investigations and communications and the provision of redress. Interestingly, 2004 also witnessed the passage of two ASEAN Declarations which opened the door to more human rights programming in specific areas: the ASEAN Declaration on Violence against Women and the ASEAN Declaration against Trafficking in Persons, particularly Women and Children. Both call for more cooperation in the sub-region.

The fourth corner of the Asian region is the Pacific, and the Pacific Islands Forum is the main inter-governmental body in this setting. In 2004 a number of meetings, governmental and non-governmental, bolstered by a report from an Eminent Persons' Group, converged on the need to promote more national human rights institutions and possibly a sub-regional mechanism in the Pacific for the promotion and protection of human rights. A welcome move is from the Solomon islands which has proposed the setting up of a national human rights commission. Granted that some of the States in this sub-region are very small and geographically dispersed, it may be more cost effective to opt for a sub-regional mechanism and system rather than individual national commissions for every country.

### **Directions:**

The message from the above is that given the vastness and heterogeneity of the Asian region – politically, economically, socially and culturally, it is probably not viable to advocate the need for an Asian treaty or system with mechanisms such as a human rights court or commission along the lines of what is evident in Europe, the Americas and Africa. The nearest the region has come to a regional mechanism is the Asia-Pacific Forum of National Human Rights Institutions, but this is a network of national human rights commissions rather than an inter-governmental body as in other regions of the globe. Interestingly, precisely because the region has no inter-governmental system, the UN through the OHCHR has rightly been increasing its presence in the field. Organically, the UN presence may offer an emerging proxy system or a complementary system where the States are not yet willing to act in concert to adopt a regional inter-governmental system. Yet, the test is for the UN presence itself to be functionally efficient and effective, and this depends upon a systematic and well-supported decentralization process of the OHCHR to the field level. An inevitable reality also is that the field presences of the OHCHR very much depend upon the consent of the relevant States.

On another front, the most visible possibility of systems-building is to foster sub-regional systems and mechanisms for the promotion and protection of human rights

rather than a macroscopic regional Asian system. The four sub-regions are cited above as potential and actual areas of progress. Yet, the challenge for their impact is to offer redress where national settings are unable or unwilling to act. Care has to be exercised so that regional and sub-regional initiatives are not merely window-dressing and do not act as a façade for justifying national failings.

Ultimately in addressing the issue of regional and sub-regional systems-building, there is still no substitute for the effective promotion and protection of human rights at the national level – hence the pivotal development of national protection systems. Progress has been made on some fronts in this regard, in particular the advent of national human rights commissions and ombudspersons – an evident growth industry in the Asia-Pacific region. However, from the angle of checks and balances against abuse of power, it is necessary to foster a variety of mechanisms and actors at the national level – governmental, non-governmental and others. For instance, the traditional courts system needs to be improved to integrate human rights protection more into their work. Side by side with this is the call for an active and vigilant civil society and media, and broad awareness-raising, education and capacity-building of individuals, communities, law-enforcers, private sector and governmental officials to prevent and remedy human rights violations.

From the angle of checks and balances, the better part of Asian wisdom is to mistrust the monopoly of power. Thus the need for a variety of systems and mechanisms, involving a plurality of actors, to promote and protect human rights at any level – regional, sub-regional and national, granted that the political and social “will” to accelerate these dynamics will differ in time, scope and space.

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