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THE POTENTIAL ROLE OF TURKEY TOWARD A REGIONAL HUMAN RIGHTS ARRANGEMENT IN ASIA¹

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ABSTRACT

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The purpose of this paper is to discover the possibilities for establishing a regional human right instrument and respective enforcement mechanism in Asia and the potential role of Turkey in that regard. The examples of three existing regional human right systems indicate that such establishments significantly contribute to the protection and development of human rights and freedoms. It is often argued that the distinct features of Asia hinder a concrete regional project in terms of human rights. This account, however, ignores recent human rights movements in the region. Recent developments strengthen the hope toward a credible Asian human rights mechanism. It must be also noted, even mere efforts be it political or civil to build such a system will greatly contribute to the development of human rights by raising public awareness and furthering capacity building. In other words, not only the goal but also the process itself to attain this goal is highly valuable in terms of human rights protection. Of course, political dedication is the pillar of a regional system. In that regard, Turkey may play a crucial role in leading such efforts along with other democratic states in the region. As a democratic country and well-developed economy, together with its geopolitical position and historical ties, Turkey should undertake concrete steps for establishment of regional cooperation for human rights protection.

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INTRODUCTION

The world has witnessed important developments with regard to human rights in the twentieth century. Until about the second half of the century, human rights were regarded solely as the responsibility of the state. The atrocities and destructive effects of the World War II have changed this view drastically and triggered international action on the issue. The adoption of the Universal Declaration of Human Rights on December 10, 1948 by the UN General Assembly was a landmark step in recognition and articulation of human rights by the international community. The declaration enshrined the bedrock principle that all human beings, by virtue of their common humanity, are entitled to minimum standards of human dignity regardless of any distinction such as race, sex, origin, religion, or political opinion. The recognition of human rights continued with the emergence of human rights arrangements at the regional level. Europe, America and Africa have established their regional human rights instruments

¹ This Article is converted from an information note prepared on a prospective Asian human rights mechanism.

along with implementation machineries.² Asia, the largest and most populous continent of the world, remains the only region that lacks a region-wide mechanism for the protection of human rights.

It has been argued that certain unique characteristics of Asia, such as geographical vastness of the continent, the great diversity of ethnicities, cultures, and religions across the region, and significant disparities in the level of economic and social development among the regional states hinder the establishment of a regional human rights mechanism.³ The lack of political will and heterogeneity of the political regimes are other and, perhaps the most underlying, factors that explain the absence of a human rights arrangement in the region.⁴

However, there have been visible movements in Asia towards recognition and improvement of human rights standards in the last few decades.⁵ Asian states have increasingly signed and ratified international human rights instruments, most notably the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.⁶ The participation of Asian governments, national human rights commissions and civil society organizations in the regional meetings and activities to address human rights issues has also risen significantly.⁷ Moreover, serious efforts have been undertaken by certain Asian states for the establishment of a human rights mechanism at the sub-regional level.⁸ All these developments raise hope for institutionalization of human rights in the region.

1. The Significance of and Challenges to a Regional Human Rights Arrangement

As emphasized in the Vienna Declaration of 1993 and epitomized by the three existing regional human rights mechanisms, “*regional arrangements play a fundamental role in promoting and protecting human rights.*”⁹ As such, a regional human rights system would undoubtedly contribute to the enhancement of human rights culture and practices in Asia. In such a diverse region as Asia, greater respect for human rights will facilitate an environment that diverse cultures and ethnicities and vulnerable groups can live together in peace and harmony. A regional mechanism will also create an impetus for further cooperation and integration among Asian states and will help settle regional disputes. Further, it will strengthen the efforts and cooperation in combating transnational problems in the region,

² It should be noted that the conceptualization of human rights and the implementation mechanisms vary in these three regional systems to some extent. See *infra* notes 13–27 & accompanying text.

³ See The Role of Regional Human Rights Mechanisms, EU Doc EXPO/B/DROI/2009/25 (2010), at 20, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf), accessed on 28.09.2015; Kim, Jina, *Developments of Regional Human Rights Regime: Prospects for and Implications to Asia*, at 58, available at http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p57-1022.pdf, accessed on 28.09.2015.

⁴ The Role of Regional Human Rights Mechanisms, *supra* note 3, at 5.

⁵ See Durbach, Andrea, Renshaw, Catherine & Byrnes, Catherine (2009), ‘*A tongue but no teeth?*’: *The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region*, 31 Sydney L. Rev. 211, 215–22.

⁶ Kim, *supra* note 3, at 57.

⁷ *Id.* at 82.

⁸ Association of Southeast Asian Nations (ASEAN) made considerable progress towards establishing a sub-regional human rights mechanism. Article 14 of ASEAN Charter stipulates the establishment of an ASEAN human rights body for the promotion and protection of human rights and fundamental freedoms. Pursuant to the Article, the Terms of Reference (TOR) was adopted in 2009, and following, ASEAN Intergovernmental Commission on Human Rights was established in the same year. TOR states that the purpose of AICHR are, *inter alia*, “*to promote and protect human rights and fundamental freedoms of the peoples of ASEAN*” and “*to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.*” ASEAN TOR available at http://www.asean.org/storage/images/2012/Social_cultural/ACW/TOR-ACWC.pdf, accessed on 28.09.2015. For a detailed information of ASEAN’s human rights initiative see AICHR What You Need to Know, 2nd edition, The ASEAN Secretariat, available at <http://atachr.kln.gov.my/index.php/documents?download=1:aichr-booklet>, accessed on 28.9.2015; Phan, Hao Duy (2009), “A Blueprint For a Southeast Asian Court Of Human Rights”, *10 Asia-Pac. J. on Hum. Rts. & L.* 385, 385-91.

⁹ Art. 37 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993). The Article reads as follows: “*Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.*”

such as child and women trafficking and forced labor. Therefore, the establishment of a regional human rights system in Asia should be supported to the full extent.

The establishment of a region-wide human rights mechanism, however, involves many challenges, particularly considering the regional idiosyncrasies of Asia. The path toward that end requires genuine and continuous efforts by political actors and civil society organizations. Although it ultimately depends on political will of the regional states, civil society organizations and various non-political state organs, such as judiciary, may play an important role in promoting political consensus. The involvement of constitutional courts in such efforts will indeed contribute to this endeavor. The constitutional courts of Asia should thus undertake an initiative to discover possibilities for the establishment of an effective and credible human rights system.

2. Existing Regional Human Rights Organizations

The progress of regional human rights systems in Europe, America and Africa may provide valuable lessons for Asia. In Europe and in the Americas rather effective and advanced human rights systems are in place. The European Convention on Human Rights (ECHR), which is the primary human rights instrument in Europe, comprises civil and political rights¹⁰ and currently has forty seven state parties, covering nearly entire Europe and eight hundred million people.¹¹ The Convention had originally prescribed an implementation machinery consisting of a Commission having quasi-judicial functions and a non-permanent Court. In 1998, the Protocol 11 replaced the existing mechanism with the permanent European Court of Human Rights.¹² The Court supervises state compliance with the Convention through individual and inter-state complaints.¹³ Individual complaint mechanism is the pillar of the European system. Well-developed case law and high compliance rate of the member states with the judgments of the Court constitute the major strengths of the individual complaint mechanism.

The inter-American Commission on Human Rights was established with a mandate to promote and protect human rights through facilitating the exchange of information and cooperation among governments.¹⁴ Although the Commission was bound with the principle of non-interference and had lacked the power to adjudicate individual complaints for violation of human rights, it played an eminent role in promoting human rights in the region by carrying out on-site observations and publishing country reports.¹⁵ The inter-American system was strengthened by the adoption of the American Convention on Human Rights (ACHR), which primarily affords protection to civil and political rights.¹⁶ The Convention extended the powers of the Commission to examine individual complaints and prescribed the non-permanent American Human Rights Court.¹⁷ Only the Commission and the state parties are empowered to refer a case to the Court,¹⁸ and thereby they are performing a filter function with respect to the individual complaints in the inter-American system.

The African Charter on Human and People's Rights (ACHPR) covers both civil and political rights and economic, social and cultural rights.¹⁹ It is also unique among international and regional human rights instruments in the sense that it includes not only human rights but also people's rights and a list of duties

¹⁰ See art. 2–17 ECHR.

¹¹ See Council of Europe, Treaty Office,

<http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>.

¹² See Council of Europe, European Court of Human Rights,

http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer.

¹³ See art. 33–34 ECHR. The Court can also issue advisory opinions interpreting the Convention upon the request of the Committee of Ministers. The Committee is composed of the Ministers of Foreign Affairs of the states of the Council of Europe. See art. 47 ECHR.

¹⁴ See OAS, Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/mandate/what.asp>.

¹⁵ See Report of Expert Dialogue with Civil Society and NHRIs on Regional Human Rights Mechanisms in Africa, the Americas and Europe (hereinafter UN Report) (2009), at 8–11, United Nations Human Rights, Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, available at http://bangkok.ohchr.org/programme/asean/report_jakarta_workshop.pdf. accessed on 25.9.2015

¹⁶ See art. 3–25 ACHR. Art. 26 adopts an evolutionary approach with regard to social, economic and cultural rights.

¹⁷ See art. 41, 52–69 ACHR.

¹⁸ See art. 61 ACHR.

¹⁹ See art. 3–14, 15–17 ACHPR

of individuals to the community and the state.²⁰ The Charter established the African Commission as the supervisory organ, and the Protocol, which entered into force in 2004, supplemented the system with the African Court for Human and People's Rights (ACtHPR) with the power to render legally binding decisions. Similar to the inter-American system, individuals are not entitled to direct access to the Court.²¹

As the experience of Europe, Americas and Africa demonstrate, the establishment of a regional human rights system requires an evolving process. It took, for example, five decades for the European system to reach its current form. With this in mind, Asia should employ a step by step process to achieve an effective and credible system. The prerequisite for a regional human rights system is an intergovernmental organization. All the three existing regional systems were built within a political organization: the Council of Europe, the Organization of American States, and the African Union (previously the Organization of African States). Thus, at the initial stage of an Asian human rights system, the focus of efforts should be primarily directed at establishing an intergovernmental organization to promote cooperation among regional states for the development of human rights.

3. The Path toward Regional Human Rights Arrangement

3.1. A Regional Organization

As stated earlier, the priority in Asia should be given to establish an intergovernmental organization. One may raise the concern that such an organization might not attract widespread interest from Asian states. It should be not forgotten, however, the Council of Europe was established by only ten West-European countries in 1949, and today it virtually encompasses the entire Europe.²² There exist a considerable number of advanced liberal democracies in Asia, and those countries may lead the establishment of a regional-intergovernmental organization. The accomplishment of this initial step, in turn, might prompt more Asian countries to participate in the organization in the near future.

3.2. Prospective Asian Human Rights Instrument

The next component of a regional system is a human rights instrument. With respect to the scope of rights to be addressed in the instrument, it may be more practical for Asia to follow the European and American examples. Accordingly, the instrument might incorporate primarily political and civil rights, and social, cultural and economic rights might be addressed in a separate document. Alternatively, both generations of rights might be embraced by employing an evolutionary approach concerning second generation of rights. Due to low level of economic development across Asia, the fulfillment of social and economic rights may need to be considered in the long term. Therefore, it might be advised for Asia to give the priority to civil and political rights at the formation stage of a regional arrangement.

A prospective Asian human rights instrument should reflect the regional characteristics while respecting universal human rights. The very purpose of a regional system is to promote and protect human rights standards within the context of local cultures, needs, and priorities. That does not implicate a disregard of universal standards but to pay due regard to regional values and particularities. The African Charter, for example, incorporates its regional peculiarities along with international standards. Collective rights and duties and respect for family and community are explicitly defined in the African Charter. In a similar fashion, regional values and cultures, such as collectivism and filial piety may be embraced in the Asian instrument without deviating from universal standards. In this way, the portrayal of Asian values in a contradictory manner with universal human rights would be invalidated. Further, certain regional human rights issues, such as exploitation of woman and children, may need to be addressed with a special emphasis in the instrument.

²⁰ See art. 19–24, 27–29 ACHPR.

²¹ See art. 5 ACtHPR Protocol.

²² The Council of Europe, the main intergovernmental organization in the region, was established in 1949 by ten Western European countries in London as a response to the horrors of the World War II with the aim of protecting and promoting human rights, democracy and the rule of law. See *The Role of Regional Human Rights Mechanisms*, *supra* note 3, at 56.

3.3. Enforcement Mechanism

Also critical is that the establishment of an appropriate mechanism to supervise the compliance of the state parties with the regional instrument. It might be advised for Asia to follow an evolutionary approach with respect to the supervision mechanism as well. Because the principles of sovereignty and non-interference are highly regarded by Asian states, it may not be feasible at an early stage to reach a widespread consensus for a regional human rights court with power to render legally binding decisions. The operation of a regional court in an effective manner also would require adequate funding and human resources, which may be more achievable over time. The African Court, for example, lacks effectiveness due to such hardships.²³ Though the ultimate goal of a prospective Asian system should be the implementation of human rights principles through a competent regional court, its establishment might need to be considered at a later stage.

The early progress of the Inter-American system may provide a good example for Asia with respect to the implementation mechanism. As noted earlier, although the American Commission was initially established with a soft mandate promote human rights in the region and was bound with the principle of non-interference, it played an eminent role in promoting and protecting human rights in the region by holding on-site visits and publishing country reports with the consent of the concerned state. Asia may follow a similar path by establishing a Commission having a mandate to promote state parties to respect human rights and the regional system. The Commission may be empowered to interpret the prospective Convention upon the request of state parties, to investigate alleged massive human right violations with the cooperation of the concerned state, and to publish reports on the progress of the state parties on human rights. The regional states may be more comfortable with granting such soft powers to the Commission since they rest upon cooperation rather than enforcement and therefore are not in direct conflict with the principle of sovereignty. This initial step may lead to a greater cooperation and consensus on human rights issues among the regional states, and in the future the Commission may be supplemented with a Court competent to adjudicate individual complaints for human rights violations.

The structure of the Commission carries great significance to ensure a well-functioning mechanism. First, a single Commission rather than a set of separate bodies may be more practical and effective. Several sub-commissions may be formed to assist the Commission with administrative matters or certain human rights issues of regional importance, such as woman and child exploitation. Every state party to the Convention should be represented in the Commission. However, in order to assure impartiality and independence, a special emphasis should be placed on the qualifications of individuals who will serve in the Commission. The members of the Commission should not be affiliated with their governments, and they should serve in their personal capacity. Further, they should be granted a full-time and long term service, with a restriction on engaging any activities that is in compatible with their positions. The Commission must also be provided with adequate and stable funding.

This rather soft mechanism outlined above may be more achievable at the early stage of institutionalization of human rights in Asia. The central factor in establishing and maintaining a regional human rights system is the political will, and this soft approach may be necessary to induce the regional states to participate in the system. As stated earlier, there has been growing presence of civil society organizations in the field of human rights in recent years, demanding from Asian governments a greater respect for human rights. Similarly, the number of national human rights institution has risen significantly in Asia, and Asia-Pacific Forum has been very successful in promoting human rights in the region.²⁴ All these developments, however, have yet to lead to a tangible outcome with respect to a regional human rights arrangement.

4. The Role of Constitutional Courts in Institutionalization of Human Rights in Asia

The participation of the constitutional courts or equivalent bodies in such efforts may give a momentum to the process and accelerate the pace of institutionalization of human rights. Although not political

²³ See The Role of Regional Human Rights Mechanisms, *supra* note 3, at 74.

²⁴ As one noted commentator stated, "the APF and its network of national human rights institutions are the closest that the Asia Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights." *cited from Durbach, Renshaw & Byrnes, supra* note 5, at 217.

actors, constitutional courts play a crucial role in state affairs by safeguarding the principles of democracy, the rule of law, and human rights, and they may exercise a greater influence on political actors for the establishment of a human rights system.²⁵ In this sense, the constitutional courts may serve as a bridge between state authorities and civil society organizations. In addition, constitutional courts may cooperate with civil society organizations in raising public awareness on human rights through capacity building and education, which are necessary for accomplishing advanced human rights practices and standards in the long run. Constitutional courts of Asia thereby may play a constructive role in the advancement of human rights by integrating different actors concerned.

The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) might engage in activities to advance public opinion toward the establishment of an Asian human rights system. AACC might prompt and coordinate the cooperation of Asian constitutional courts with national human rights institutions and civil society organizations at the national and regional level so as to enhance human rights fulfillment and buttress demands for a regional arrangement. AACC might hold region-wide events and activities on a regular basis to explore the prospects of a human rights arrangement. It might also adopt an Asian Human Rights Declaration as a way of leveraging the establishment of a regional instrument. Although not legally binding, the Declaration would serve as a basis for a prospective Asian human rights instrument as well as contributing to the development of customary human rights law in Asia. AACC might also initiate a forum to facilitate intergovernmental collaboration for a regional human rights arrangement.

5. Turkey's Potential Role

Turkey is often described as a “*bridge*” or “*crossroad*” between Asia and Europe or East and West.²⁶ There are many factors contributing to this description; its geopolitical position, history, religion, culture, democracy and relatively advanced economy. Turkey has deep roots in Central Asia, a version of Turkish language is spoken in many states in that region.²⁷ Turkey shares a long history and same religion with many Arab countries, and it has special place among the people of this region as a successful model combining religious and modern values. At the same, Turkey is in close relationship with the West, with a large volume of business, cultural and political activities. Turkey also retains good relations with Far East countries.

Certainly, these features of Turkey provide a great opportunity to further cooperation among regional countries. This paper will, however, focus on Turkey's human rights experience and suggest that it should play a pioneering role to promote a regional human rights mechanism in Asia.

Turkey became a member the Council of Europe in 1950. It ratified the European Convention of Human Rights (ECHR) in 1954 and recognized compulsory jurisdiction of European Court of Human Rights (ECtHR) in 1990.²⁸ From that date until 2010's, thousands of applications were lodged at the Court against Turkey. In order to provide a better protection for human rights at the national level, Turkey has introduced individual application to its legal system. Accordingly, beginning from 23/9/2012, individual may lodge application at the Constitutional Court of Turkey alleging a violation of fundamental rights under joint protection of the Constitution and ECHR.²⁹

Since then, the Constitutional Court received and adjudicated thousands of applications. After the introduction of individual application, complaints brought before ECtHR against Turkey are significantly

²⁵ See generally Ginsburg, Tom (2008), “Constitutional Courts in East Asia: Understanding Variation”, *3 Journal of Comparative Law* 80 (a case study regarding the role of constitutional courts in political and state affairs in Asia (Indonesia, Thailand, South Korea, Mongolia)).

²⁶ Yanik, K. Lerna, “The Metamorphosis of Metaphors of Vision: ‘Bridging’ Turkey's Location, Role and Identity After the End of the Cold War” *Geopolitics*, Vol. 14, 2009, Issue 3, 531–549, 531.

²⁷ Kramer, Heinz, Will Central Asia Become Turkey's Sphere of Influence, available at <http://sam.gov.tr/tr/wp-content/uploads/2012/01/8.-WILL-CENTRAL-ASIA-BECOME-TURKEYS-SPHERE-OF-INFLUENCE.pdf> accessed on 15.12.2016

²⁸ Official Gazette 27.9.1989, No: 20295. The recognition was deposited at the Council of Europe General Secretary on 22.1.1990.

²⁹ The individual application system was adopted through 2010 constitutional amendment, however, it started to operate on 23.9.2012 as prescribed the Law numbered 62126 article 76.

decreased. Indeed, ECtHR recognized individual application to the Constitutional Court as an effective domestic remedy, meaning that no application can be lodged at ECtHR prior to bringing the allegation before the Constitutional Court.³⁰

The Constitutional Court demonstrated a great success in dealing with allegations of human rights violations.³¹ This success attracted nation-wide interest and increased human rights awareness both among people and public authorities. Accordingly, introduction of individual application system undoubtedly contributed to the protection and advancement of human rights in Turkey.

The Turkish Constitutional Court is also committed to the development of human rights in Asia. As a member of AACC, the Court undertook extensive activities to that end. As an example, the Court assumed the term presidency of AACC between 2012/2014 and hosted its 2nd Congress on 27 April-1 May, 2014 in Istanbul.

This paper suggests that, considering its unique position in the region with the successful implementation of human rights agenda, Turkey should play an active role in promoting cooperation among regional states on the protection of human rights. In addition to political efforts, Turkey's democratic institutions, most notably the Turkish Constitutional Court, may organize regional meeting to discuss and discover the possibilities of a human rights instrument. Through such efforts, Turkey will contribute to build a common understanding and better protection of human rights in the vastest continent of the world.

CONCLUSION

Asia is the only continent in the world lacking a region-wide human rights arrangement. Recent developments in national and sub-regional level, however, demonstrate an increasing demand of civil societies toward a greater respect for human rights. Leading democracies in Asia should undertake the task to form a political consensus for a regional human rights instrument. The experience of existing regional human rights systems may be followed in this regard. First, a regional human rights document concerning civil and political rights may be established. A soft enforcement mechanism with quasi-judicial functions may follow the adoption of such a document. Over time, more concrete steps may be taken to ensure a robust regional human rights system. As existing systems also demonstrate, democratic and well-developed states should initiate the process. In this regard, Turkey may play a crucial role. First of all, its historical relations with many of regional states are of great importance to promote regional cooperation. Due to its history and overwhelming Muslim population, it has strong relations with many Arab countries. Also, Turkey has historic and national ties with Central Asia countries. As an advanced economy and strong military power, it is also a natural strategic ally for regional states such as Russia and Iran. Also, Turkey carries an important experience in regional arrangements as being a part of European Council for a half-century. Moreover, Turkey has recently took considerable steps toward enhancing human rights protection. The individual application system was introduced to Turkish legal system in 2012, and since then the awareness of both public authorities and people with respect to human rights increased significantly. Accordingly, Turkey should use its leverage power and experience to advance human rights protection in Asia, and undertake initiative toward this along other leading democracies in the region.

³⁰ See *Uzun v. Turkey*, 10755/13, 30.4.2013.

³¹ For statistics on individual applications see Annual Report of 2015, The Constitutional Court of Turkey (2016), 273-279, available at <http://www.constitutionalcourt.gov.tr/inlinepages/publications/pdf/annualreport2015.pdf> accessed on 25.12.2016

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