
Introduction

Is there a regional human rights system in Asia? Asia¹ is the only area in the world that does not have a human rights court or commission² covering the region as a whole, and it seems to be easy to denounce the mechanism of human rights protection in the region. However, we cannot answer the above question with a simple “No,” because a closer look at recent developments in the region leads us to realize that a potential human rights system is indeed emerging.

Regional systems have developed in Europe, the Americas, and Africa to supplement global human rights institutions, as well as domestic justice systems.³ The European Court of Human Rights⁴ has been in operation in Europe for decades. The Inter-American Commission on Human Rights⁵ was created in 1959 under the Charter of the Organization of American States (OAS),⁶ and the Inter-American Court of Human Rights⁷ was established in 1979. The African Commission on Human and Peoples’ Rights came into existence in accordance with the African Charter on

1 In this book, the term “Asia” is a loosely defined concept. In terms of definition, see *infra*, section 2.2, the discussions on Asia. This book generally focuses on twenty-three East Asian states, which demonstrate the trends of human rights development in the broad Asia region.

2 ASEAN has developed the ASEAN Intergovernmental Commission on Human Rights (AICHR), but it covers only ten ASEAN member states, which are considered a sub-region of Asia.

3 See Henkin *et al.*, *Human Rights* 338–39 (1999).

4 The European Court of Human Rights (hereafter “the European Court”), established in 1959 under the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5; 213 UNTS 221.

5 The Inter-American Commission on Human Rights (hereafter “the Inter-American Commission”) created in 1959 under the Charter of the Organization of American States (OAS).

6 The Charter of the Organization of American States, 119 UNTS 3, entered into force December 13, 1951.

7 Under the American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force July 18, 1978.

Human and Peoples' Rights,⁸ adopted by the Organization of African Unity (OAU) in 1986, and the African Court on Human and Peoples' Rights was established in 2004.⁹

The expansion of regional human rights systems is largely based on the impressive performance demonstrated by the institutions in Europe and in the Americas. The jurisprudence developed by the European Court is considered an influential source of law not only in European states but also in other parts of the world.¹⁰ The European Convention on Human Rights¹¹ enjoys the status of domestic law in many European states.¹² The Inter-American Court of Human Rights has also proved that it has evolved over time to become a fully functional regional human rights protection mechanism in the Americas.¹³ African states are trying to make the African Court on Human and Peoples' Rights into a meaningful human rights protection institution among African Union member states. The experience of Europe, the Americas, and Africa has proved that regional institutions can promote and protect human rights with higher standards than the global systems do.¹⁴ They make available flexible remedy measures and enhanced implementation of the norms when domestic institutions violate or neglect human rights.¹⁵ Because of the successful experience in European and American systems,¹⁶ Asian NGOs and some

8 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev.5, entered into force Oct. 21, 1986.

9 See Protocol on the Statute of The African Court of Justice and Human Rights, arts. 1 and 2. The African Court on Human and Peoples' Rights continues to operate, but it will be merged into a single African Court of Justice and Human Rights when the process is complete. See section 4.2.3.

10 Anne-Marie Slaughter, 40th Anniversary Perspective: Judicial Globalization, 1109.

11 The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "European Convention" or "ECHR").

12 See Drinan, *The Mobilization of Shame: A World View of Human Rights*, 109. See also Drzemczewski, *European Human Rights Convention in Domestic Law* 232–34.

13 See Cavallaro and Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court*.

14 See Bayefsky, *How to Complain to the UN Human Rights Treaty System* 173–74. See also Buergenthal *et al.*, *Protecting Human Rights in the Americas: Cases and Materials* 24–35.

15 See Dinah Shelton, *The Promise of Regional Human Rights Systems*, in Weston and Marks eds. *The Future of International Human Rights* 363; see also George William Mugwanya, *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*.

16 Bayefsky emphasizes that many petitioners prefer the regional procedures of the European Court and the Inter-American Commission / Court of Human Rights than the UN Human Rights Committee, because the decisions are legally binding. The successful petitioners in the European Court have received effective relief in most cases, and the decisions of the Inter-American Court are also binding: Bayefsky, *supra* note 14 at 173.

states in the region have come to share the view that similar objectives could be achieved in Asia through a regional system.¹⁷

Regionalism has been strengthened in Asia during the last few decades, especially in the areas of economic and security cooperation.¹⁸ The United Nations and the Office of the High Commissioner for Human Rights (OHCHR) have endeavored to establish a regional human rights mechanism in Asia along with the regional integration. Owing to the continuous efforts to promote regional or sub-regional human rights institutions in Asia by NGOs and other international and domestic entities, significant changes in the attitudes of the governments have been witnessed. The most important positive development is the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in Southeast Asia.¹⁹

Concerning the prospect of a regional mechanism in Asia, gloomy views were more common than optimistic outlooks until recent years because of the weak capacity and hostile attitudes of many countries in the region. Former Director of the Asia Division of Human Rights Watch asserted that a regional mechanism was unlikely in the near future at either the regional or sub-regional level because of “interstate rivalries, the lack of universal acceptance of international standards, and the significant number of authoritarian states” in Asia.²⁰

This pessimism, however, has gradually conceded its position to somewhat optimistic views on regional cooperation owing to the development of human rights norms and institutions in Asia.²¹ The last few decades have seen a variety of activities and initiatives for human rights cooperation evolving at the regional, sub-regional, and national levels in Asia. However, the development of human rights systems in Asia is still only a half-full glass. It has been part-filled with some positive elements, but is still half-empty, further developments needed.

This book attempts to show the significant changes that have taken place in the region in recent decades, with a focus on East Asian states.²²

17 For more discussion on the benefits and feasibility of a regional human rights system, see Chapter 4.

18 Such regional organizations as APEC, UNESCAP, APT, and ARF, and East Asian Summits (EAS) have been accelerating regional integration in Asia.

19 See *infra*, sections 3.6.2.1 and 4.5.2, for discussions of ASEAN.

20 Jones, *Regional Institutions for Protecting Human Rights in Asia*, 273.

21 See Muntarhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?* 417.

22 For human rights discussion purposes, this book generally focuses on three sub-regions: Northeast Asia, Southeast Asia, and South Asia. Central Asia, West Asia, and Pacific regions are not entirely excluded from discussions. However, because significant regional

When viewed through the lens of a systems approach,²³ I argue that a human rights system is indeed emerging in the region, since the constituent elements of such a system – norms, institutions, and modes of implementation – are continuously developing. Of course, I do not intend to suggest that such development is sufficient to guarantee a well-functioning human rights system, but I believe that there is more that is happening beneath the surface in Asia than meets the eye, and that such changes must be analyzed carefully lest we miss important signals and opportunities to promote the emerging human rights system in Asia.

Signs of such an emerging system are found in East Asia in its norm-building and institution-building processes, as well as in the implementation of human rights. To begin with, contrary to the self-serving contentions of certain authoritarian regimes, Asian societies have incorporated civil or constitutional norms in their domestic laws since the mid nineteenth century, long before the contemporary international human rights movement emerged. In other words, to varying degrees, the local legal systems of many Asian states have already constructed – and currently possess – a platform to incorporate international human rights law. This does not mean, of course, that most Asian states have adopted or implemented robust human rights norms; instead, I suggest that there is nascent human rights law already working in one way or another in many Asian countries. For example, all of the twenty-three East Asian states²⁴ have ratified at least two fundamental human rights treaties,²⁵ namely the Convention on the Rights of the Child (CRC)²⁶ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷ Approximately three-quarters of these countries

cooperation is being initiated by the states in East Asia, primary emphasis is put on those. For more information, see *infra*, section 2.2 for discussions of Asia.

23 See *infra*, section 2.3 “The systems approach to human rights.”

24 In this book, “East Asian states” refers to the following twenty-three countries in North-east Asia, Southeast Asia, and South Asia: Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic People’s Republic of Korea, India, Indonesia, Japan, Lao People’s Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Republic of Korea, Singapore, Sri Lanka, Thailand, Timor-Leste, and Vietnam.

25 For the gradual process of ratification, see Table 3.8, “Ratification process of international human rights treaties (as of September 1, 2011),” in section 3.4.1.

26 Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (hereafter “CRC”).

27 Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 UNTS 13 (hereafter “CEDAW”).

have ratified both the International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁹ as of 2011.³⁰ Even though such momentum has not yet reached the stage of adopting a regional human rights charter, the adoption of these international instruments shows that the normative basis for regional human rights cooperation exists at least in part.

Second, there have been positive developments in the institution-building process. Various inter-governmental meetings or workshops on diverse human rights issues have been held at the regional or sub-regional level to promote human rights cooperation. Currently, four different levels of human rights dialogue are proceeding, with many Asian states participating at the regional or sub-regional level, including: (1) the United Nations-sponsored Asia-Pacific inter-governmental workshops; (2) the Asia-Pacific National Human Rights Institutions forum; (3) sub-regional development; and (4) international and regional NGOs' efforts.³¹

Strategically, the movement to establish a pan-regional commission or court in the Asia-Pacific area initiated by the UN was slightly adjusted in the late 1990s. The UN-sponsored Asia-Pacific workshops adopted a "step-by-step approach"³² in 1996, agreeing to place more emphasis on specific categories of human rights cooperation. The governments that participated in the Kathmandu Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region in 1996³³ concluded that it was premature to discuss specific arrangements for the setting up of a formal human rights mechanism in

28 International Covenant on Civil and Political Rights, Dec. 16, 1966, preamble, 999 UNTS 171 (hereafter "ICCPR").

29 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, preamble, 993 UNTS 3 [hereafter "ICESCR"].

30 See Table 3.3.

31 Mary Robinson, Opening Statement, Ninth Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region in 2001. Mindful of possible conflicts among the diverse initiatives, Mary Robinson, Former UN High Commissioner for Human Rights, emphasized that the UN Workshop should be considered "as an opportunity to take stock of what is being done and get a better understanding of the fundamental principles underlying any initiative aimed at a possible Asian subregional or regional arrangement."

32 The Kathmandu Workshop in 1996 for the first time adopted an agreed conclusion with the step-by-step approach as a compromise.

33 The fourth workshop on regional human rights arrangements in the Asian and Pacific region held in Kathmandu, Feb. 26–28, 1996.

the region,³⁴ and they changed their principle of cooperation in favor of a more incremental approach.³⁵ Mary Robinson reiterated this approach at the Tehran Workshop in 1998, and this compromise was formally adopted as “a step-by-step, building blocks approach involving extensive consultation among Governments of the region towards the possible establishment of regional arrangements.”³⁶ The Asian-Pacific workshop in 2002 reiterated the principle of “the inclusive, step-by-step, building blocks approach towards enhancing regional cooperation for the promotion and protection of human rights.”³⁷ Under this approach, the focus of human rights cooperation in Asia-Pacific has been temporarily restricted to certain designated areas in acknowledgement of the obstacles to human rights institution-building and implementation across the region.³⁸ This compromise, nevertheless, should not be regarded as a failure. The Four Pillar Approach of the Tehran Workshop has contributed to the promotion of human rights in the region through: (1) national human rights plans of action and national capacity-building; (2) human rights education; (3) national human rights institutions; and (4) realization of the right to development and economic, social, and cultural rights.³⁹ Each year, the representatives of more than thirty Asian countries gather several times to discuss various issue-areas, continuously reaffirming the universality of human rights norms. The ratification of international treaties has been promoted, and there has been a considerable increase in the number

34 See Shelton, *supra*, note 15, at 363.

35 See Jefferies, *Human Rights, Foreign Policy, and Religious Belief: An Asia/Pacific Perspective*, 889.

36 Conclusions of the Sixth Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region (Tehran, February 28 – March 2, 1998) in *Regional Arrangements for the Promotion and Protection of Human Rights in The Asian and Pacific Region*, UN Doc. E/CN.4/1998/50 (1998).

37 Conclusions of the Tenth Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, in *Regional Arrangements for the Promotion and Protection of Human Rights in The Asian and Pacific Region*, UN Doc. E/CN.4/2002/WP3 (2002).

38 See Mary Robinson, Opening Address at the Sixth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region, Feb. 28, 1998. Mary Robinson actively advocated the validity of the new approach. She said: “I was not surprised to learn that there have been difficulties in establishing a human rights mechanism to cover a region whose vastness is matched only by its diversity. Those difficulties need not – and should not – prevent progress. There is much to gain through working on a step-by-step process involving the sharing of information, experiences and best practices, and building up national capacities for the protection and promotion of human rights.”

39 See Conclusions of the Sixth Workshop, *supra*, note 36.

of meetings and workshops on human rights since the Programme of Action was adopted by the Tehran Workshop.

In particular, the Association of Southeast Asian Nations (ASEAN) agreed to establish the ASEAN Human Rights Body by adopting the ASEAN Charter in 2007,⁴⁰ materializing its long discussions since the early 1990s, and all of its member states ratified the Charter, making it effective on December 15, 2008.⁴¹ The ASEAN Intergovernmental Commission on Human Rights (AICHR) that was established subsequently enhanced human rights cooperation in Southeast Asia, and worked to provide a strong boost for broader regional cooperation.⁴² Thus, although Asia does not yet have a permanent institution in the form of a regional human rights court or commission, these developments indicate that the foundations for a regional system are being built through the various incremental acts of human rights cooperation.

Finally, as regards the implementation of human rights, stronger efforts are being exerted by UN mechanisms, transnational networks, and domestic actors with enhanced capacity, even if the pace of change is painfully slow, with numerous challenges that inhibit the full realization of many rights.

Mindful of the evolution, as well as the challenges, of the emerging human rights system, this book aims at seeking a better understanding of the human rights norms in practice, assessing the efficacy of institution-building efforts, and evaluating the process of implementation of human rights in the region. It tries to acknowledge objectively what has been achieved. However, it also attempts to disclose the problems and weaknesses of the system, because a critical review of its shortcomings will eventually make it more meaningful and functional. Furthermore, a proper assessment of its current status will present some strategic principles for future cooperation in the region.

This book consists of six chapters. Following this brief introduction, Chapter 2 discusses the analytical framework and related conceptual and methodological issues that I utilize for this study. First, it deals with the conceptual problems surrounding Asia itself. Even though a uniform definition of “Asia” does not exist, we tend to agree that the world consists of regional groups. A part of the world is called “Asia” or “Asia-Pacific”; and, sometimes, it is viewed as an aggregation of sub-regions, even if the

40 Charter of the Association of Southeast Asian Nations, Nov. 20, 2007.

41 Wahyudi Soeriaatmadja, Cheer over ASEAN Charter, *The Straits Times*, Dec. 16, 2008.

42 For more information, see *infra*, sections 3.6.2.1 and 4.5.2 for discussions on ASEAN.

geographical boundaries of the region often do not match the political perception. This chapter views Asia as a region whose regional identity has not been completely established. It finds the region flexible and fluid with many different possibilities co-existing. For the purposes of the analysis and exploration of the current stage and the future of the human rights system in Asia, this book primarily focuses on twenty-three East Asian states, which could be supplemented by additional study in the future that includes West and Central Asia. Second, with regard to methodology, this chapter illustrates a systems approach⁴³ that puts greater emphasis on the interdependent and complex elements of various human rights mechanisms in East Asia. Within this framework, we can analyze the norms, institutions, and implementation arrangements, at the global, regional, and domestic levels, that interact with each other and form, as a whole, the emerging human rights system in Asia. Third, this chapter emphasizes that Asia has always been a participant in the development of human rights. Human rights are not wholly alien concepts to Asia, and Asian countries have had their own ways of respecting human dignity through religion, scholarship, and social systems. The particularities of the human rights concepts in Asia need careful attention, but there is no reason to deny the existence and salience of human rights in the region, especially by comparison to earlier historical periods in other regions. Through these discussions, this chapter sets out the methodology for analyzing the emerging human rights system in Asia.

Chapter 3 focuses on norms. First, it outlines a framework for the analysis of human rights norms in Asia, focusing on filtering mechanisms in the process of norm acquisition and exchange. Then, it reviews the treatment of international law in domestic legal systems, and the current status of human rights norms. It also analyzes international and domestic laws, and regional norms, so as to evaluate the development of human rights norms and the rule of law in the region.

Chapter 4 focuses on institution-building efforts. This chapter first reviews the experience of building human rights institutions in other regions. It also examines recent developments in regional and sub-regional cooperation in Asia. It then discusses strategic principles to strengthen the human rights institutions in the region.

Chapter 5 deals with the state of implementation of human rights in Asia. Reviewing the current implementation mechanisms, it discusses the difficulties that inhibit the enforcement of human rights in East Asia. It

43 For the definition of “systems approach,” see *infra* Chapter 2.3.2.

Cambridge University Press

978-1-107-01534-0 - Emerging Regional Human Rights Systems in Asia

Tae-Ung Baik

Excerpt

[More information](#)

INTRODUCTION

9

emphasizes the cooperative dimension of human rights implementation, and concludes that a regional human rights system will enhance the protection of human rights.

According to Abdullah Ahmad Badawi, former Prime Minister of Malaysia, the population of the thirteen ASEAN Plus Three (APT) states amounts to 2 billion.⁴⁴ The sixteen states in the East Asian Summits – which include India, Australia, New Zealand, and APT members – account for 49 percent of the world population.⁴⁵ The growth of human rights movements in Asia has been relatively recent, but the concept of human rights already has tremendous influence – much greater than is generally understood. The accelerating process of globalization imposes on Asia an increasingly prominent role in world politics and economic activity. Based on the analysis of twenty-three East Asian states, this book reiterates that human rights should be a fundamental component of globalization, and that Asia will not – and should not – be an exception in the process.

44 YAB Dato' Seri Abdullah HJ Ahmad Badawi, Towards an Integrated East Asia Community, Keynote Address at the Second East Asia Forum, Kuala Lumpur, Dec. 6, 2004: www.asean.org/16952.htm (visited Sept. 15, 2011).

45 Australian Department of Foreign Affairs and Trade homepage, The East Asia Summit: www.dfat.gov.au/asean/eas/index.html (visited Sept. 15, 2011). Since Russia and the United States joined the Summit in November 2011, the size of the population is even greater.

Analytical framework: human rights systems in Asia

2.1 Purpose of this chapter

This chapter examines a number of preliminary conceptual issues necessary for analyzing the emerging human rights system in Asia. It particularly focuses on the following three aspects: (i) What does the term “Asia” or “Asia-Pacific” mean in this book? (ii) What is the *systems approach*? (iii) How are we to acknowledge the *particularities in human rights* in Asia? These issues are closely interrelated. This chapter will address the questions one by one, forming the methodological foundation of this book.

First, in a nutshell, “Asia” in this book is an open-ended geopolitical concept referring to a fluid and changing area. An analysis of the historical and current usages of the term “Asia” deconstructs the traditional perception of the region, and we need to develop a more flexible view of it. “Asia” is an operational concept, rather than a concretely defined area with specific borders. It is a geopolitical term mostly (but not strictly) coinciding with the contemporary way of categorizing the world. Consequently, when referring to the region “Asia,” we do not pay serious attention to the geographical boundaries to distinguish it from other notions such as “Asia-Pacific” or “East Asia.” Sometimes, the term “Asia” means little more than its sub-regional components, even if “Asia” or “Asia-Pacific” may cover a region broad enough to include Northeast Asia, Southeast Asia, South Asia, West Asia, Central Asia, Australia, New Zealand, and Pacific Island states. This book does not intend to change the loose usage of the term “Asia” by limiting it with tighter borders in the belief that Asia is gaining added relevance as a regional group. This book attempts to keep Asia as an open-ended concept, which is developing its political, economic, and cultural identity based on the approach of open regionalism.¹

¹ See *infra*, section 2.2.6.