

Some European reflexions on regional standard setting in Human and Minority Rights in South Asia

Basic approaches towards a regional mechanism in South Asia

The International Centre for Ethnic Studies (ICES) published a draft South Asian Charter on Minority and Group Rights (2008).¹ The draft Charter once in force, would apply to members of the South Asian Association for Regional Cooperation (SAARC), and any other State which has been invited by SAARC to become a member”.² Most of the SAARC member states signed and ratified almost all International Human Rights Treaties which would ensure that a regional human rights instrument would remain under the international frame and not threaten so far reached minimum standards in each South Asian country. The draft Charta would therefore complement the basic international standards and could accelerate the ratification process of international treaties, especially in countries like Afghanistan, Pakistan or Bhutan which show significant gaps to engage with legal international instruments.

In terms of fulfilling obligations under regional and/or international human rights systems there is still a huge lack of implementation and executing mechanisms on the national level in politically comparable neighboring regions.³ Overall there appears to be a gap between ratification and effective implementation even through soft mechanism like monitoring and reporting instruments. When it comes to the monitoring of the states’ performance regarding the implementation of international treaties, the situation in all South Asian countries seems to be comparable. In India, the National Human Rights Commission (NHRC) did not provide input

¹ International Centre for Ethnic Studies is based in Sri Lanka (www.ices.lk). The draft Minority Rights Charter is available on the EURASIA-Net website: <http://www.eurac.edu/Org/Minorities/eurasia-net/index.htm>

² Actually eight member states: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka (<http://www.saarc-sec.org>) and seven observer status countries or supranational organizations: China, the European Union, Iran, Japan, Korea, Mauritius and the United States of America.

³ An overview of similar initiatives in the Pacific Region and ASEAN in David Keane’s article, “Draft South Asian Regional Charter on Minority and Group Rights: A Comparative Regional Analysis”, in European Yearbook of Minority Issues (Vol. 8), Leiden 2010 (Martinus Nijhoff Publishers), forthcoming.

nor participated in deliberations during the process of preparing the country's periodic reports to various UN treaty bodies. In Nepal, the Commission regrets in its 2004 Annual Report that several reports to UN treaty monitoring bodies had been sent by the government without inviting the council of the NHRC.⁴ Countries like Sri Lanka and the Maldives has still to empower their NHRC to carry out monitoring activities. Furthermore as it happens to all International Human Rights Treaties, SAARC member states have submitted declarations and reservations which allow a certain "flexibility" in fulfilling human rights standards. As long as there is no instrument or mechanism dedicated to the protection of human rights and minority issues in the frame of SAARC, it is worth to have a look on the ongoing legal developments as such as the SAARC Social Charter which has to be implemented through National Coordination Committees (NCC) or appropriate national mechanisms and especially through the NHRCs in each SAARC member state. The future elaboration of a regional monitoring system could be based on politically independent national human rights institutions which closely cooperate among each other. Exchange of information's on a regular base and a formally established consultation mechanism could be the starting point of a minimum standard setting.

A first meeting of National Human Rights Institutions (NHRI) for the countries belonging to SAARC took place on 16-18 April 2009 in Delhi and agreed to:⁵

- work towards national capacity building through sharing of experience, information and best practices on human rights;
- take steps to promote human rights awareness, and towards this end, hold conferences at least once in two years, apart from exchanges of visits, training programs and bilateral or regional cooperation between the NHRIs;

⁴ NHRC of Nepal, Annual Report 2004, 77.

⁵ Emma Lantschner, "National Human Rights Commissions in India and Nepal: State of Affairs and Challenges Ahead", in European Yearbook of Minority Issues (Vol. 8), Leiden 2010 (Martinus Nijhoff Publishers), forthcoming.

- work together to identify and cooperate on capacity building for dealing with human rights issues like human rights awareness, human trafficking and migrant labour;
- work collectively at UN fora, including the Human Rights Council, for an independent status for NHRIs, distinct from NGOs;
- appeal to the respective Governments to support and provide necessary wherewithal to NHRIs to ensure that they become fully compliant with Paris Principles, which includes administrative and financial autonomy.

As for the time being there is no regional mechanism for the protection of human rights it is particularly important to cooperate independently from any state interference. But constitutional safeguards are not sufficient how it shows the example of the National Commissioner for Linguistic Minorities (NCLM) in India. The organ established by the Constitution has the task of overseeing the fulfillment of linguistic minority rights but has only powerless functions. Despite of its status as a constitutional authority, the NCLM has no instrument to directly intervene or receive information's. NCLM reports are not discussed neither on State nor on Union level or have any impact on political affairs or judicial authorities.

First attempt towards supra-national instruments in Europe and South Asia

Comparing European experiences with future SAARC developments, one has to elaborate on the regional security architecture and the economic cooperation.⁶ As from the European experience, the concept of the Organization for Security and Cooperation in Europe (OSCE) at the end of the Cold War included the objective to reduce the probability of military conflicts by promoting economic cooperation and integration alongside democracy and human rights. The institutional development of SAARC shows the understanding of economic

⁶ Ugo Caruso, "The international standard setting in human and minority rights in South Asia", in European Yearbook of Minority Issues (Vol. 8), Leiden 2010 (Martinus Nijhoff Publishers), forthcoming.

development and security issues although no significant initiatives for a regional security policy was undertaken. The geo-politic important area situated between powder kegs like Afghanistan and Pakistan, quite recently terminated civil wars in Nepal and Sri Lanka and finally the political interests of two super-powers, China and India, do not easily enforce a common regional security perspective. Although with the essential support of India, SAARC could be a neutral regional player in the field of crises management generating a win-win situation for South Asian states if some lessons from the OSCE experience would be taken in consideration:⁷

- Security related activities or studies have to be undertaken and the political and economic dimension of SAARC should be completed by a more “glocal” approach including environmental, democratic and human rights issues;
- The principle of unanimity in the decision making process should be replaced by the European principles of subsidiarity and proportionality and the OSCE procedure “consensus minus one” (in case of clear, gross and uncorrected violations of OSCE commitments, decisions could be taken without the consent of the State concerned);
- The OSCE, just upon political commitments linked peace and security to the respect of human rights and created organs like the High Commissioner on National Minorities (HCNM), in contrast SAARC was unable to implement policy summit declarations and standards developed in its several SAARC Regional Conventions;
- The soft law approach should facilitate the participation of civil society (NGOs) in the future framework of a human rights and minority protection system elaborated by a Working Group of Eminent Persons of South Asia who should be officially

⁷ Caruso, op.cit. note 6.

asked to draft a South Asia Human Rights Convention with full and active participation of civil society groups and other stakeholders;

- SAARC's secretariat, regional headquarters and administrative units should be strongly reinforced to ensure satisfactory acceptance by member states, minority representatives, civil society and citizens in South Asia.

Only after the experiences of the two World Wars, Europe developed effective forms of bi- and multilateralism and achieved so a new concept of sovereignty. On the other hand, South Asian countries still stick to the traditional concept of sovereignty by a strong central state with a certain amount of internal power-sharing. In Europe, multilevel sovereignty provided the frame for supranational politics on EU level and power shifting to the regions, which are enabling Europe to promote cultural diversity, language rights and different forms of minority protection. South Asian states are still working on this conception of a supranational top-down and bottom-up approach in the frame of SAARC.

Finally European human rights and minority protection mechanisms in the frame of the Council of Europe (CoE), especially the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages have to be taken into consideration. From a formal point of view their soft law approach and their monitoring mechanism could be an example of best practice for SAARC, and from a conceptual point of view, opinions of the monitoring bodies on Central Asian states could be of certain relevance for human and minority rights dimension in South Asia.

First analysis towards working modern regional territorial autonomies

A federal system or regional territorial autonomy has been in a number of cases the peaceful solution for the territorial integrity of a state and the right to internal self-determination

of a minority. But autonomy, namely cultural or personal autonomy, can be established also without a precisely defined territory, namely for all members of a group living dispersedly or intermingled with other groups. Both forms of autonomy are born out of the requirement of granting minority protection in some or one part of the territory of a democratic state and is driven by the request of collective self-determination based mostly on a ethno-linguistic, historically grown group identities.⁸ Thomas Benedikter elaborates at least 4 criteria in order to determine a modern working autonomy system:⁹

- A state with rule of law and with an independent judiciary as well as an division of legislative and executive powers;
- The permanent devolution of legislative powers to freely elected regional assemblies of the autonomous entity and not only decentralization of powers to small elites within a non democratic system;
- A working pluralist democratic system with free and fair elections;
- The equality of fundamental political and civil rights to all citizens legally residing on the territory of the autonomous entity.

These criteria do allow us to check if autonomous entities do fully respect the minimum requirements or not. In 2009 worldwide at least 20 independent states have established about 60 such autonomous regions with a special legal status. Europe has been the cradle of territorial autonomy, since the first modern autonomy system in a democratic framework was created in 1921 by Finland on the Aland Islands, mostly inhabited by Swedish people. Later, 10 other European states adopted regional autonomy as a means of solving ethnic conflicts, among those states Spain is a special case as it has endowed all of its regions with different levels of

⁸ Thomas Benedikter (ed.), “Solving Ethnic Conflict through Self-Government – A Short Guide to Autonomy in Europe and South Asia, Bolzano/Bozen 2009 (EURAC), 5ss.

⁹ Thomas Benedikter, “The concept of modern autonomy systems and a short look on territorial autonomies in South Asia and Europe”, Working paper for the EU-FP7 project “My Science” presented in Bolzano/Bozen, 23 February 2010.

autonomy, transforming itself in a “State of Autonomous Communities”. Including the most recently reestablished autonomy of Serbia's Province of Vojvodina we can count 37 autonomous regions in Europe.

On contrary, using the above mentioned criteria, regional autonomy in South Asia is not widely applied today.¹⁰ Only India by constitutional provision has established already in the 1950ies so called “Autonomous District Councils” (ADCs) which fulfill the above listed criteria. Other states as Pakistan and Bangladesh do have one or some autonomous entities, but these entities do not fully respect the minimum requirement. Bhutan, Nepal, the Maldives and Sri Lanka are unitary States so far and do not have any territories with autonomy. This may change this year, when Nepal is going to adopt a new constitution providing for some regional decentralization. Also Afghanistan, which is composed by provinces, does not attribute them legislative powers by constitutional means, although the local governors do in fact retain a large amount of power.

Bangladesh is a unitary state with Islam and the Bengali language as the two fundamental features of the State. In 1997 Bangladesh granted certain rights to the tribal population of the Chittagong Hill Tracts with the obligation to establish autonomy, which was continuously delayed and applied in a very restricted form.

Sri Lanka, too, is a unitary state with its binational character. Since the very first years of independence Sri Lanka had to come to terms with the presence of one major ethnic minority, the Tamils asking for self-government and equal rights. But neither the first nor the second Constitution did take it into account and provided some territorial power sharing.

Pakistan, with a population of 160 million, would require efficient forms of territorial power sharing, in symmetrical and asymmetrical form to accommodate the basic issue of democratic government in the whole state's territory. Another challenge to accommodate a

¹⁰ See, for example, Thomas Benedikter, “The world’s working regional autonomies, an introduction and comparative analysis”, New Delhi 2007 (Anthem Press),.

particular situation given by historical and ethno-geographical facts is the unsolved Kashmir issue.

India is the only country in South Asia that has enshrined some forms of territorial autonomy in its constitution and which has established working regional autonomies fully comparable with autonomous regions in Europe. India has enshrined two forms of autonomy within the 5th and 6th schedule of the Constitutions. The first one accommodates some smaller tribal peoples with limited self-administration. This resembles rather to cultural autonomy than territorial. The second one, the 6th schedule provides rights to self-government to some districts (13 ADCs), mostly in the Northeastern states of Assam, Tripura, and West Bengal. In India's 330 districts, about 50 have a majority language which is not equivalent to the State's official languages, nevertheless there are no autonomies in most of those cases. Finally talking about autonomy in India we should also bear in mind the case of Jammu and Kashmir, which for just 6 years had the most advanced form of autonomy leaving just defense, foreign affairs and telecommunication issues to the central state. This autonomy has been curtailed and abolished in the 1950ies and is one of the root factors of the ongoing unrest and conflict in Jammu and Kashmir.

In Nepal 60 ethnic and caste groups speak 91 autochthonous languages. On district level, only in 54 out of 75 districts Nepali is the mother tongue of the majority of the population. There have been many decades of ethnic discrimination in Nepal, which along with social injustice and extreme poverty fuelled the civil war from 1996 to 2006. This Maoist rebellion was also caused by the centralized structure of the Nepali state and the dominance of the upper caste Nepali Hindu who constitute only 31% of the population but occupied 70% of the state dominant posts. The present constitutional transition includes not only an ethnic based federalism but even the right of self-determination. Article 138 of the interim Constitution of 1990 already states that in order "to bring an end to discrimination based on class, caste, language, gender, culture, religion

and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system”. No agreement has so far been reached on the concrete model of federalism and even though federalism can be the best technique to avoid ethnic conflicts in diverse societies, it is not a magic formula *per se* for very small minorities.¹¹ Nepal’s experience with decentralization goes back to the 1960ies when the country was structured in 14 zones and 75 development districts. Criteria for demarcating the districts were economic self-sufficiency, comparable population size, access to infrastructure but also preservation of cultural identity and recognition of historical tradition. In 1970 the zones were grouped in 5 development regions but failed to reduce the centralist tradition.

On the basis of past experiences in decentralization, the drafters of the constitution agreed upon a federal structure based on a functional federalism or an ethnic one. The first approach could be called geographical federalism dividing the country in 3 areas: Himalayan north, hilly center including the Katmandu valley and the South plain Terai; or in 9 districts based on economic features, both appreciated by the Hindu elite.¹² Maoist and numerically stronger ethnic groups like the Newars prefer an ethnic based federalism. A combination of both could be a compromise for the drafters of the constitution as listed by Giovanni Poggeschi:¹³

- 15-20 units based on economic criteria could get strong devolved powers from the centre which is more than the 5 existing development regions but less than the 75 districts;
- Each of those units should have a Council vested with competences relating to linguistic and cultural issues;

¹¹ Giovanni Poggeschi, Nepal: “Its past and (maybe) its future constitution”, EURASIA-Net Study Visit Report, Bolzano/Bozen 2009 (EURAC).

¹² Poggeschi, op.cit. note 11.

¹³ Poggeschi, op.cit. note 11.

- Democratic rights should replace the caste privileges and a proportional system on central and federal level should protect minority groups and preserve their culture, especially of the smaller minority groups;
- The Central Parliament should consist of a First Chamber with general competences and a Second Chamber for minority rights and cultural issues.

Nepal's politicians and political forces now have acknowledged the urgent need of decentralizing the power, but rather than special autonomy, almost all proposal on the table focus on symmetric power sharing or decentralization, either as full fledged federalism or as an advanced form of regionalism.

In South Asia's big federal states federalism is the key to manage ethnic diversity through power sharing. India, Pakistan and to some instance also Bangladesh have to improve or reinforce their federal structure. Historic specific cases like Jammu and Kashmir, Chittagong Hill Tracts or Assam should be entitled to establish a far reaching autonomy fulfilling the right of internal self-determination. The 28 Indian States have not established sub-state units (e.g. regions) between the federal state level and the elected municipality and village council level. Some of the minority conflicts and forms of life of indigenous and tribal people could be accommodated through the establishment of a democratically governed sub-state unit.¹⁴

But as the European experience shows, if just one or a few minority groups settling on a smaller part of the national territory have to be accommodated, federalism – as one option of multilevel government - may not be entirely necessary. In some cases, the very particular nature of one ethnic national minority and region might acquire a particular arrangement which is neither claimed nor necessary for other units of the state. This has happened with some islands of Scandinavia (e.g. Aland Islands) as well as with historically distinct regions of unitary states

¹⁴ Benedikter, op.cit. note 8.

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The European systems of modern autonomy are a success story although we cannot pretend to export models to other regions in the world. But we have to consider single instruments of autonomy regimes and analyze them why they are peacefully implemented in some cases and failed in other one's. Finally the outcomes of these analyzes have to be applied in ethnic conflict areas in order to find peaceful solutions for co-existence.

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