



9TH INFORMAL ASIA-EUROPE MEETING (ASEM) SEMINAR ON HUMAN RIGHTS

"Human Rights in Criminal Justice Systems"

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SEMINAR REPORT

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I. Executive Summary¹

The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests: firstly, the legitimate interest of the State in the observance of national laws, the fight against crime and the maintenance of internal security; secondly, the interest of the victims of crime and abuse; and, thirdly, the rights of the accused or the convicted and sentenced offender. International human rights law acknowledges the need to balance State power and individual liberty, and sets out the minimum guarantees that States must observe throughout their criminal justice process.

Participants in the seminar were in **general agreement on the substance of the fundamental human rights guarantees** as well as their importance in safeguarding the effective and fair functioning of the criminal justice system. However, the discussions highlighted the fact that there were often **large gaps between the standards laid down in international treaties, domestic legislation and their implementation** in practice. Participants noted that **while corporal punishment has been outlawed by international human rights case law and there is a growing global trend towards the abolition of the death penalty**—factors which contribute to the progressive development of human rights—it is still a point of debate for those states that wish to maintain these forms of punishment as part of their domestic criminal justice system. However the problems faced by both Asian and European countries showed a great deal of similarity and all participants emphasised the need to continue to engage in a dialogue on criminal justice reform and to share experiences and best practices.

The 9th Informal ASEM Human Rights seminar entitled “Human Rights in Criminal Justice Systems” was held in Strasbourg—a significant centre for human rights dialogue—where the achievements and challenges of the European Court of Human Rights were presented to the participants. The event was organised by the Asia-Europe Foundation, the Raoul Wallenberg Institute and the French Ministry of Foreign Affairs, in co-operation with the International Institute of Human Rights, the European Court of Human Rights and the University of Strasbourg. Mr. Jean-Paul Costa, President of the European Court of Human Rights, opened the event with his reflections on the important role of the Court and the challenges it faces. Minister for Foreign and European Affairs Mr. Bernard Kouchner provided a message underscoring the significance of the series of informal human rights dialogue between the two regions, delivered by Amb. François Zimeray, Ambassador for Human Rights of France. Keynote Speakers Mr. Thomas Hammarberg, Human Rights Commissioner of the Council of Europe, and Dr. Kiran Bedi, former Police Advisor to the UN Secretary General, highlighted issues and raised questions that helped set the frame for the subsequent seminar discussions.

The seminar brought together 95 participants including official government representatives (from foreign affairs ministries, justice ministries), judges, lawyers, non-government organisations, civic associations and the academe, representing 39 of 45 ASEM partners to

¹ The views expressed in this report are strictly those of the authors, and do not necessarily reflect those of the Asia – Europe Foundation, the Raoul Wallenberg Institute or the French Ministry of Foreign Affairs.

The two Main Rapporteurs are Dato’ Param Cumaraswamy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers, and Dr. Manfred Nowak, United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment. Working Group rapporteurs Atty. Simon Creighton, and Prof. Kuk Cho contributed to this report. The authors gratefully acknowledge the assistance of Johanna Lober, Greg Mayne, Isabelle Tschan and Ioulia Ovtchinnikov.

discuss the integration of human rights standards in criminal justice systems as well as to share experiences and best practices. Participants were earlier provided a background paper on the subject prepared by the two Main Rapporteurs, Param Cumaraswamy and Manfred Nowak.

The seminar convened four working groups for an open, direct and in-depth discussion of how to improve human rights protection at the different stages of the criminal justice system. The working groups focused on the rights of the accused during pre-trial procedures and detention; fair trial standards; human rights standards relating to crime and punishment; and rights in prison. After one and a half days of intensive discussions, the results of the working groups were presented to and endorsed by the plenary.

The following points summarise the most important issues and recommendations:

Pre-trial Procedure & Detention

- In many countries, problems occur with respect to the right of the accused to be promptly informed of the reasons of arrest and of all his or her rights during detention, particularly with respect to the rights of access to and communication with his or her lawyer, medical doctor and family, the right to remain silent, the effective availability of *habeas corpus* and the right to complain about the treatment in custody. In this context, participants stressed that the effective guarantee of the right to legal counsel and the availability of legal aid are crucial to ensure the protection of the accused against arbitrariness and ill-treatment during police custody and detention on remand.
- In light of the presumption of innocence as a fundamental principle guiding criminal justice during the pre-trial phase, participants discussed the need to place pre-trial detainees under a separate authority and chain of command from investigating authorities, and to strictly implement the separation of remand prisoners from convicted prisoners.
- As torture and ill-treatment most frequently occur in police custody, participants emphasised the need to put in place effective safeguards against abuse, such as audio-visual recording of interrogations, guarantees concerning the presence of legal counsel during interrogation and the establishment of an effective oversight of the police by an independent authority, separate from the chain of command of law enforcement (“police over police”).
- Seminar discussions confirmed that in many participating countries, pre-trial detention continues to be the rule, rather than the exception. In addition, pre-trial facilities are frequently overcrowded and in much worse conditions than ordinary prisons. In this respect, participants agreed on the necessity to reduce the use and length of pre-trial detention by increasing reliance on non-custodial measures, and by introducing a maximum period of detention on remand commensurate with the length of the potential sentence.

Fair Trial

- In many countries, the right to a fair trial is seriously threatened, particularly in politically sensitive cases. Participants emphasised the importance of an independent, impartial and corruption free judiciary for securing the right to a fair trial and the rule of

law. All courts, regardless of their designation as ordinary, military or special, are obliged to guarantee the right to a fair trial.

- As many of the accused have little knowledge of the operation of the legal system, the importance of access to competent defence counsel to represent their interests at all stages of the criminal process was emphasised by the participants. In circumstances where the accused cannot afford to pay for their own legal counsel, States should establish mechanisms, for example legal aid, legal clinics or pro bono legal services, to provide for legal representation where the interests of justice so require.
- Participants discussed the positive and negative aspects of lay persons' involvement in criminal trials. It was noted that the use of lay assessors or juries was a common practice in Asian and European countries. In view of the public nature of trials, in terms of the trial hearing and the judgment, participants generally felt that such public involvement should be encouraged not only to protect the rights of the accused but also to promote transparency and public confidence in the criminal justice system.
- Participants felt that one of the most fruitful aspects of this ASEM seminar was the opportunity it provided for exchange of experiences, best practices and the realisation that many States, both in Asia and Europe, faced common problems in ensuring fair trials. Participants recommended that efforts be made at the intergovernmental level to develop a compendium of best practices in the implementation of the right to fair trial.

Crime and Punishment

- Discussions centred upon the different objectives underpinning the criminal justice system and how they influenced punishment choices. Participants recommended that States should develop a criminal justice policy, which is directed at the reformation, rehabilitation and social integration of the offender in accordance with the principles of modern criminology and penology. Prevention of crime and rehabilitation of offenders should be considered as twin objectives of punishment.
- In many countries the increasing use of alternatives to imprisonment or other custodial punishments was highlighted. Participants recommended that States should strongly promote non-custodial forms of criminal sanction as an alternative to imprisonment in accordance with the 1990 UN Standard Minimum Rules for Non-Custodial Measures to provide greater flexibility in sentencing, consistent with the nature and gravity of the offense, personality and background of the offender, and with the ultimate aim of the protection of society.
- In many countries, mandatory sentences had been introduced in order to limit judicial discretion in sentencing and to appear to be tough on crime. States should take into serious consideration that mandatory sentencing limits judicial discretion for sentencing and the right of the accused to have his or her sentence reviewed on appeal. It is also seen as impinging on judicial independence.

Rights in Prison

- Safety in prisons and action to prevent violence within custodial institutions presents a major challenge in all jurisdictions and requires further attention. The right to life requires positive action on the part of States to protect those at risk of self-harm and

suicide as well as those sections of the prison population at risk from other prisoners. Participants emphasized the need to provide appropriate training to correctional staff in order to reduce situations of violence and vulnerability for all people in prisons – both prisoners and staff.

- One of the most consistent themes that arose in the discussions on imprisonment was the need for prisoners to remain integrated in the wider society through the promotion of family ties and links to the community in general. The promotion of a stable custodial environment and the aim of social integration are best achieved through the maintenance of family ties, both during and after imprisonment. These practices should also be cognisant of the duty to protect and promote the best interests of the child where family members are imprisoned.
- The position of those groups of prisoners who face particular challenges and difficulties in custody were considered and it was stressed that juvenile prisoners should be separated from adults and that diversionary measures should be maximised so as to enable children and young people to have the greatest possibility of reintegration and re-socialization. The special needs of women in prison also require particular attention especially with reference to issues of health and natal care and parenthood and the arrangement of staffing so as to ensure that women can be held safely and are protected from abuse.
- In the context of the formalisation of the role of victims within the criminal justice system, it was recommended that compensation schemes for victims should be administered by the State to avoid arbitrariness.

General Recommendations to ASEM States

- Participants affirmed the importance of the respect for the relevant international standards relating to the fair and effective functioning of the criminal justice system. In that respect it was recommended that States which have not ratified, nor incorporated into domestic law, international or regional human rights treaties, particularly the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto, should be encouraged to do so.
- The absence of a regional human rights mechanism for protection of human rights was considered by the participants. The participants encourage Asian States to establish a regional mechanism, followed by a court similar to the European Court of Human Rights, for the promotion and protection of human rights.
- The practice of torture or ill-treatment at any stage of the criminal justice process was an issue of serious concern throughout the workshop discussions. Participants reaffirmed the fundamental obligation of the State to ensure the prevention, investigation, prosecution and punishment of any individual involved in such ill-treatment. In addition, participants emphasised the duty of all actors in the administration of justice, including police, judges, prosecutors, lawyers and prison officials to actively combat torture.
- The proper functioning of many criminal justice systems is hampered by the allocation of insufficient resources, financial and human, often leading to violations of human

rights. Participants felt that Governments should prioritise the provision of adequate resources, including appropriate salaries and conditions of work for police, prosecutors, judges and prison officials, to ensure the independent, impartial and effective functioning of their criminal justice systems.

- Specific groups, such as children, women or minority groups, have special needs when it comes to the criminal justice process which should be appropriately recognised in domestic law and practice.
- The rights of victims of crime were addressed by all working groups. Participants emphasised that the rights of victims should be better promoted and protected, including access to justice, the right to reparation and other forms of assistance, in accordance with the 1985 UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power. However, the participants agreed that greater recognition for the rights of victims should not be achieved at the expense of the rights of the accused.
- Training and awareness raising about international human rights standards was frequently highlighted as a crucial way of ensuring better protection of human rights. Actors in the criminal justice system, including judges, prosecutors, lawyers, police, prison officials, and other officials in enforcement agencies should be provided with training on international and regional human rights standards. Consideration should also be given to institutionalising human rights education in schools, both secondary and tertiary.
- Participants highlighted the important role that independent monitoring bodies, such as national human rights commissions, ombudsmen, regional and international supervisory bodies and NGOs could play in monitoring compliance with relevant human rights standards at the different stages of the criminal justice system.

II. Seminar Report

A. Overview

The overarching objective of the seminar was to discuss ways of better protecting human rights at the various stages of the criminal justice process and to emphasise the important roles that the main actors in the administration of justice – judges, prosecutors, lawyers, police and prison officials – have to play in protecting and engendering a culture of rights. The seminar specifically aimed to:

- Identify trends on how individual rights are protected across ASEM countries;
- Find common priorities in meeting international human rights standards at the pre-trial, trial, post-trial as well the sentencing and punishment stages; and,
- Formulate recommendations for relevant institutions at national, regional and inter-regional levels.

Participants were divided into four working groups, representative of both regions, to discuss the following issues: pre-trial procedures and detention; fair trials; crime and punishment; and rights in prison. Summaries of the group discussions, as well as the recommendations adopted by each group, follow.

In general participants were in agreement on the substance of human rights norms, as embodied in international and regional human rights instruments, relevant to the criminal justice process, as well as the importance of these norms for ensuring the fair, effective and efficient functioning of the criminal justice system. However, in practice there were significant problems with the actual respect of these rights on a day-to-day basis. European participants emphasised the important contribution that the European Convention on Human Rights had made, and continues to make, to improving the respect for rights in European criminal justice systems. As a result many participants believed that the establishment of a regional human rights mechanism could make a significant contribution to the protection of human rights in criminal justice in Asia.

A common theme raised in the working groups is the perceived conflict by some quarters of society between the interests of the state in the investigation, prosecution and punishment of crime and the respect for fundamental human rights, particularly the rights of accused and convicted persons. Disagreement on this issue was most pronounced in relation to capital and corporal punishment. International human rights law acknowledges the need to balance State power and individual liberty, and sets out the minimum guarantees that States must observe throughout their criminal justice process.

Participants emphasised that there is no conflict between the interests of the State in ensuring security, on one hand, and the promotion and protection of fundamental human rights, on the other hand. These are mutually reinforcing objectives. In that regard the mainstreaming of human rights into the criminal justice system, in particular through the provision of information and training about human rights for the main actors in the criminal justice system – judges, prosecutors, lawyers, police and prison officials – is considered to be essential. Educational activities on human rights for the broader society are also recommended as being important, in themselves as well as for promoting a better understanding of the need for the respect of human rights in the criminal justice system.

B. Working Group I: Pre-trial Procedures and Detention

The pre-trial phase is a crucial and sensitive stage in the criminal justice process. On the one hand, the interest of the investigating and prosecuting authorities requires effective measures to secure all available evidence and prevent collusion and interference with witnesses. On the other hand, the suspect has a right to protection from undue interference by the investigating authorities, particularly in light of the presumption of innocence and the prohibition of enforced self-incrimination. With this background, participants discussed challenges and good practices of protecting human rights during the pre-trial phase.

Rights of the Accused in Pre-trial Procedures

In most ASEM countries, the right of the accused to be promptly informed about the reasons for arrest and of all his or her rights during detention, including communication rights, the right to legal counsel, the right to remain silent and the right to challenge the lawfulness of the deprivation of liberty are in principle guaranteed in domestic legislation. The implementation of these rights in practice, however, often lacks effectiveness. In particular, participants discussed several examples where existing legal standards concerning the maximum length of police custody and the right to prompt access to legal counsel were systematically circumvented in the interest of national security (in particular under emergency legislation), or for the expedience of the investigating agencies.

Participants focused on the right to timely access to a lawyer as a crucial safeguard during the pre-trial stage. In many non-European countries access to legal counsel is limited to cases of serious crimes, while in many European countries the presence of a lawyer is only guaranteed after the first interrogation. Participants stressed the need to strengthen the rights of legal counsel, including the right to be present during the initial stage of interrogation, the right to speak with the client in private and the right of full access to the investigation files. The discussions on access to legal counsel were closely linked to the availability of free legal aid. Experiences from participating countries and representatives from international NGOs demonstrated that many ASEM countries lack a coherent legal aid system. Good practices discussed included the involvement of national bar associations in the running of legal aid clinics; the creation of legal aid boards to monitor the implementation of legal aid policies and to provide quality assurance; and the equitable remuneration of legal aid lawyers by the government.

In addition, participants considered in detail how the right of the arrested person to be informed of all his or her rights during pre-trial detention was implemented in practice. In some countries, the investigating authorities deliberately withhold information on rights during pre-trial detention; in other countries the information is not effectively available as it is provided in a language the persons concerned does not understand. In this respect, the Austrian practice of distributing the information in writing in 19 different languages, including advice on how to get a lawyer, was seen as an example of good practice.

Recommendations

- Limit the period of police custody in line with international standards
- From the beginning of the police custody, ensure the right of the accused to be promptly informed of the reasons of arrest and all rights during detention, including access to and communication with a lawyer, medical doctor and their family, the right to remain silent and the right to lodge a complaint about his or her treatment in custody

- Guarantee the right to habeas corpus
- Ensure the availability of effective legal assistance and legal aid from the beginning of police custody

Authority over Pre-trial Detention & Safeguards

In light of the presumption of innocence and to prevent a conflict of interest between the prosecution's interest and the rights of the accused, participants underlined that police custody, detention on remand and imprisonment of convicts should be strictly separated both in terms of location and chain of command. The removal of pre-trial detention from the authority of the police significantly reduces the risk of torture and ill-treatment. Remand detainees should therefore be transferred from the police to facilities under a different authority. Suspects should not be returned to police custody for subsequent interrogations, but should remain on the premises of the pre-trial facilities. All participants agreed on the need to strictly separate remand prisoners from convicted prisoners within the same detention centre.

In most participating countries, the maximum period for police custody and detention on remand is fixed by law, but often not adhered to in practice. To protect detainees from arbitrary and prolonged detention, participants discussed different ways of implementing effective and independent judicial review. For example, in the Philippines, mobile judicial bodies (“justice on wheels”) carry out judicial control over pre-trial detention in remote rural areas. Other good practices in ASEM countries relate to the periodic review of pre-trial detention at regular intervals in order to assess whether detention on remand continues to be justified. Participants also strongly felt that victims of arbitrary pre-trial detention should be provided with a legal remedy and compensation.

Recommendations

- Ensure the strict separation of police custody, detention on remand and imprisonment of convicts in terms of location and chain of command
- Separate juvenile from adult detainees
- Implement a mandatory and periodic system of effective, independent and impartial judicial control of pre-trial detention
- Provide compensation to victims of arbitrary and/or prolonged police custody and detention on remand

Combating Torture and Ill-treatment in Pre-trial Detention

A point frequently raised was the lack of awareness of the absolute nature of the prohibition of torture among law enforcement and prison officials, resulting in the trivialization of torture as a “mistake” rather than condemning it as a serious crime. In addition, interrogation techniques and restrictions on the use of force by law enforcement officials are often not regulated by domestic law, leaving police officers with considerable uncertainty as to which methods can be legally applied. In fact, in many countries, domestic legislation does not contain a specific provision criminalising torture with a punishment commensurate with the gravity of the offence. Instead, broad defences are available preventing the effective criminal prosecution of torture crimes. In addition, participants were concerned about the prevalence of almost complete impunity for perpetrators of torture crimes in some participating countries. Even where special units exist mandated to investigate police abuse, their effectiveness and independence is seriously impeded if they are placed under the same law enforcement authority that they are supposed to monitor. With this background, participants agreed on the

fundamental importance of creating a “police over police”- an independent complaint mechanism equipped with full powers to investigate ex-officio cases of alleged abuse in police custody.

To prevent torture and ill-treatment, participants stressed the need for a system of regular visits to places of detention by an independent external monitoring body, as is required under the Optional Protocol to the Convention against Torture (OPCAT). Examples from several ASEM countries demonstrated that pre-trial detainees are frequently “forgotten” in prison, even though no judicial judgement on their guilt has ever been pronounced. In addition, participants underlined that the opacity and secrecy often surrounding detention facilities is conducive to torture and inhumane conditions of detention. Regular visits to places of detention are therefore an important tool in preventing ill-treatment and raising awareness about “forgotten prisoners”.

The discussions further identified other essential safeguards to combat torture and ill-treatment in pre-trial detention, including: the audio-visual recording of police interrogations; mandatory medical examination upon admission to pre-trial detention facilities; and bringing suspects physically before a judge. It was stressed that these measures not only serve to detect abuse but also to protect law enforcement officials from false accusations. At the procedural level, the non-admissibility of evidence obtained by torture in criminal proceedings was considered to be an essential safeguard and participants agreed on the importance of enforcing the exclusionary rule in practice. It was recognised that the sole reliance on confessions as the basis of conviction increases the risk of torture. Therefore, participants underlined the need to train law enforcement officials in investigation techniques and to increase their capacity to secure other forms of evidence.

Recommendations:

- Establish oversight of the police by an independent authority separate from the chain of command of law enforcement (“police over police”)
- Legal regulation of the use of force by police officials in accordance with the “Basic Principles on the use of force and firearms by law enforcement officials”
- Open police custody and pre-trial facilities to independent external monitoring, such as the National Preventive Mechanism under OPCAT
- Bring suspects “physically” before a judge for an independent review of detention and possible ill-treatment
- Grant access to a medical doctor and a mandatory medical examination upon admission to pre-trial detention
- Ensure effective safeguards during interrogation by police and prosecutors, such as video/audio recording and presence of the defence counsel
- Ensure the non-admissibility of evidence extracted by torture in any proceedings

Conditions of Pre-Trial Detention

In accordance with international human rights standards, persons in pre-trial detention have the right to be treated humanely and with respect for the fact that they are presumed innocent until proven guilty. Participants discussed, however, that in practice pre-trial detainees are often held in worse conditions than convicted prisoners. In addition to the problem of overcrowding, pre-trial facilities are often not well equipped with visiting rooms or do not provide for adequate activity regimes, thereby seriously violating detainee's visiting and

communication rights and sometimes leading to irrevocable consequences for the social life of the person concerned.

Recommendation:

- Improve physical conditions of police custody and remand detention facilities in line with international minimum standards

Pre-trial Detention as the Rule, not the Exception

According to article 9 of the UN International Covenant on Civil and Political Rights (ICCPR), detention on remand should not be the general rule. However, participants confirmed that in many ASEM countries pre-trial detention is the rule, rather than the exception. Among the reasons for the excessive use of pre-trial detention is a “tough on crime” attitude among actors within the criminal justice system and the general public, combined with a tendency to consider suspects of crime guilty, even before the case has been decided in court. Pre-trial detention is therefore often perceived as a first part of the sentence. Other factors considered to contribute to the high pre-trial detention rate are the automatic prescription of detention on remand for minor offences and the lack of alternatives to incarceration.

Participants agreed on the necessity to reduce the use and length of pre-trial detention by increasing reliance on a comprehensive and coherent system of non-custodial measures. With respect to experiences with bail systems in ASEM countries, concerns were raised relating to inconsistent or discriminatory application, including the non-availability of bail for non-citizens, discrimination against indigents and the general exclusion of certain offences from the bail scheme. In addition to the independent and periodic judicial review of detention on remand (see above) participants supported the Latvian case whereby the length of pre-trial detention is by law limited to half of the period of the potential prison sentence, and cannot exceed a maximum period of two years, as an example of good practice. Participants also agreed that the use of pre-trial detention of juveniles should be reduced by means of diversion.

Recommendations

- Limit the maximum length of detention on remand commensurate with the potential sentence
- Reduce the use of pre-trial detention through non-custodial measures, such as bail, house arrest, confiscation of travel documents, electronic and other means of surveillance
- Replace pre-trial detention of juveniles by means of diversion
- Eliminate the use of pre-trial detention for petty offences

Public Perception of Pre-trial Detention

In more general terms, the working group also touched upon the influence of public opinion of pre-trial detention on criminal justice policies. In some ASEM countries, the prevailing public perception does not distinguish between pre-trial detainees and convicted prisoners, and the demand for a “tough on crime” policy by the general public as well as by law enforcement officials puts pressure on judges to decide in favour of deprivation of liberty. Participants therefore repeatedly emphasised the need to increase awareness and knowledge

about the rights of the accused among the different actors in the criminal justice system and the general public alike. In addition, it was stressed that the media and civil society play an important watchdog role and are key to addressing the emotional side of the “war against crime” as well as to point out the social costs of excessive and arbitrary use of detention on remand.

C. Working Group 2: Fair Trial

Trial proceedings constitute the most public element of the criminal justice system. As a result the fairness and effectiveness of their functioning is often the standard upon which the entire justice system is assessed. This working group focused upon the practices of ASEM countries with respect to trial procedure, sought to identify common principles, problems and best practices. Moreover, the group discussed the content of the international and regional human rights standards in this area.

Significant agreement existed among the participants as to the fundamental guarantees of the right to a fair trial, as expressed in international law, and many jurisdictions faced similar problems in ensuring the proper functioning of their judicial systems. In the European region, the European Convention on Human Rights was directly applicable in most countries, or had been implemented through enacting legislation and had pre-eminence over domestic law. Participants emphasised the continuing importance of its effect in ensuring the right to a fair trial in Europe. In Asia, there is no regional human rights convention which some participants argued impacted significantly on the human rights situation in the region. However, in several countries constitutional provisions protected human rights.

The discussions identified a range of good practices for ensuring the better protection of human rights. The establishment of independent ombudsman institutions or national human rights commissions compliant with the Paris Principles; independent prison/detention centre monitoring bodies; open political space for civil society and the press; training in human rights for relevant actors in the criminal justice system; and the integration of human rights into law school curricula were cited as important ways of institutionalising respect for human rights.

Recommendations

- States which have not ratified the ICCPR, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and OPCAT are urged to do so and to incorporate into their domestic laws the fair trial procedures set out in Article 14 of the ICCPR.
- In response to the 1993 Vienna Declaration and Program of Action, Asian States are urged to consider the setting up of a regional mechanism including a regional court for the promotion and protection of human rights.
- A compendium of best practices in the implementation of Article 14 ICCPR to guide states in the administration of criminal justice should be developed.
- Judges, Lawyers and Prosecutors must be sensitised through continuing legal education in the domestic application of international human rights norms including fair trial procedures set out in Article 14 of the ICCPR.

- International human rights law should be included in the curriculum of institutions of higher education. Ministries of education are urged to include teaching of human rights values in schools.

Fairness, Independence and Accountability

The core principles that govern trial proceedings are the requirements of fairness, independence and impartiality. Fairness entails the equality of arms between the prosecution and the defence ensuring that each side has the opportunity to present their case without being placed at a disadvantage vis-à-vis their opponent. This encompasses a range of specific procedural guarantees the minimum of which are set out in the relevant international standards and were discussed in detail by the working group. It also requires the absence of direct or indirect influence, pressure or intimidation for whatever motive.

The independence and impartiality of the judiciary are also essential elements of the right to a fair trial. Independence is composed of the institutional independence of the judicial branch and the independence of individual judges. Participants affirmed that key attributes of institutional independence are the separation of powers between the various branches of Government; independence in the administration of the court system, particularly the allocation of cases; respect for the decisions of the court; and the enforcement of judgements. Individual independence guarantees the ability of a judge to decide cases on the basis of the facts and the law without improper influence, pressure or threats. Some participants expressed concern that in their countries the Government exercised a significant amount of influence over the appointment of judges, particularly at the lower levels, endangering the independence of the judiciary.

Impartiality similarly requires a judge to not be influenced by personal bias or preconceptions in the case before them and to maintain the equality of treatment between the parties. The working group discussed in this respect the importance of ensuring the integrity of the judiciary, by establishing mechanisms for the combating of corruption and other illegal practices in the judicial system.

Recommendations

- An independent, impartial and corruption-free judiciary shall be guaranteed by the State. This includes both the individual and institutional independence of judges. In particular, appointment procedures for judges must ensure selection based upon merit. In this regard, the establishment of an independent judicial service commission to make such appointments is a good practice.
- In countries where the subordinate judiciary is controlled by the executive, states should legislate for the separation of the judiciary from the executive to enable the subordinate judiciary to be seen to be independent and impartial.
- While it may be legitimate to set up specialised tribunals to deal with administrative matters and the like, and military courts to deal with military personnel, extraordinary courts shall not be set up to displace the jurisdiction of ordinary courts.

Publicity

The transparency of trial proceedings, by ensuring public access and the public issuance of judgements, is also an important general principle protecting the right to a fair trial and facilitating democratic control of judicial proceedings. In ASEM countries public trials are the

norm, except in certain limited circumstances where the public can be excluded when the interests of the parties so require, for example in cases involving children, or to protect the fairness of the trial, or in cases involving national security in democratic societies. In the latter case, given the risk of abuse, the closure of trials should only be initiated if strictly necessary.

Involving the public is also an important way of maintaining confidence in the operation of the judicial system as well as encouraging familiarity, understanding and commitment to the principles of fair trial in society. Common ways of involving the public in ASEM countries involved the use of lay assessors or jury systems. Participants felt that members of the public endeavoured to fulfil their allocated roles fairly and in the interest of the effective functioning of the judicial system. Continued public involvement therefore should be encouraged by ASEM states.

A difficult area addressed by the working group related to the public discussion of criminal proceedings, either during the pre-trial or trial stage, in the media or by Government or other public officials. This area requires a delicate balancing of the right to freedom of expression and the right to a fair trial. Discussions in the media about trials could often be sensationalised, have little concern for the facts and unduly influence lay participants, whether as jury members or assessors. Similarly, Government officials have a tendency to assume the guilt of the accused, thereby endangering the presumption of innocence.

Recommendations

- Excessive media coverage of pre-trial and trial stages could prejudice the fairness of the trial. The competing rights to freedom of the press and the right to a fair trial must be carefully balanced.

Right to Counsel

One of the key safeguards for the right to a fair trial for the participants was the right to counsel. The provision of counsel from the initial stages of contact with the police throughout trial and until the final conclusion of any appeals is essential to ensure the fairness of the proceedings, in particular the equality of arms between the accused and the State.

Discussions centred on the delays that exist in many countries in the provision of access to counsel, in particular during interrogations. Concerns were expressed that in some countries legal provisions that provide for access to counsel within a reasonable time or as soon as possible had been interpreted in a manner that facilitated the interrogation of accused without representation.

Participants emphasised that delays in providing access to legal counsel have a significant impact on the ability of the accused to obtain a fair trial, particularly on the right to remain silent. Therefore it is essential that an accused has access to counsel from the initial stages of arrest, in all circumstances when they are being interrogated, and they must be provided with sufficient time to consult with their counsel in the fullest confidentiality. In the circumstances where the accused cannot afford legal representation, the interest of justice requires that they should be provided with effective legal representation.

Recommendations

- In the provision of legal aid or assignment of counsel to accused persons, particularly in serious crimes, States must see to it that the counsel is competent

Other Issues

Delays in the criminal justice process are a common problem facing both European and Asian countries. In Europe, a significant number of cases currently before the European Court of Human Rights relates to the human rights implications of court delays amongst European member states. However, delays are not only an issue with respect to guaranteeing a fair trial for the accused; they also decrease public faith and can have serious implications for other aspects of the criminal justice system. For example, delays can result in longer pre-trial detention, therefore increasing prison populations.

A variety of factors are responsible for causing delays: legal – both substantively and procedurally, for example too many appeals or excessively formal procedures; institutional, for example lack of courtrooms or judges and poor court management; or financial, for example the allocation of insufficient resources to the courts. Delays are addressed in different ways in the jurisdictions represented in the working group. In some countries there is a constitutional guarantee for a trial within a reasonable time. Other countries provide incentives to the prosecution to speed up investigations or engage in forms of plea or charge bargaining, and others focus upon improved case management. The working group emphasised that commitment by the State, both financially and politically, to the fair and efficient functioning of the criminal justice process, through reform and/or the investment of sufficient funds, is essential.

The role of victims and the importance of giving more attention to their welfare is an issue being addressed in many jurisdictions. The right to attend proceedings (and in some countries the right to initiate proceedings), victim impact statements, compensation and other forms of redress are examples of the measures adopted in order to better represent the interests of victims in criminal proceedings. Participants stressed that this greater recognition of victim rights, whilst valid, should not come at the expense of the rights of the accused.

In recent years, juvenile justice systems have been the subject of reform in many ASEM countries. Participants emphasised that given their specific needs, juveniles should be entitled to separate procedures which take into consideration their age and stage of development and the primary interest in ensuring their well being, in particular their rehabilitation and reintroduction into society. Particular consideration should be given to diversionary processes, aimed at providing the greatest chance for reintegration and re-socialisation to children and young people, promoting mediation between the perpetrators and the victims as well as the use of non-custodial measure in resolving juvenile delinquency—consistent with Article 3 of the UN Convention on the Rights of the Child.

Recommendations

- States should provide adequate resources, both financial and human, for the effectiveness of their criminal justice systems. Periodically, States should examine their criminal justice systems and undertake reforms to correct deficiencies in the delivery of effective and fair criminal justice.

- States should protect the rights of victims of crimes, including the right to reparation which should be incorporated into the domestic law of the state. Where victims are unable to obtain compensation from the perpetrators of the crime, States should establish mechanisms to ensure the provision of compensation to victims.
- Juveniles are entitled to specific procedures within the criminal justice system which safeguard their best interests. Particular consideration should be given to diversionary processes.

D. Working Group 3: Crime and Punishment

Recognising the international norms and trends regarding the protection of human rights in the criminal justice system, the participants in Working Group 3 discussed the theory and practice relating to crime and punishment in their respective countries and exchanged their views and experiences.

Retributive Trend

In the current political and economic climate, participants expressed concern that a retributive trend in criminal policy might be increasing; that public funding might be directed towards retributive measures in the global economic crisis; and that States might disregard international legal norms with regard to the criminal justice system. The working group emphasised that human rights should be respected and protected in the criminal justice system and that it is more effective to invest public funding into crime prevention rather than in retributive measures. While recognising that States have, in principle, the right to determine their own penal philosophy and law, the participants maintained that States should make serious efforts to incorporate international legal norms into their domestic law.

Participants also discussed the importance of non-custodial forms of criminal sanction as an alternative to imprisonment, given the poor prison conditions that exist in many parts of the world and the negative impact that this has on detainees' health. Non-custodial measures were also emphasized in light of the importance of the reintegration of detainees into society. Participants observed a certain trend that the more prisons are built, the more people are simply incarcerated without meaningful facilities and programs for rehabilitation and education. In this regard, the participants reconfirmed the importance of the 1990 U.N. Standard Minimum Rules for Non-custodial Measures.

Most participants expressed their concern about mandatory death sentences which are applied in some countries and the increasing numbers of proposals for mandatory sentencing in common law countries. The working group agreed that mandatory sentencing permits no judicial discretion in sentencing once an individual has been convicted of a specific crime and removes the right of the accused to have his or her sentence reviewed on appeal.

Recommendations

- States should develop a criminal policy with the objectives of punishment being the reformation and rehabilitation of offenders in accordance with the principles of modern criminology and penology. The prevention of crime and the treatment of offenders should be considered as twin objectives of punishment. States should ensure that, even in the global economic crisis, more public funding is put into crime prevention rather than in retributive measures.

- States must be cognisant of and respect international legal limits on punishment and incorporate them into their domestic law.
- States should strongly promote non-custodial forms of criminal sanction as an alternative to imprisonment in accordance with the 1990 U.N. Standard Minimum Rules for Non-custodial Measures, in order to provide greater flexibility in sentencing consistent with the nature and gravity of the offense, personality and background of the offender and with the ultimate aim of the protection of society.
- States should take into serious consideration the limitation that mandatory sentencing places upon judicial discretion in sentencing and the right of the accused to have his or her sentence reviewed on appeal.

Capital and Corporal Punishment

A significant proportion of the discussion in the working group focused upon two topics upon which participants were not able to reach an agreement: the death penalty and corporal punishment.

Most participants argued that imposition of a death sentence is inconsistent with accepted standards of international human rights law; a moratorium on executions should be implemented immediately; and corporal punishment should be prohibited by law. Although the question was raised of how to change the public consciousness favorable to death penalty in retentionist countries, there was not enough time to discuss this question.

However, a few participants contended that neither capital punishment nor corporal punishment is a human rights issue but a criminal justice issue and that any State has the sovereign right to choose its own legal system and depending on its domestic values and circumstances, decide on its own effective criminal policy.

As a result of these and other differences of opinion, it was not possible to reach a consensus agreement in the plenary on recommendations relating to capital and corporate punishments.

Other Issues

The working group also engaged in an extensive discussion of other topics such as preventive detention, victims' rights and traditional criminal justice systems.

Participants discussed the practice of preventive detention in their own countries, and how it leads to infringements of the human rights of the offender. In particular, preventive detention without judicial intervention and without a maximum limit was criticised. Some participants argued that preventive detention should only be used as an exceptional measure for serious repeat offenders.

The members of the group also engaged in a comprehensive and in-depth discussion on victims' rights. The exchanges focused on the marginalised role of victims and the lack of consideration for their interests in the criminal justice system and reconfirmed the importance of the 1985 U.N. Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power. Whilst considering that the discourse of victims' rights is often used to encourage a retributive trend in criminal policy, at the same time, the group emphasised that the enhancement of victims' rights should not weaken the rights of the accused.

Discussions were also held on the potential for violations of human rights by new forms of crimes such as cyber crimes, trafficking in human beings, and organ theft which have increased in recent years.

It was also pointed out that the traditional criminal justice systems of ethnic minorities have often been neglected by States as well as by criminal law scholars. Participants agreed that they should be respected when they do not violate international human rights standards.

Recommendations

- States should pay more attention to human rights violations in the context of new forms of crimes such as cyber crimes, trafficking in human beings, and organ theft.
- States should encourage the respect of traditional justice systems whenever possible and when they do not conflict with international human rights standards and national laws.
- States should make all efforts to provide access to justice, restitution, compensation and assistance to victims in accordance with the 1985 U.N. Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, without any compromising of the rights of the accused.

E. Working Group 4. Rights in Prison

As noted in the background paper, prisoners are entirely dependent upon the State to recognise and uphold their rights and are therefore in an exceptionally vulnerable position. Consequently, the working group sought to explore methods by which penitentiary authorities can find the appropriate balance between the needs of security within prisons and the rights of those imprisoned. There are also inevitably wider societal issues to consider in relation to conditions of detention as well as the impact of imprisonment on different communities and the families of the imprisoned.

The Impact of International Human Rights Treaties, Jurisprudence and Soft Law Standards

Individuals who are detained remain entitled to the respect of their fundamental rights and several provisions in international and regional human rights treaties, in particular the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as a significant body of soft law, provide for the protection of the human rights of prisoners. The act of ratification of international human rights treaties was widely regarded by the participants of the working group as only the first step of a process and not an end in itself. In that regard the importance of domestic implementation of international legislation and standards was underlined. In this context, the group considered that it is particularly important and useful to establish directly enforceable domestic rights. Furthermore, jurisprudence by international and regional bodies is seen as an important tool to raise standards.

All of the participants stressed the need to move outside of the legal sphere. The impact of the promotion of social awareness of human rights of prisoners was seen as crucial given the lack of knowledge existing in wider society about conditions of detention and life in prison and the lack of public debate about the purpose of imprisonment. The knowledge and information gap

existing between the actors involved in the criminal justice system and those who have expertise in human rights render the implementation of international legislation and standards difficult. Therefore information on human rights standards should be made more easily accessible to actors in the criminal justice and prison system.

Recommendations

- The ratification of human rights treaties is essential to advance human rights in prisons.
- Treaty rights are further enhanced by the direct enforceability of these rights in domestic law.
- Alongside formal legal standards and remedies, there is a need to build greater social awareness of the issues concerning imprisonment.
- The importance of establishing regional human rights mechanisms was underlined, including regional human rights courts, supported by networks of national human rights institutions
- Co-operation between the two regions is encouraged to build capacity in prison systems in regard to healthcare, education and general standards. Priority areas should be identified expeditiously to initiate programmes with a view to sustained activity.

Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Torture is intentionally inflicted on a person by law enforcement officials for the purpose of extracting a confession or information, for punishment, intimidation, coercion or discrimination. Furthermore, the conditions of detention themselves and the treatment of prisoners can amount to cruel, inhuman and degrading treatment. The members of the group emphasised that international treaties, regional and international jurisprudence as well as soft law standards are a key tool in helping establish minimum standards and avoiding in practice the existence of conditions within prisons that amount to inhuman, cruel or degrading treatment. This is particularly important to prevent the lack of resources being used as an excuse for poor conditions of detention. The ratification of the Convention against Torture and its implementation in domestic law was considered by the working group to be an essential step towards eliminating the deliberate infliction of torture and prison conditions amounting to inhuman and degrading treatment.

All members of the working group agreed on the relevance of the principle “if you don’t look you don’t see,” meaning that prisons need to be opened to the outside world and regular detention monitoring is important to prevent torture and ill-treatment and to improve the conditions of detention.

Participants were able to point to particular models that had aided this progress in their respective countries. Some felt that NGOs were best placed to provide a wider understanding of the impact of imprisonment on society at large, through monitoring the impact on communities and prisoners’ family relationships, especially children. Besides the opening up of detention facilities to families and communities, regular inspection and detention monitoring through formalised inspection or preventive bodies, such as the National Preventative Mechanisms (NPMs) under OPCAT and/or national human rights commissions or other non-judicial bodies, were found to be helpful to open up the prison system and to prevent torture and ill-treatment. It was stressed that through such actions advice can be given to the staff of penitentiary institutions and the dialogue engendered by these approaches can help avoid institutional defensiveness. Even though the appropriate structure may vary, there

was consensus that the access of civil society and independent bodies to prisons will engender the appropriate checks and balances.

Recommendations

- ‘If you don’t look you don’t find/see’. Pro-active steps must be taken to identify and investigate conditions and actions in prisons that might amount to torture or cruel and inhuman or degrading treatment
- The CAT & ICCPR as well as universal minimum standards for the treatment of detainees and regional agreements provide essential guidance and policies to prevent conditions of detention amounting to cruel, inhuman or degrading treatment
- Domestic law must make provision for the criminalisation of torture and the prosecution of perpetrators (according to Article 4 of CAT)
- Regular visits to detention facilities by independent monitoring bodies, both national (such as NPMs under OPCAT) and international, are essential.
- Civil society, including families and communities, play an important monitoring role and should be provided with access to prisons.
- Safety in prisons and action to prevent violence requires more attention. The training and education of staff is required to protect the rights of detainees and to reduce situations of violence and vulnerability for all people in prisons. Positive action is needed to protect those at risk of self harm and suicide.

The Rights of Prisoners and the Role of Prisoners in Society

There was consensus in the working group that although prisoners are deprived of their liberty they do not lose their liberties. At the same time, it was observed that in reality imprisonment means that prisoners might fall into a difficult position of being outside of society. Therefore the aim should be to follow the “principle of normalisation”, meaning to grant detainees a life that resembles, to the utmost possible extent, life outside prison.

The most prominent theme that arose was the need for prisoners to remain integrated and connected to wider society through the promotion of family ties and contact with the world outside prison. The promotion of family ties has a vital role to play in terms of social cohesion which facilitates the return to the community of an individual after the execution of the prison sentence. Examples of best practice were given from various countries ranging from the provision of facilities for special visits by children and families, through to the allowance of conjugal visits in some jurisdictions. The provision of appropriate information to prisoners was also considered to be a good example of best practice with some states now providing information packs to prisoners explaining their rights and responsibilities. The working group endorsed the recommendations made in the background paper (at page 85) promoting the integrative and rehabilitative aim of imprisonment.

The working group members recognised the requirement to grant a series of fundamental rights in prison, such as to provide adequate and appropriate food and medical care, and also to allow religious practice. There was a divergence of practice among the member states regarding the respect of political rights in prisons, such as the right to vote. It was felt that international and regional standards play a vital role in helping establish recognised human rights norms to aid States in reaching appropriate decisions on such issues.

The right to work of prisoners was seen as a major challenge. The working group stressed that making suitable work available was an essential part of the re-integrative aims of imprisonment but this needs to be carefully balanced against the possibility of exploitation or creating tension with local communities by undercutting local labor costs. Safe working environments for prisoners must be protected and inspection mechanisms put in place to ensure compliance.

All of the jurisdictions represented in the working group had taken some steps to recognise the special status and needs of particular groups of prisoners. Women and minors were reported to be detained in separate facilities in most of the countries. Concern was expressed regarding the vulnerable position of women as well as the relatively poor facilities available in comparison to men's prisons.

While the degree of overcrowding varied in each country represented in the working group, it was seen as a universal problem leading to inhuman conditions of detention. In the absence of a consensus on more specific actions, it was agreed that the promotion of diversion from custody and restorative justice might have benefits in reducing prison populations.

Recommendations

- 'Prisoners lose their liberty, not their liberties.' As prisoners remain part of society, the aim should be to follow the "principle of normalisation."
- Prisoners should be integrated into society through positive state action to ensure the maintenance of family ties - both during and after imprisonment. The best interests of the child must be the primary concern where family members are imprisoned.
- Diversion from custody and restorative justice are appropriate means to address overcrowding in prisons
- International labour standards to prevent forced labour must be complied with in prisons. In circumstances where labour is permitted in prison, an equitable system of remuneration should be provided. Standards should be in place to ensure safety in prison workplaces.
- States should comply with the UN Convention on the Rights of the Child and international and regional standards on juvenile justice to ensure that the best interests of the child are protected.
- Children in prison should be separated from adults
- The age of criminal responsibility should be consistent with the best interests of the child.
- Diversionary measures should be maximised so as to enable children and young people to have the possibility of reintegration and re-socialisation.
- Female prisoners must be held separately from male prisoners.
- The special needs of women in prison must be given proper attention with particular reference to issues of health and natal care and parenthood.
- Staffing must be arranged to ensure that women can be held safely and protected from abuse.
- Positive steps should be taken to ensure that women have access to the same facilities as men.

Rights of Victims

Although one of the cross cutting questions rather than a specific question on imprisonment, the members of the working group stressed that victims' rights and the rights of the prisoner

co-exist with each other and should not be considered as oppositional. Many countries are exploring a more formal role for victims within the criminal justice system and the members of the group considered that the move towards a formalisation of their status is to be encouraged. It was pointed out that very often prisoners and victims will be drawn from the same groups and communities. Often victims become criminal offenders and prisoners may also become victims.

Recommendations

- The rights of the prisoner co-exist with the rights of victims and should not be considered to be in opposition.
- Giving victims a more formal role within the criminal justice system should be encouraged.
- Compensation schemes for victims should be administered by the state to avoid arbitrariness.

F. Concluding Observations

The seminar addressed a wide range of human rights issues that pertain to all stages of the criminal justice process. Common themes addressed throughout the discussions highlighted the lingering perception that a conflict exists between the interests of security and the protection of victims and the rights of the accused; the importance of the respect of international norms; and the difficulties and significant complexity that is inherent in the ensuring the effective functioning of any legal system. All themes were discussed in a constructive spirit in the working groups and during the final plenary session.

ASEM partners make up a community of extraordinary diversity. Within each country there is a plurality of interests, experiences and values. The very commitment to international dialogue presupposes differences in perspective that need to be better understood. The rapporteurs were duly attentive to divergences of opinion which have been summarized in this report. However, the rapporteurs were in the end struck by the almost total absence of disagreement on the fundamental guarantees of human rights that must be respected in criminal justice systems.