

**PROSPECTS OF EUROPEAN MECHANISM OF
HUMAN RIGHTS PROTECTION IN SOUTH ASIA:
A COMPARATIVE ANALYSIS OF EUROPEAN MODEL WITH THE SAARC**

An Article By: Anurag Devotka, Nepal, PROLAW 2013-2014

Edited By: Venera Ramaj, Kosovo, PROLAW 2013-2014

1. Introduction:

The adoption of the U.N. Charter in 1945 set in motion a human rights revolution that culminated in the internationalization and humanization of international law. This conviction was carried forward with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the International Covenant on Civil and Political Rights (ICCPR) with an Optional Protocol, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)-the three of which are collectively known as the "International Bill of Rights"-and a host of other human rights instruments.¹ Hence, the global dimension of human rights protection carried forward by the United Nations has been a benchmark in protecting and promoting the rights of the individual irrespective of structure and politics of the individual states.

The normative and institutional evolution of international human rights law at the global level played a predominant role in encouraging the creation of regional human rights systems in Europe, the Americas, Africa, and more recently the emerging systems in Asia and the Arab States, often for the ultimate purpose of recognizing human rights at the grass root level. Questions may however arise on why regional mechanisms to achieve this goal? In response to this regional approach, I offer a counter claim with three core explanations in establishing the regional mechanisms to be more practical, systematic and reasonable. Firstly, these mechanisms are complementing the universal mechanisms in protecting and defending human rights where the political, cultural, and economic similarity enables regional systems to offer better enforcement potential than their international contemporaries. Secondly, it would not be an error to make an assertion that the regional organizations being located closer than other international human rights organizations, as they would offer a more accessible forum in which individuals

¹ These instruments have been adopted by the U.N. and its specialized agencies. e.g., *Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No 49, U.N. Doc. A/44/49 (1990); *Convention on the Rights of the Child*, G.A. Res 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984); *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, U.N. Doc. A/RES/34/180 (1980); *International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature Nov. 30, 1973*, 1015 U.N.T.S. 244 (entered into force July 18, 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 7, 1966, 660 U.N.T.S 195 (entered into force Jan. 4, 1969); *Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., Supp. No. 15, U.N. Doc. A/5515 (1963); *Convention on the Political Rights of Women*, Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150; *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277.

can pursue their cases. Thus, regional human rights instruments (e.g. treaties, conventions, declarations) help to localize international human rights norms and standards, reflecting the particular human rights concerns of the region.² Last but not the least, the nooks and corners the international mechanisms fail to penetrate may be approached easily through the regional mechanisms. For instances, a crisis occurring out of traditional and cultural conducts solved through regional apparatuses invites less debate than on the international level because of the understanding of the culture and tradition of one another at the regional level.

Considering the achievements and contributions made by the American and European system of regional Human Rights protection, the urge is for the similar methods and protection mechanisms for violation of Human Rights in South Asian Region. The concept of regionalism is not novel in South Asia, as the step of regionalism has already been initiated with the institutionalization of the South Asian Association for Regional Human Rights Cooperation (SAARC). Though it has been working as a regional mechanism and as an instrument for the problems relating to human rights in South Asian regions, effective implementation is still in its infancy. The comparison with the European model is very often focused in terms of economics and politics, where the issues of human rights are given the least preferences. In light of that, I would like to make an inference to the human rights protection mechanism in European system and take it as an inspiration in South Asian model. In this region, the challenge of Human Rights development has continued for several decades against large scale Human rights violations. Even though there are universal human rights protection mechanisms, they has not been able to penetrate the thick layer of human rights problem in South Asia and able to resolve these problems in the grass root level. And ironically, this is the region in the world which lacks a robust regional human right protection mechanism.

Europe's regional system classifies the protection of human rights as a corner stone, which is lacking in SAARC. So this study will determine the lesson that SAARC can learn from the EU in terms of human rights protection as a way of moving forward for SAARC with issues that matter most in the region.

2. European System of Human Right Protection: A Glimpse

The European system came into being as a natural reaction to a gross human rights violation during WWII and a defense against all forms of totalitarianism.³ Although various organizations and institutions including the European Community (or European Union) and the Organization for Security and Cooperation in Europe (OSCE) nowadays deal with human rights at the European level, what is commonly referred to as the European system of human rights protection is still the system created within, and operated by, the Council of Europe.⁴ The council of Europe

² Office of the High Commissioner for Human Rights, *An Overview of Regional Human Rights Systems*, available at <http://bangkok.ohchr.org/programme/regional-systems.aspx>, (12/16/2013).

³ It was believed by European states that human rights need to be respected so as to secure democracy and avoid dictatorship, and conflict between East and West Europe enabled countries in the West to make an exclusive human rights system, as cited by Jina Kim, *Development of Regional Human Rights Regime: Prospects for and Implications to Asia*, 59 available at http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p57-1022.pdf, (12/16/2013).

⁴ Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement compatible with Reinforcement?' (1998) 8 *Transnat'l L. & Contemp. Probs.* 313.

is the main institutional framework for the protection of human rights in Europe. The main documents adopted in the European area under the auspices of the European council are the Convention for the Protection of Human Rights and Fundamental Freedoms⁵ and the European Social Charter.⁶ Personal, legal, civil, and political rights are guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, while economic and social rights are laid down in the European Social Charter (1961). The lists of rights in these documents are very similar to those of Universal Declaration and Covenants.⁷ The best thing about the European mechanism of protecting human right is that it has not just articulated the rights and obligations under a text of law in the convention, but, it also establishes mechanisms for the implementation of these rights. When it comes to the implementation of the rights enshrined under the European Convention, the convention establishes institutional mechanism consisting of the European Commission (now defunct) and the European court of human rights. Thus, the major human rights standard mechanism to be taken as reference from Europe would be the Council of Europe, the Convention and the Court.

The principles of **the Council of Europe** as established in its article 3 include pluralist democracy, respect for human rights and the rule of law. It is the primary objective of the council which is still holding unity amongst the European nations. Like for instance, for a state to join the Council, it must demonstrate both a respect for the rule of law and for human rights. Additionally, it is concerned with promoting European culture and diversity, consolidating and maintaining democratic stability, and promoting economic strength.⁸ The most influential outcome of the council of Europe in defending human rights of the people could be summed up in two words, 'convention' and 'court'.

The European Convention on Human Rights, adopted by the Council of Europe, signed on 4th Nov. 1950 and entered into force on 3rd Sept, 1953 is the legal basis for the protection of human rights in Europe. It has defined a number of civil and political rights to be enjoyed without discrimination⁹ including: the right to life,¹⁰ protection against torture,¹¹ the prohibition of

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Adopted at Rome, on November 4, 1950 and entered into force in 1953, on September 3

⁶ The European Social Charter, adopted on October 18, 1961 and entered into force on February 26, 1966, followed by the additional Protocol from 1988, Amendment Protocol from 1991 and the additional Protocol regarding the collective complaints system. In 1996 the revised text of the European Social Charter is signed (into force since 1999).

⁷ Jack Donnely, *Universal Human Rights in Theory and Practice*, 2nd edition, (New Delhi: Manas Publication 2005), 138-39

⁸ Art. 3 of the Statute of the Council of Europe requires, every member of the Council of Europe must accept the principle of rule of law and if the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the council as specified in Chapter 1(Aims of the Council of Europe).

⁹ Janusz Symonides (ed.), *Human Rights, International protection, monitoring, enforcement*, (UNESCO publishing 2003), 135-136

¹⁰ European Convention on Human Rights, Art. 2.

¹¹ *Ibid*, Art. 3

slavery and forced labor¹² the liberty and security of persons¹³ right to marry and found a family¹⁴etc. Additional protocols have added more rights and new structures into the system.

European Court of Human Rights is the supervisory machinery built under the convention that is also embedded under the institutional structure of the Council of Europe. The function of the Court is to monitor the implementation of the Convention. With the ratification of the Convention the countries become members of the Court. It is this Court's task to decide on human rights issues (of the individual as well as the states) with regard to all European countries, regardless of their cultural, legal and ideological differences.

3. SAARC as an existing mechanism of protecting human rights in South Asia:

The South Asian Association for Regional Cooperation (SAARC) was established in 1985 with the objective of promoting regional cooperation between seven South Asian countries—Bangladesh, Bhutan, India, Nepal, Maldives, Pakistan and Sri Lanka. The work of SAARC is quite tremendous in bringing countries of the region closer and promoting cooperation among them in certain areas. At the same time, its efforts and effects towards instant protection of human rights remain a 'paper tiger' because of no existing enforcement mechanisms. Though it has been criticized for not being a strong institution to regionally address the problems of the states however, on a positive note it has set a blueprint of the notion of regionalism in South Asia, which is worth mentioning.

Though the entire region of Asia lacks a regional human rights protection mechanism as that of Europe, Africa and America, providing a prospect of such mechanism for the entire Asia would sound a bit impractical because of the scale and diversity of the population as well as the territory. South Asia, being one of the top regions in the world hosting massive human rights violations and the countries in the South Asia share almost the similar cultures and traditions with one another, the prospect of regional mechanism in this particular region is more requisite and practical.

As SAARC has provided the organizational structures and initiatives to the protection of human rights in South Asian regions, its rationality loses its grip in the absence of effective implementation. On that milieu, fabrication of distinct mechanism of human rights protection in South Asian region apart from SAARC would likely lessen unwanted impediments and delays. The strengthening of existing mechanisms serves to be far better than a fresh start, especially to the South Asian country, which is a home for massive property and dense population.

¹² *Ibid*, Art. 4

¹³ *Ibid*, Art. 5

¹⁴ *Ibid*, Art. 12

4. The Prospect Regional Human Rights Protection Mechanism in South Asia and the Feasibility of European System:

Taking lessons from the European model, in an urge to adopt absolute and effective institutional mechanism, it serves as the successful model of integration, as it has gathered considerable experience. Despite having its constraints and limitations, European system of human rights protection is considered most successful (relatively) on a functional level. The underlying principles and diversified context of various member states enhances the prospect of South Asian region to take aspiration for the European model. Indeed it must be kept in mind that total replication of European system of human rights protection will be inherent failure in context of South Asia. The South Asian region is contextually in a different plain than in Europe, with indicators being social, economic, political, technological etc. For example, judgment implementation can be considered from European model and amalgamated in a hybrid model to suit South Asian context.

a. SAARC Council as a Council of Europe:

The first lesson to be learnt from the European model is the establishment of firm institutional backbone that holds and unites the states together and drives towards a collective purpose. The good thing about the institutional setup of SAARC is that it already has the council as the governing body, represented by the head of the governments of the member states. There is a council of ministers to assist the council, helping in formulation of policies, reviewing the functions of the SAARC, promoting regional interests etc. However it lacks a proper monitoring mechanism which often results in 'no' implementation of plans and agendas. At the other hand, the council of Eurodss pe monitors member states' progress in these areas and makes recommendations through independent expert monitoring bodies¹⁵. All Council of Europe member states have abolished the death penalty.¹⁶

So, two basic lessons could be learnt, first, the provision of human rights protection under the broader mandate of SAARC Council's role and functions which seem to be lacking and secondly, the establishment of strong and proper monitoring mechanisms, which is a utter need in South Asia, since SAARC has been highly criticized for being a 'paper tiger', some call it a 'tongue without teeth', to institutionally strengthen the human rights protection mechanism in this region.

b. SAARC Charter and the European Convention on Human Rights

It has been three decades since the adoption of SAARC and despite a serious human rights crisis throughout the region, SAARC has not given thought to adopting a specific, detailed and

¹⁵ The list of monitoring bodies include, Group of States against Corruption (GRECO), European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Group of Experts on Action against Trafficking in Human Beings (GRETA), European Commission for the Efficiency of Justice (CEPEJ), Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), European Commission against Racism and Intolerance (ECRI), European Committee of Social Rights (ECSR), Advisory Committee on the Framework Convention for the Protection of National Minorities, and Committee of Experts of the European Charter for Regional or Minority Languages, as available at <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en>, (12/21/2013).

¹⁶ Ibid

uniform human rights convention or charter despite the existence of these in all other major regions of the world.¹⁷ Hence, without a strong legal foundation, the establishment of proper institution to protect the human rights would remain within the papers, as seen in the South Asian regions. Thus the feasible way out in South Asian context would be either to frame a new convention on the protection of human rights taking into consideration the forms and modes of human rights violation in this region, or to accommodate the provisions of defending the human rights violations within the SAARC charter.

Taking into consideration the ongoing instances of not taking seriously the mandates of SAARC Charter, if the convention is to stand as a strong legal foundation, it shall be concluded in accordance with the Vienna Convention on the Law of Treaties. This founding treaty shall have to bear binding force and be performed by all parties to it in good faith (*pacta sunt servanda*) where member states cannot invoke their domestic laws as a justification for their failure to implement the treaty. In line of this basic principle of international law, for the countries of South Asia, and looking at their deviation rates in terms of rule of law and human rights, a strong regional convention has been a need of time, to legally bind the states and for the better performance of the regional law in this region.

c. Establishment of Regional Human Rights Court in South Asia:

The establishment of the convention is baseless without establishment of the court. The convention serves as a legal basis where as a court is the supervisory basis or the guardian of the convention. Drawing from Europe, the major function of the court is to monitor the implementation of the convention. As provided by the convention, the jurisdiction of the Court covers every area ranging from the interpretation and application of the Convention and the protocols, and in the events of dispute as to whether the Court has jurisdiction, the Court itself posses the jurisdiction to decide.¹⁸ The Court also accepts applications of instances of human rights violations from individuals as well as states. In order for an application to be accepted by the Court, all domestic legal remedies available to the applicant must have been exhausted.¹⁹

Coming to grounded reality, the nations in South Asia have topped the rankings either in worst political and press freedom, corruption, poverty, etc., for many years. The region also seriously lacks an independent judiciary in most of the countries, as they are kept under serious scrutiny of the executive and sometimes are kept under immense political pressure through various means. Thus it gives a clear picture that the rights of the people of the region are very likely to be jeopardized by the existence of such judiciaries and the end of process in the national level. Hence, the regional call for a human rights court which takes an application from the individual against the violation of his/her rights by the state itself. This admissibility criterion could be drawn from European court itself, where in many cases the European Court has decided in favor of individuals deferring to the national court's decisions.²⁰

¹⁷ Dr. Gyan Basnet, New identity for SAARC: Establishing a regional human rights mechanism, available at http://www.nepalnews.com/archive/2013/others/guestcolumn/may/guest_columns_04.php, (12/25/2013)

¹⁸ *Convention* Art.31(1,2)

¹⁹ *Ibid*, Art.35

²⁰ For example the case of Hugh Jordan v. UK; Stewart v. UK, European Court of Human Rights, could be taken into consideration.

Drawing on the contribution made by the European Court, the two principles endorsed by the court could be taken as a reference, namely: the 'margin of appreciation' and the 'living instrument' doctrine. The concept of 'margin of appreciation' grants domestic courts a good deal of judicial discretion, on the grounds that domestic courts are closer to the society where the problem has emerged. The concept of the Convention as a 'living instrument', rests on the idea that the problems of today's societies could not have been foreseen when the Convention was adopted²¹. Thus human rights protection grows and evolves with changes in European societies. Consequently, the European court serves to be a best example to take a lesson for the countries like South Asia.

However, the initiatives taken by the South Asian states on regional human rights mechanisms are praise worthy. For instance, the South Asia Human Rights Documentation Centre (SAHRDC) and South Asia Forum for Human Rights (SAFHR) are networks of individuals and organizations committed to promoting human rights. The SAHRDC seeks to investigate, document and disseminate information about human rights violations and human rights treaties and conventions while SAFHR was a direct response to what NGOs in the region believed was a delinquent effort by SAARC to promote observance of and respect for international human rights. These efforts seem to have lost its way because of the lack of institutional framework in the region.

²¹ Nina - Louisa Arold., 'Utilizing the European Convention on Human Rights Approaching and understanding the Court', (Summer Course on European System of Human Right Protection, 12 to 23 September 2011 at the Europa/Universitat)