CHAPTER SIX

LESSONS FOR THE PROPOSED SOUTH ASIAN HUMAN RIGHTS MECHANISM FROM THE EXISTING REGIONAL MECHANISMS
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6.1 Introductory

In this penultimate chapter, I have picked up the threads of the arguments built in the previous chapters of the study. Especially the second and the third chapter wherein I have discussed the development of international human rights monitoring by the UN and by regional human rights mechanisms respectively. While discussing the regional features in the third chapter I have discussed certain features of these regions which I found similar with South Asian region. The present chapter is devoted to the lessons or inspirations South Asia and SAARC may draw from the successes and weaknesses of the human rights systems of the UN and the regions. It is important to reiterate here that all the regional human rights mechanisms have been greatly inspired by the international human rights system that is working under the UN. Also, the older regional mechanisms for human rights have taken lessons from the UN system for human rights and similarly the newer regional regimes have adopted and learnt from the older regimes on human rights. To follow the same pattern I have kept this chapter to take lessons from all the existing mechanisms in order to prepare a blueprint for a new human rights mechanism for South Asia.

While discussing the international and regional efforts, I have tried to mention the trend towards sub-regional arrangements for the protection of human rights in other regions like Europe, Africa etc. etc. It is also in line with this trend that this research is proposing a sub-regional level of mechanism for South Asia. Therefore, the region of South Asia need to take lessons from both the trends, that is, regional level of human rights enforcement as well as the sub-regional level of promotion and protection of human rights. While doing so the UNs initiatives for human rights monitoring would also be given utmost importance.
The intricately woven network of human rights monitoring shows the interdependency of the universal human rights norms and the regional preferences related to human rights. Though I have tried to draw the most suitable lessons for South Asia from both the aspects, I would, however, begin with drawing lessons from the human rights system running under the aegis of the UN.

6.2 Lessons for the Proposed Human Rights Mechanism for South Asia from the the United Nations’ Human Rights Mechanism

The UN’s human rights system has special importance in this chapter because this system has had a great impact on all the other regional human rights endeavors in two ways. In the first place, almost all the regional regimes have been inspired by the international documents on human rights drafted by the UN; secondly and perhaps equally importantly, the UN’s structure for human rights promotion and protection is very comprehensive and therefore, has a lot of things to offer to the regional systems, both established as well as upcoming.

As a matter of fact, the UN system is important to be considered while designing a new regional human rights regime for another reason also. And that reason is that the loopholes and the drawbacks of the UN system served as one of the biggest factor behind the emergence of regional human rights systems. Therefore, for more than one reason, there was need for a second tier of human rights, and the lessons from the UN system could not be overlooked. Therefore, any doctoral study like this ought to keep all the features of the UN system in consideration and give it due respect.

I would discuss the human rights aspects of the UN system and the provisions from where they emanate. As a consistent feature of all the human rights systems discussed in the third chapter one thing is common that all these human rights mechanisms function under some international organization of global or regional nature. Therefore, the first feature from where I would like to draw my lessons for the proposal of a South Asian human rights system would be to design such a system under a similar organisation of the region, which would be SAARC, and to study its constitution, structure and functions in general which can a play role to promote and protect human rights. Secondly, I would be looking for some similarities of their human rights systems with the existing initiatives or
provisions within the regional organization of South Asia that is SAARC, in order to pick up threads for my human rights proposal for the region. I would begin my analysis from the UN, which is discussed in the next part of this chapter.

### 6.2.1 Lessons from the United Nations Charter for the SAARC Charter

As mentioned in the second chapter of this study, the UN provided for human rights in its very first document, that is, the UN Charter. Secondly, the UN has been amending its Charter from time to time ensuring adaptability and responsiveness towards the concerns of the international community. On the other side, the SAARC also adopted its Charter immediately after its inception, however, it has neither mentioned human rights in its Charter nor has it amended its Charter since its implementation in 1985. The SAARC Charter is limited only to ten Articles and most of the Articles are not well explained.

In my opinion, therefore, SAARC’s first lesson from the UN system would be to work on its Charter and to make it more reflective of the region’s demands and concerns pertaining to human rights. The demand for amendments in the SAARC Charter have been expressed by some members of the organization, however, nothing concrete seems to have been done.\(^1\) On the other hand, some of the scholars have also tried to bring out the merits of the SAARC Charter saying that it is well drafted since it is precise and short and talks of promoting peace, stability, and amity.\(^2\)

There are also some similarities between the two Charters, that is, the UN Charter and the SAARC Charter. For example, Article II, Para 1 of the SAARC Charter mentions non-interference in the internal affairs of other States and mutual benefit as one of its principles. In Para 2 of the same Article, the Charter says that ‘such cooperation shall not be a substitute for bilateral and multilateral cooperation but shall complement them. Further the SAARC Charter in Article X

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Para 2 reads: ‘Bilateral and contentious issues shall be excluded from the deliberations’ also support the Article 2 of the SAARC’s Charter. These provisions in the Charter of SAARC are, similar to Article 2(7) of the UN charter which reads: ‘Nothing contained in this Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . .’

The motive for not allowing bilateral matters to be discussed at the regional platform of SAARC was to avoid confrontation between member States as mentioned in the fifth chapter. It was therefore, considered wiser to keep bilateral matters outside the realm of the SAARC. This strategy was also adopted by the Council of Europe while drafting the ECHR. It was decided to include only the non-debatable provisions in the Convention and to keep the contentious ones for later considerations.

Similar to the UN’s organizational structure, the SAARC also has a provision for a Secretariat in Article VIII. The biggest problem in the provision for the Secretariat is that it does not elaborate on any aspect of it. On the other hand, the UN Charter provides for its Secretariat in Articles 97-101 in Chapter XV. I have tried to highlight the strong position of the UN Secretariat in the second chapter of this study, especially in case of human rights matters since the UN has keep the office of High Commissioner for Human Rights under the supervision of the Secretariat. Otherwise also, the Secretary General who is head of the UN Secretariat, keeps participating in the treaty body system of human rights, because according to Article 30(2) of the ICCPR, the Secretary General may invite nomination for membership from the States parties for the vacant seats of the Human Rights Committee, the treaty body for the ICCPR. I believe as a lesson from the UN system the SAARC should strengthen its Secretariat by adopting a separate protocol by way of making an amendment in the Charter.³

In May 1997, the then Secretary General of the SAARC, Mr. Naeem U. Hasan in an interview expressed his views on his office and its growth.⁴ He said that the


SAARC Secretariat needed to be made more professional on the lines of the UN and other regional Secretariats. He said that in recent years, the office of the Secretary General of SAARC has become ‘more central than before’. He further said, “I have strong reason to believe that as I write after eleven years of this interview the situation would have only improved from there on. And that it is thinkable to work on SAARC Secretariat.”

Article X of the SAARC’s Charter is perhaps the most debated provision of the document. The Charter’s Article X in its Para 1 mentions that ‘decisions at all levels shall be taken on the basis of unanimity’. This provision is a contrast to the procedures adopted by the UN for decision making. Article XVIII of the UN Charter provides for ‘...Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting’. Since 1985, it has been observed that due to lack of consensus among the members, several crucial decisions of SAARC remain pending for a long time, for example the proposal of SAFTA.

In Para 2 of the same Article, the bilateral matters have been kept outside the scope of SAARC. On the other hand, due to no solutions to these inter-State conflicts, the SAARC has become an irresolute body. The members at conflict do not let the consensus to be built up which is essential for decision making and as a result the organization is being blamed for being slow and weak. The SAARC organs must come forward to ensure that this platform is taken seriously by its members especially by the Secretary General and the Secretariat as mentioned above.

As the focus of this study is to inculcate a human rights system within SAARC, I

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5 id.

6 This feature of SAARC has theoretical background of the second phase of regionalism as discussed in the chapter four.


would refer to the Charter based organs of the UN which monitor human rights. This organizational set up is being included in this study in order to look for a similar possibility in the present set up of the organisation of SAARC.

The first organ to promote human rights in the UN is the UN’s General Assembly. As mentioned in the second chapter, the UN’s General Assembly is the deliberative organ of the UN and it derives its power to ‘discuss any question or any matter within the scope of the present Charter...’ as per Article 10 of the UN Charter. Also, in Article 13 of the same Charter, the General Assembly is authorized to make recommendations for the purpose of ‘assisting in realisation of human rights.’ On the other hand Article IV of the SAARC Charter provides for the following provisions:

1. A Council of Ministers consisting of the Foreign Ministers of the Member States shall be established with the following functions:
   a) formulation of the policies of the ASSOCIATION; b) review of the progress of cooperation under the ASSOCIATION; c) decision on new areas of cooperation; d) establishment of additional mechanism under the ASSOCIATION as deemed necessary; e) decision on other matters of general interest to the ASSOCIATION.

2. The Council of Ministers shall meet twice a year. Extraordinary session of the Council may be held by agreement among the Member States.\textsuperscript{9}

In this Article it is observable that the organ of Council of Ministers of the SAARC can be further developed as the UN’s General Assembly. Because in the functions of this organ of the SAARC it is clearly mentioned that this organ can formulate policies of the organization, can review the progress of cooperation and most importantly, can also decide on the new areas of cooperation. Taken together all these provisions make us believe that the Council of Ministers is best replication of UN’s General Assembly as it is enjoying more or less similar functions as of its UN counterpart.

I would like to mention here that SAARC has no agenda for human rights, however, in case of initialising any system for human rights this SAARC organ

\textsuperscript{9} Available at: http://www.saarc-sec.org/SAARC–Charter/5/. Visited on 16 October 2011.
may be assigned with this task in future. As a matter of fact, I view the provision (e) of the Article IV of the SAARC Charter, which says that the Council of Ministers of SAARC may take ‘decision on new areas of cooperation’ as a very important provision because this can be used to propose inclusion of human rights within the agenda of SAARC. In my opinion this provision gives support to this study as it is providing a ground for the first step for the bringing human rights in the SAARC Charter. And for any proposal based research it is better to find some points of reference within the existing system in order to make the proposals of the study achievable in future.

The second body to support UN human rights monitoring is the Security Council. As mentioned in the second chapter, this is the only organ of the UN which can take enforcement actions on a situation, including human rights. Articles 23-27 of the Chapter V of the UN Charter provide that the Security Council is the only UN body with any 'real' enforcement potential.\(^{10}\) In the SAARC structure a body similar to the UN’s Security Council can be the Heads of State or Government provided for in the Article III of the SAARC Charter.

However, due to fragile political equations in the region it is not desirable at this nascent stage to suggest any ‘enforcement’ function which might be taken against States for their human rights failures. To propose such a stringent measure at this stage would only dissuade the already shy region from opting for a human rights system. Moreover, such actions do not match with the consensus principle of the SAARC, according to which all the decisions of this organisation are to be taken by consensus as per Article X of the SAARC Charter. Therefore, these functions cannot be acquired by SAARC, not at least at the very onset of a human rights proposal.

In addition to these organs the Economic and Social Council (ECOSOC) of the UN plays an important role in the UN system for human rights. The ECOSOC was provided for in the Charter itself ‘to promote social progress and better standards of life in larger freedoms’ as per the Article 1 of the Charter.

Further the Article 61 of the UN Charter lays down the provisions for the ECOSOC and authorizes it to initiate studies,\(^1\) make recommendations,\(^2\) prepare drafts of the conventions,\(^3\) call international conferences,\(^4\) may seek reports on the follow up on its recommendations\(^5\) etc. etc. In my opinion these activities can be initiated in South Asia without hampering the present SAARC set up. As mentioned in the second chapter of the UN Charter the ECOSOC has also been supporting and promoting regional commissions. Since there are several regional commissions working under the ECOSOC, it will not be an exaggeration to say that ECOSOC can also be involved in the building up of a South Asian human rights mechanism.

The ECOSOC has been adopting different means for the monitoring of human rights. The ECOSOC offers advisory services to the States on request. States are provided with educational and informational assistance so that they can observe high standards of human rights protection and promotion.\(^6\)

In addition to human rights education and awareness the ECOSOC has invented monitoring measures which have strengthened the enforceability of human rights under the UN. Some of the measures are categorized as Permanent Procedures; 1235 Procedure and 1503 Procedure, while others are known as Special Procedures which can be individual called "Special Rapporteur", "Special Representative of the Secretary-General" or "Independent Expert" or a working group usually composed of five members; one from each region.\(^7\) Also, fact-finding missions\(^8\) may be initiated for country-specific mandates. Under these missions individuals with relevant expertise are sent to the effected area or

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\(^{1}\) Article 62(1) of the UN Charter, 1945.

\(^{2}\) Article 62(2) of the UN Charter, 1945.

\(^{3}\) Article 62(3) of the UN Charter, 1945.

\(^{4}\) Article 62(4) of the UN Charter, 1945.

\(^{5}\) Article 64 of the UN Charter, 1945.


\(^{7}\) *id.*

country to study the situation at hand and to gather information. It is important to note that a fact-finding mission can be undertaken only with the consent of the State in question.¹⁹

Having brought out the human rights approach engrained in the UN charter, I would like to cite an example, for the SAARC Charter. In the very first line of the SAARC Charter it is mentioned that the members of SAARC are ‘Desirous of promoting peace, stability, amity and progress in the region through strict adherence to the principles of the UNITED NATIONS CHARTER…’, therefore, it will not be incorrect to state that the SAARC has indirectly accepted the human rights elements of the UN Charter which it should bring forth by way of a regional mechanism for human rights.

To carry on with the lessons from the UN I would like to discuss the lessons from the human rights system of the UN which SAARC might adopt according to its own requirements in future. It is the most inspiring system of human rights monitoring and every regional regime has taken up some of the features of the UN’s system of human rights.

6.2.2 Lessons from the United Nations’ Human Rights System for the Proposed South Asian Human Rights System

The SAARC also ought to learn from other documents of the UN, for example, the UDHR. The UDHR has thirty Articles which refer to the civil and political as well as economic, social and cultural rights. However, the UDHR does not mention group rights which are major concern for the non-western regions like South Asia. Secondly, except for in Article 29(1) which reads, ‘Everyone has

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¹⁹ In 1970 the Secretary-General issued Draft Model Rules of fact-finding procedure for UN bodies dealing with violations of human rights. Although these Draft Model Rules were adopted in 1974 by the ECOSOC. The UNGA has also adopted a resolution on Fact Finding. There are many other sources to fact finding procedures, for example, the first international codification of fact-finding procedure was the Hague Convention for the Pacific Settlement of Disputes of 1907. See: Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security adopted by GA/RES/46/59, 9 December 1991. Available at: http/ /www.un.org /documents / gal /res/ 46/ a46r059. htm. Also see: Training Manual on Human Rights Monitoring. Available at: http:// www1 .umn .edu/ humanrts/ monitoring/ chapter 18 .html. Visited on 12 July 2011.
duties to the community in which alone the free and full development of his personality is possible, there is only a vague hint upon the duties aspect of human rights which is too weakly mentioned to be followed by the States. As mentioned in the second chapter of this study under the philosophical approach to human rights the countries of South Asia follow a much broader approach to human rights wherein the duties are given due importance along with rights.

Keeping these features in mind, I am of firm opinion that the SAARC should adopt a regional Declaration on human rights which may be of non-binding nature as was done by the UN, wherein the regional preferences are addressed. In case of South Asia, it is desirable to have such a declaration since the States would not hesitate to adopt it for its non-binding nature. With the help of this declaration, an environment of human rights can be promoted in the region and then gradually the region may start working on treaty based documents in longer run.

Following the suggestion of having a South Asian Declaration on human rights on the lines of the UDHR there should be reference to all kinds of human rights irrespective of their generation or nature. Also, this Declaration should specifically mention the group rights, human duties, rights related to development and environmental rights in order to articulate the human rights approach of the region. I have discussed this proposed Declaration in detail in the concluding chapter of this study.

The UN has kept a balance between the Charter based and the Treaty Based monitoring of human rights. The Treaty Based monitoring functions on the basis of the International Covenants and Conventions of the UN. Under each of these treaties an enforcement body has been created to see the actual implementation of the provisions of the treaty. This kind of monitoring does not apply to South Asia due to absence of such treaties in the region. As a reference to this system SAARC has adopted a Social Charter in 2004, which can be mentioned as a regional derivation of the international Covenant on Economic, Social and Cultural Rights, 1966, by the UN. There is a provision for reporting by the States.

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party to this Charter however, this monitoring has been kept under the national bodies. I have discussed this document in detail ahead in this chapter and in the concluding chapter as well.

Another lesson drawn from the UN’s system of human rights monitoring which according to me should be reflected in the proposed human right system of South Asia would be that the SAARC should also design a system which has parallel approach as of UN; one which is non-binding and another which is binding or treaty based. UN also planned its human rights system keeping in mind the Sovereign status of the States and hence, beginning from a Declaration. After the States were conditioned to the culture of human rights, then the treaties were introduced. Of course the journey was long but the target was not unachievable. As a matter of fact, in other regional systems of human rights also the development took place in phases, which were more or less similar to the UN’s phases. Therefore, this journey for human rights system in South Asia may appear to be unachievable at this point of time but as per my study it can best be called as tough but achievable.

In this study, the universal trends and the regional trends of human rights are equally important. Therefore, after analyzing the lessons from the UN’s human rights system I will discuss the European system of human rights, which is the first treaty based regional human rights system. I have also drawn some lessons from the European system for the proposed South Asian system which I am going to discuss ahead.

**6.3 Lessons from the Statute of the Council of Europe for the SAARC Charter**

The CoE draws its mandate from the Statute of 1949, adopted by the ten western European States since these countries were having common socio-economic and cultural features. Same is true in case of SAARC. The Seven founding members of SAARC were considered best suitable to create this organization due to their common features. However, SAARC could not move ahead on the way and in a way which CoE could. Reasons for this stagnation lie in the provisions of the Statute and the Charter of the CoE and SAARC respectively. For example, the Statute of the CoE refers to democracy as one of its goals; however, no such term is mentioned in the SAARC’s Charter. However, once the SAARC Charter of
Democracy gets implemented, there is stronger hope that in future SAARC will include democratic values in its Charter.

During my comparative study of the two organizations I could derive certain similarities and dissimilarities between the Statute and the Charter of the respective organizations. For example, in the objectives of the two documents both the organizations mention the economic and social growth as their primary objective, both mention common action and cooperation between the members as important goal, both mention that their goals are not in any form contrary to any international organisations. Also in the last objective of the CoE which says that, ‘Matters relating to national defense do not fall within the scope of the Council of Europe’ hints upon the priority of the CoE to protect the sovereign status its members States which is also very clearly mentioned in the objectives of the SAARC that the organization would exercise, ‘respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other States and mutual benefit’.

There are certain dissimilarities as well for example, in the objectives of the SAARC the human rights are nowhere mentioned, whereas in the objectives of the CoE, ‘maintenance and further realisation of human rights and fundamental freedoms’ is clearly mentioned as one of the objectives of the organization. And this is the point around which this whole study is being conducted. Hence, the first lesson SAARC could take from the Statute of the CoE is to include human rights in its goals.

The structure of the CoE is also of equal importance for this part of the study. The Statute of CoE provides for a body called the Committee of Ministers in its Chapter IV Articles 13-21. This is the most powerful decision making organ of the CoE. The structure of this Committee can be compared with the SAARC’s Council of Ministers provided for in the Article IV of the SAARC Charter. The two organs of the CoE and SAARC are the decision making organs. Both the bodies are constituted of Foreign Ministers of the member States as per Article IV (1) (a) of the SAARC Charter and Article 14 of the Statute of the CoE. As per Article IV (2) of the SAARC Charter the Council of Ministers are to meet twice a year with a provision for extraordinary session ‘, by agreement among the Member State’ which is similar to the provisions in Article 21 of the Statute.
which mentions that ‘the Committee shall meet before and during the beginning of every session of the Consultative Assembly and at such other times as it may decide.’

It is noteworthy here that agreement of the States is equally emphasized by both the organizations. However, there are certain dissimilarities as well. For example, SAARC Charter does not provide for as many powers to this body as does the Statue.

Keeping in mind that the CoE is a supranational organization which authorizes it to take binding decisions for the members, I suggest that some of the functions of the Committee of Ministers of the CoE can be adopted by the Council of Ministers of the SAARC, without changing the nature of the latter. In my opinion, the Council of Ministers may take lesson from the Article 17 of the Statute which mentions that ‘The Committee of Ministers may set up advisory and technical committees or commissions for such specific purposes as it may deem desirable.’

In my opinion there are existing organs of the SAARC which can be assigned with this role. For example the Standing Committee of the SAARC which is provided for in the Article V of the SAARC Charter. In the SAARC Charter itself, it is mentioned that the Standing Committee can set up Action Committees in case of matters involving more than one country. Although the provision does not refer to any human rights related aspect but that can be added to later when the human rights promotion takes off in the region. I am emphasizing here that such provisions of the SAARC Charter may be used to begin similar human rights related activities of the CoE. The nature of such works in South Asia would be advisory; so that, the countries would also not be adverse to these.

Further, in Article 5(a) of the Statute, it is mentioned that ‘In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.’ I also propose that the SAARC Council of Ministers should also take up the role of issuing recommendations on human rights related matters. This can be done even in the absence of a formal human rights system in the region because SAARC already has a number of Conventions and Agreements.
which are related to human rights as mentioned in the previous chapter. In the light of the discussion above, SAARC may take some lessons from the European experience and must acceptably add more functions to the organ of the Council of Ministers.

The second organ of the CoE is also of importance for this study; that is the Parliamentary Assembly, earlier known as the Consultative Assembly. It is the main deliberative organ of the CoE, according to Article 22 of the Statute and has members of the Parliaments from the members States as per Article 25 of the Statute. This organ is similar to a regional Parliament. There is no such organ in SAARC’s structure, due to a number of reasons like variety of political regimes in the region, over sensitive approach to Sovereign status, inter-state conflicts etc. etc. However, it is advisable to have such a regional body of the members of the Parliaments of the region as debated in favour of by several south Asian scholars also.

Such a regional platform for South Asia will serve multiple purposes. First, the deliberations of the regional level are directly conveyed to the State Parliaments and will make SAARC more popular in its own members. If such a regional Parliament issues some directions to national legislative bodies, the ordinary people of the members States will also get to know more about the existence and scope of SAARC, which is not a case as of now. Thirdly, in case of a proposal for human rights is presented before these representatives, they will not be able to reject it out rightly since no government would like to lose its image of a welfare State by such a reaction. This is the second lesson SAARC can take from the organization of the CoE. I have discussed this proposed body in the concluding chapter as well.

As discussed in the third chapter, in Europe, there is a trend towards sub-regional arrangements which can be seen as the emergence of CoE, EU, OSCE, etc. within one region. And all these sub-regional organizations work for human rights in their own way. Therefore, this feature of the European regionalism also supports the study at hand since South Asia is also a sub region of Asia. The presence of pockets of regional organisations in Europe mean that such a system is not hypothetical.
Here I would like to discuss another sub-regional organisation of Europe in comparison to South Asia that is the European Parliament of the EU.\(^{21}\) The European Parliament functions in Europe similar to the Parliamentary Assembly of the CoE. It is a unique organ which is directly elected by all the people of the member States of the EU.\(^{22}\) There have been a lot of ideas expressed in favour of establishing a South Asian Parliament also\(^{23}\) which I have discussed in length in the next chapter.

After having discussed the guiding constitutions of the regional organisations of South Asia and Europe, I would now derive lessons from the human rights system of the Europe for the region of South Asia.

### 6.4 Lessons from the European Human Rights Mechanism

Before bringing the human rights prospects of Europe and South Asia to comparison, I would compare the conditions of the two regions. This is because I see that the history of Europe is quite reflective of the present day South Asia.

The historical relations between the Europe and South Asia have indeed been very strong. The two regions share a lot of similarities and dissimilarities.\(^{24}\) As


\(^{22}\) The work of the European Parliament is important because in many policy areas, decisions on new European laws are made jointly by Parliament and the Council of Ministers, which represents Member States. Parliament plays an active role in drafting legislation which has an impact on the daily lives of its citizens: For example, on environmental protection, consumer rights, equal opportunities, transport, and the free movement of workers, capital, services and goods. Parliament also has joint power with the Council over the annual budget of the European Union. For more details, see: http://www.europarl.europa.eu/parliament/public/staticDisplay.do;jsessionid=AA29F7A1315A753810FB2F059CBB4208,node1?id=146&language=en. Visited on 23 August 2010.


\(^{24}\) Kant K. Bhargava, EU-SAARC Comparisons and Prospects of Cooperation, Discussion Paper, Centre for European Integration Studies, 1998. Available at: http://aei.pitt.edu/338/01/dp_e15
mentioned in the third chapter, the region of Europe has also had history marked by divisions and conflicts. As a matter of fact, the two World Wars were fought upon European land with the European States playing a major role. In South Asia also, there are inter-state conflicts, terrorism, nuclear threats etc. etc. which have labeled the region as a conflict zone. To cite one such example, there have been conflicting relations between major States of Europe that is France and Germany. Similar is true in case of South Asia when we refer to the Indo-Pak relations.

In addition to this, Europe, like South Asia, has had a variety in its political regimes. The eastern part of Europe was communist in approach hence it found the goals of the CoE to be threatening since one of the goals of the CoE was to democratize the Europe. Same is the case of South Asia at present, where there is found variety in the nature of political regimes which has inculcated a mistrust among the SAARC members.

Despite all these negative features of regionalism, Europe could establish the most successful system for the implementation of human rights. To me this is the most important lesson to be taken by South Asia from Europe. It will not be an exaggeration to say that as a lesson form the CoE, SAARC has already adopted a Social Charter in 2004 which is very similar to the European Social Charter adopted by the CoE in 1961, which I have discussed in detail ahead. Also the SAARC has initiated a movement in the region in early 2011 to democratize all the State systems of the region by adopting SAARC Charter of Democracy.25

6.4.1 Lessons from the European Convention on Human Rights for the Proposed South Asian Human Rights Mechanism

In addition to all these points, I would like to highlight here that the CoE also

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adopted a parallel approach in the implementation of human rights, one binding, in the form of treaties and the other non binding, as recommendations. This is similar to the UN’s approach, however, it cannot be considered an inspiration from the UN since the UN adopted its treaty system in 1976 with the enforcement of the Covenants and the European Convention was adopted in 1950 and was implemented in 1969.

The European system of human rights has a lot of lessons for the proposed South Asian mechanism for human rights. The European system of human rights has two more documents on which it rests, in addition to the Statute which has just been discussed. The first important human rights document after the Statute is the European Convention, 1950. I would like to focus on other aspects of the European Convention on Human Rights also, for example, that the CoE thought of prioritizing the kind of rights to be included in the European Convention on Human Rights and in the process it left the more contentious rights to be included later by way of separate Protocols. It proved to be a good strategy since it gave a solution to the anticipations of the reluctant States and brought them into the human rights system. A similar strategy may be applied to South Asia by leaving the problematic rights to be considered later.

It is important to note that the European Convention on Human Rights gives due importance to the NGOs and group of individuals, which is also a feature of the non-western regions like South Asia. Whenever South Asia moves ahead with its human rights policy, I think the role of NGOs and other groups would be of great help. I will deal with this point in detail in the next Chapter. The clause (2) of the same Article of the European Convention on Human Rights is also important to be discussed here as it says that: ‘Such declarations (of submission to the authority of the European Human Rights Commission by a State in question) may

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26 Section III of the ECHR in Para 1 of Article 25 states: The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.
be made for a specific period’ which I think will also be applicable to the situation of South Asia. This is said to ensure that the States of South Asia do not feel threatened and trapped in the jurisdiction of the Commission, and remain responsive to such situations. When the plan for human rights is made for South Asia, the States may be allured to join this plan by use of such a clause as mentioned in Article 25(2) of the European Convention on Human Rights.

I would also like to highlight here that even in European Convention on Human Rights the position of the Secretary General is very strong\(^27\) as seen in a number of provisions of the European Convention on Human Rights. SAARC is also advised to invest more in this office to make it more effective and capable of performing new role within the organisation.

Next aspect is from the Article 28 and 30 of the European Convention on Human Rights which provides for the friendly settlements of disputes through a sub-commission provided respectively. Such provisions should be included in the South Asian human rights document keeping in mind the bilateral issues of the members States. These clauses may also be helpful in removing the reluctance of the South Asian States in adopting a human rights policy.

It is worthy of mentioning here that there are some aspects of the European Convention on Human Rights which South Asia needs to avoid for example that the European Convention on Human Rights does not provide for Right to Self-Determination, which is very important right for the South Asian region due to demands for group rights in the region. Also there is no reference to or any provision covering the human rights violation at the hands of private entities like Multi-National Companies (MNCs). For South Asia it can be a major concern since the region has become more vulnerable to violations of human rights at the hands of MNCs\(^28\) etc. in this era of globalisation and due to the region’s great

\(^{27}\) The Office of the Secretary-General finds reference in Articles 15 (3), 24, 25 (1) and (3), 30, 35, 37, 40, 57, 63 (2), 65 (1), 66 (1) and (2) of the ECHR.

value as a market as well a human resource.

The European Convention on Human Rights provides for two major organs for its implementation first the European Commission of Human Rights and the European Court of Human Rights. I will discuss these organs with respect to SAARC and would further use these inferences in the concluding chapter.

As mentioned in the third chapter the European Mechanism of Human Rights was introduced as the first organ of the European Commission on Human Rights in 1954 and as per Article 20 of the Convention consisted of one member from every Member State and the Article 21 provided that the members were to be elected by the Committee of Ministers. Here I would like to reiterate the potential of the Council of Ministers of SAARC in the proposed human rights system. Similar work can be done by this organ of SAARC in case such a Commission for human rights is established for the region.

In order to keep the working of the Commission apolitical the members of the European Commission for Human rights were to serve the Commission as independent individuals and not as government representatives as per Article 23 of the Convention. Similar provision would suit the region of South Asia, since the region faces a lot of political variety which might reflect in the representatives of the commission if they act as government candidates.

In European system under the Article 24 of the Convention, the main function of the Commission was to receive State communications against other States and acquired the competence to handle the individual communications29 in 1955, since it was subject to the declared acceptance of at least ten contracting States.30 This particular function of the Commission would be a distant goal for South Asia since the region is not having any system for human rights at all. And also the SAARC members cannot be expected to be receptive to this supranational feature of a human rights system right at the beginning. However, these features are expected to be acquired by this proposed system at a mature stage.

However, there is one provision in Para I of the Article 25 of the ECHR which mentions that the Commission can receive petitions ‘from any person, non-

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governmental organizations or group of individuals...’ 31 In this Article the mention to NGOs is very important in context of South Asia. In my view the first step towards the human rights system in this region can be taken by the civil society of the region, for two reasons. Firstly, these are non-governmental in nature hence would not threaten the States, secondly, till now it is the regional civil society of South Asia which has been speaking for a human rights system for the region, hence they are would be more adaptable and receptive to such an initiative. Therefore, from the European Convention the lesson to bring NGOs in the limelight can also be picked up for this study.

The CoE has also established an office of European Commissioner on Human Rights. 32 Main function of this office was to promote human rights education quite like the Office of High Commissioner on Human Rights which works under the UN Secretariat. This office also offers mediation in case of political problems of the States parties and also visits the States to see the ground reality of the human rights conditions 33 by a Panel of Experts. The functioning of the Office of the European Commissioner on Human Rights reflects some universal as well as some regional way of monitoring of human rights. For example the mediation and on-site visits are somewhat similar to the 1235 Procedures of the UN and the panel of experts resembles the Special Rapporteurs of the UN, discussed in the second chapter and it is also similar to the on-site visits adopted by the Inter-American Commission on Human Rights discussed later in this chapter. For SAARC, a similar office can work to inculcate and promote an environment and culture of human rights, which is the pre-requisite for any new human rights system. To begin with the human rights Commissioner for South Asia can be appointed at NGO level and later can be included in the SAARC structure.

The European Court of Human Rights is the most established and the most successful human rights court of all the regions. However, this organ of the

31 For further details, see: Pieter Dijk, et.al., 1998, pp. 22-30.
33 For further details, see: http://www.coe.int/t/Commissioner/default_en.asp. Visited on 2 February 2010. Also, see: Henry Steiner, Philip Alston and Ryan Goodman, 2008, p. 937.
34 For further details, see: http://www.iwgia.org/sw1512.asp. Visited on 2 February 2010.
European human rights system has developed to its present stage after a number of phases of growth as mentioned in the second chapter in detail. The Section II of the original ECHR of 1950 under Article 19 provided for the establishment of the European Court of Human Rights and was to function in conformity with the European Commission of Human rights. The purpose of keeping the Commission as part of the Court procedure was purely political. However, later in order to uncomplicated the mechanism, the ECHR was made full time Court.

Among the original provisions of the European Court of Human Rights, Article 47 of the ECHR provided that the Court may give advisory opinion to the Committee of Ministers on legal questions or interpretation of the Convention. To begin with for South Asia also, the regional Court can be assigned only advisory role so that it does not challenge the State system and gradually, the court can attach more functions to it.

After the Statute and the European Convention on Human Rights, the third equally important human rights document of the European System is the European Social Charter. Similar to this document, there is also a South Asian Social Charter, which was adopted in 2004. Some of the aspects of the two Social Charters with reference to the ICESR of the UN have been discussed ahead.


At the international level, the UN adopted the International Covenant on Economic, Social and Economic Rights in 1966 that came into force in 1976. This Covenant was drafted to protect and promote the second generation human rights which dealt with daily needs of the people and promoted positive obligations of the State that the State must take actions to uplift theses rights (right to work, right against poverty, right to education etc.) of its people. At regional level, the CoE followed the UN and adopted the European Social Charter in 1961 which was enforced in 1965. At sub regional level, SAARC also adopted a Social

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35 Helen Fenwick, 2007, p. 22.
Charter for South Asia under SAARC in 2004 and enforced it in the same year. There are sixty nine signatures and one hundred and sixty ratifications of the International Covenant on Economic, Social and Economic Rights, which means in the municipal laws of these one hundred and sixty States, the provisions of this Covenant have been adopted.

The International Covenant on Economic, Social and Economic Rights has forty seven signatories and forty one ratifications\textsuperscript{37} and in case of the South Asian Social Charter, all the eight members have enforced this charter. There is one observation to be made here and that is the willingness of the States to domestically apply international, regional and sub regional commitments increases respectively. As we see that the number of the States that have not ratified the International Covenant on Economic, Social and Economic Rights, the European Social Charter and the South Asian Social Charter decreases from the international to sub-regional level. The International Covenant on Economic, Social and Economic Rights has recently been added to by an Optional Protocol in December 2008. The European Social Charter has had three Protocols and South Asian Social Charter has not been added to or amended till 2009. The nature of the rights provided in the UN Covenant and the Social Charters is economic and social and hence are similar.

The International Covenant on Economic, Social and Economic Rights' text provides for these rights from article one to fifteen in the European Social Charter from one to nineteen and in the South Asian Social Charter from three to nine. The supervisory bodies for the implementation of the rights provided for the International Covenant on Economic, Social and Economic Rights is the Economic and Social Council (ECOSOC). For the monitoring of European Social Charter there are two supervisory bodies: the European Committee of Social Rights and the Governmental Committee. For South Asian Social Charter, there is National Coordination Committee in each member country of the SAARC. Except for South Asian Social Charter, the other two monitoring systems of the International Covenant on Economic, Social and Economic Rights and the European Social Charter have adopted State Reporting System which I believe

\textsuperscript{37} Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp. Visited on 23 October 2009.
even SAARC should adopt as a part of its human rights system in the longer run.

As an optimistic researcher, I would like to conclude the comparison between the European Social Charter and the South Asian Social Charter on a positive note that at least South Asia is not a region without any human rights document as is generally believed. After discussing the first regional human rights initiative of Europe, I would now discuss the Inter-American system of human rights and will draw some lessons from there.

6.5 Lessons from the Inter-American System of Human Rights

The American region has also faced the turbulence of colonialism and inter-State conflicts. It is worth mentioning here that the Inter-American was the first region to initiate drafting of regional human rights documents, since the Rights and Duties of Man was adopted in 1948 four months before the UDHR was adopted or even the regional initiatives of the Europe. Therefore, the Inter-American efforts preceded the UN’s as well as the CoE’s efforts despite being a region that was badly hit by colonialism. This fact becomes even more relevant when we analyse this in the light of South Asia which has also had a colonial history. I simply want to build an argument here that if Inter-American regional could draft a regional declaration in 1948 why cannot the South Asia do it in present times.

This also hints upon the already mentioned lesson for South Asia that it should have a declaration for the region which will add to the image of the region with respect to human rights norms. And like the two Declarations which we have mentioned here that is the Universal Declaration of Human Rights and the Declaration of Rights and Duties of Man, the South Asian Declaration would also be non-binding hence would not challenge either the Sovereignty of the countries or the variety of political regimes.

Different nature of political regimes and socio-economic problems has been a steady feature of this region. However, this could not deter the regional spirit of these countries as we have already mentioned in the third chapter that way back in seventeenth century, the region had began with its efforts towards unity. South Asia can definitely learn a lot from the resilience of the Inter-American region which is discussed ahead.
6.5.1 Lessons from the OAS Charter for the SAARC Charter

Before the adoption of this declaration, the OAS had drafted its Charter. Some similarities can be observed in the Charter of the OAS and the Charter of the SAARC. In the Preamble itself, the OAS Charter mentions ‘Sovereignty’ as one of its main emphasis just like Para 1 of the Preamble to the SAARC’s Charter. Both the documents accept allegiance to the UN. Just like the Statute of the CoE, the Charter of the OAS also supports the democratic nature of governments. However, as mentioned earlier also, the Charter of the SAARC ignores the principle of democracy throughout. The main organs of the OAS are mentioned in Article 53 of the Charter and it also provides for a body of Foreign Ministers which is discussed in details in the chapter X of the Charter from Articles 61-69. Article IV of the Charter of SAARC also provides for a similar body, however, it needs to be elaborated as it has been done in the OAS Charter.

Chapter XIV of the OAS Charter provides for a body named as the Inter-American Juridical Committee. It is a very important point as far as SAARC is concerned since it does not provide for any such organs. However, there is a similar body associated with it and that is SAARC-Law. Again to the misfortune of the region of South Asia and SAARC, this body has not been able to play its potential role in the regional matters and more specifically human rights.

In chapter XV of the OAS Charter, there is a provision for an Inter-American Commission on Human Rights which is definitely not there in the SAARC’s Charter. I would like to discuss this organ in more detail in the section ahead where I am discussing the Convention based Inter-America mechanism of human rights.

6.5.2 Lessons from the Inter-American Human Rights Mechanism for the Proposed South Asian Human Rights Mechanism

Like the UN, the OAS has also adopted a parallel system for human rights monitoring, one based on the Charter of the OAS and the Declaration on Rights and Duties of Man. And the second is based on the Inter-American Convention on Human Rights adopted in 1969. As a lesson from the Inter-American system, SAARC can also demarcate such a parallel system and keeping the Charter based plan for human rights system more flexible and agreeable to the States.
There is another peculiar feature of the Inter-American system of human rights that is the dual role of the Inter-American Commission on Human Rights (I-ACHR). As explained in the third chapter the I-ACHR was conceived as an organ of the OAS and was later involved in the convention based system as a convention organ also. Therefore, the I-ACHR has control over all the States of the region, those which are members of the OAS and not parties to the convention and those also who are parties to the Convention and also the third category of States who are although party to the convention however, have not declared in favour of the jurisdiction of the Inter-American Court of Human Rights.

I would highly advise the SAARC also to keep in mind the plan of dual role of a Commission while framing a human rights system. Chapter XIV of the OAS Charter provides for the secretariat of the organization, from Articles 107-121. The length in which this organ has been discussed in the Charter hints on the importance of its role in the regional activities carried out under the OAS. The SAARC should also attach more powers to this organ.

The next document of the OAS which is important for this study is the American Declaration on Rights and Duties of Man, 1948. The Declaration was rightly renamed as the American Declaration on Rights and Duties of Persons as mentioned in the third chapter of this study. The region adopted this declaration in the times of regional conflicts and turmoil due to the aftermath of the Second World War. It is advisable for South Asia also to adopt a non-binding declaration for the region to begin with the human rights activities of the region. Like the UDHR and the ECHR, the proposed South Asian Declaration should also include all the kinds of human rights in addition to the other Asian features, for example, the human duties.

The Inter-American Commission on Human Rights when functioning as the OAS organ, receives state reports and prepares its reports on the basis of this Declaration and as the convention organ the same body functions in accordance with the Inter-American Convention of Human Rights. In 1969, the OAS carried on with the human rights development and adopted the Inter-American Convention on Human Rights. It seems that one of the major inspirations behind this development must have been the American Declaration of 1948.
The Inter-American Convention on Human rights was a step forward than its European counterpart in scope, as it included both the CPRs and ESCRs in one document. It is advisable for South Asia also to have such comprehensive document on human rights, even if it is non binding in nature. The convention provided for the civil and political rights from the Article 3-25 and dealt with the economic, social and cultural rights in Article 26. There are two lessons for the SAARC on this point, first that the proposed South Asian human rights documents should also have both these kinds of rights included and second that due to the nature of south Asian societies, the economic, social and cultural rights should be discussed in more detail as compared to the Inter-American Convention on Human Rights. As mentioned earlier, the Inter-American Commission on Human rights was provided as the convention organ from Article 34-40 of the American Convention.

Similar to its European counterpart, the Inter-American Convention on Human Rights in Article 44 in the section III also emphasises the role of NGOs and groups to be competent of complaining before the Commission. As mentioned earlier, in South Asia also there is immense role of NGOs to promote human rights therefore, while proposing any human rights initiative for the region it is advised to keep the role of NGOs in mind.

It is again observed in case of the Inter-American system of human rights also that the Secretary General has important functions related to the human rights activities based on the Convention as per Article 79 of the Inter-American Convention on Human Rights. SAARC also needs to strengthen its Secretariat and the post of Secretary General.

In 1988, the Inter-American system of human rights showed its dynamism and growth and adopted an Additional Protocol of San Slavador, thereby further adding the economic, social and cultural rights to the Inter-American Convention on Human Rights of 1969. It can be seen a similarity between the South Asian Social Charter of 2004 and the American system. However, the South Asian Social Charter has some strong points and some weak points as compared to the Additional Protocol of 1988.

The American system has created a regional body to observe compliance of this Additional Protocol whereas the South Asian Social Charter has no such regional
body for this function. The Additional Protocol has added to the enforcement of the economic, social and cultural rights as in the Article 19(6) it provides that in case the State parties to this Protocol violate the specific provisions of this Protocol that is Article 8 and 13, may invoke the interference of the commission and also the American Court of Human Rights. The Article 8 related to right to form Trade Unions and Article 13 is related to Right to Education.

Considering the political background of the American region which was marked by a variety of political regimes, there were a lot of apprehensions over having a human right court as proposed in the San Jose Conference, 1969. It is evident from the fact that the Court for human rights could come up in American system only after ten years of the proper functioning of the Commission. The Court consisted of seven Judges and the election of these judges was to be done by all the members of the OAS, irrespective of the fact that they have accepted the jurisdiction of the court or not.

The Article 57 is very important as far as the inter relationship between the two organs of the Inter-American system is concerned as it lays down that ‘the Commission shall appear in all cases before the court’ whereas in case of the European system this relationship is not possible since the European Commission is no more in existence after the Protocol 11. I would like to mention here that due to colonial background of America and South Asia it is not desirable to do away with the Commission as an organ of the human rights system since the court system is too advanced for these regions where countries are still adapting to human rights culture or yet to start with it, like in South Asia.

The Court has two Jurisdictions, one Advisory and the second Contentious. Article 64 (1) provides that all the members of the OAS may seek advisory opinion of the Court. Article 64 (2) also provides for the OAS states to seek opinion of the Court on the question of compatibility between the international and municipal laws. The Inter-American Court also welcomes debates on the legal matters wherein Professors, NGOs etc. are allowed to participate. This argument can be of use for the South Asian proposal in chapters to come since in

this region also the NGOs are quite active even if there is no formal mechanism for the promotion and protection of human rights. The Inter-American System for the protection of the ESCRs is discussed ahead.

The next regional system to draw inspiration from is the African system. The region has more similarity and affinity with South Asia and therefore, it is expected that South Asia might find it easier to follow some of the human rights initiatives of this region.

6.6 Lessons from the African Human Rights Mechanism

It may be appropriate to mention here that Africa and Asia have shared a long history of regional relations, firstly, because the two regions share the legacies of colonial history. Secondly, the regions have community life based on group rights. Regardless of the fact that Africa is much more diverse and divided on the bases of religion, nature of regimes, cultural practices etc. the religion was able to establish its regional organization way back in 1963. On the other hand in South Asia, such a step was taken not before than 1985. Some of these features have been highlighted in the third chapter while discussing the African system of human rights.

And in this chapter, the prospects of cooperation between these two regions have been discussed with special reference to human rights. The African region, which is much more complex than South Asia and suffering from far more gross problems than South Asia, could manage to have a regional body in 1963 as compared to South Asia which formed SAARC only in 1985. Not only this, Africa has launched its human rights mechanism in 1981 which is not there yet in South Asia. This means that African regionalism has surely some lessons for South Asia. I have tried to touch upon these issues in the next section.

6.6.1 Lessons from the Charter of African Union for the SAARC Charter

Originally the Organisation of African States known as OAU had no agenda for human rights in its Charter. The organization focused on conflict resolution among the States of the region who had a lot of issues related to sovereign and

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Despite the fact that the OAU had no direct inclination to foster human rights in the region it did mention the human rights documents like the UDHR. Therefore, there is an inference for SAARC at this point since for this organisation also it is said that it has no agenda for human rights, however, it can still pursue towards these rights. The OAU came into existence in 1963 and got converted into African Union with the adoption of the Constitutive Act of 2000. This Act added to the functions of the existing organs of the OAU and also added new organs in its structure. It is the second lesson for SAARC, since I am of firm opinion that SAARC needs to be rejuvenated and added to.

The first paragraph of the Preamble to the AU Charter reaffirms that “it is the inalienable right of all people to control 'their own destiny”’; the word ‘People’ mentioned in the Preamble of the OAU Charter also has reference in the Article 1 of the Charter of the SAARC, which mentions that one of the objectives of SAARC is ‘to promote the welfare of the people of South Asia’. It indicates that both the regions have social similarities and also share some human rights preferences.

The AU Charter provides for the right of peoples to self-determination. According to Article 2 (1) (e), one of the objectives of the AU shall be “to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights” whereas such a determination is not seen in the Charter of the SAARC. The Para (b) of the same Article further supports the peoples’ of Africa by providing that one of its purposes shall be “to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa.” AU reflects the true African spirit as it recognises the colonial history of the region and hence in Para (d) of Article 2 it is mentioned that the organization would work to eradicate colonialism.

We will observe in the analysis ahead that the African Charter on Human and Peoples Rights also reflects the internal aspect of self determination stating that

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42 id.
the People’s Right to self determination extends beyond colonialism.\textsuperscript{43} South Asia has also had colonial history even then the regional organization SAARC does not refer to this crucial part of regional history. Mentioning of such common features in the Charter of the SAARC can bring a feeling of togetherness and can cater to regional spirit in the members States.

The Charter of AU shares another feature with its South Asian counter part, as in Article 3(b) of the original AU Charter; there is emphasis on sovereignty and territorial integrity of the States like the SAARC’s Charter. This means that in Africa also, the consciousness towards sovereign status is very strong. And if despite that Africa could go ahead with a human rights system surely South Asia, too, can do it.

Like the Statute of the CoE, the AU Charter mentions democratic structure of government in the same Article's clause (g). South Asia has just begun to tread on this path by way of its democratic initiatives as mentioned in this chapter before that SAARC has adopted a Charter of Democracy for the region.

The two organizations seem to have similar organizational structure as well. For example, SAARC’s organ of Heads of States or Government in Article III, the AU also has a similar organ provided for in the Article 5 and further discussed in Articles 6-9 and further added to in the \textit{Constitutive Act}, 2000. However, there have been no additions in the structure of the SAARC till date. Therefore, I again recommend that SAARC must infuse some new life into the structure of the organization by adding some new functions or by explaining some already mentioned functions in detail.

Article 17 of the AU Charter provides for a Pan-African Parliament like the European counterparts and the powers, functions and composition of this organ have been discussed in detail in a separate protocol adopted in 2001. Through this organ the regional organization is made more close to the people of the region since the members of this organ are elected by the members of the Parliaments of the members States in their independent capacity. In case of South Asia also,

there is need to bring the organization close to people of the region. Despite debates on having a South Asian Parliament voiced by some of the South Asian scholars, there has been no concrete step taken in this direction till now. This point has also been discussed in detail in the concluding chapter.

Like the CoE’s Court of Justice, there is a Court of Justice\textsuperscript{44} mentioned in the AU’s Charter. This Court of Justice was merged with the African Court of Human and Peoples’ Rights by a Protocol adopted on 11 July 2003\textsuperscript{45}. SAARC does not have a Court of Justice or a Court for Human Rights. It is desirable for the region to move towards developing such organs so that human rights get consolidated in the region.

Similar to South Asia, the society of Africa is community oriented, hence, the Charter of the AU provides for an organ named the economic, Social and Cultural Council in Article 5. This organ has been added to by way of a Statute in 2004. It hints up on a similarity between the African and South Asian regional preferences because in South Asia also there is a preference for the economic, social and cultural rights due to the problems related to group rights. This feature is also seen in the African document on Human and Peoples’ Rights, adopted in 1981. I have already discussed the unique features of the ACHPR in the third chapter of the thesis.

In addition to all these points, the region of Africa is also following the sub-regional approach. There is an East African Community (EAC)\textsuperscript{46} which has its own sub-regional court. Similarly there is the Economic Community of West African States (ECOWAS) is a regional group of fifteen countries, founded in

\textsuperscript{44} Available at: http://www.africa-union.org/about_au/au_in_a_nutshell.htm#progress. Visited on 20 May 2011.


\textsuperscript{46} The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Rwanda and Republic of Burundi with its headquarters in Arusha, Tanzania. The Treaty for Establishment of the East African Community was signed on 30 November 1999 and entered into force on 7 July 2000. For further details, see: http://www.eac.int/about-eac.html. Visited on 20 May 2011.
1975. ECOWAS decided to set up its court in October 1999\footnote{For further details, see: http://www.africa-union.org/root/au/recs/ECOWAS PROFILE.pdf. Visited on 22 April 2011.} and convened its Parliament in 2002\footnote{id.}. All these indications prove that sub-regional initiatives are the new face of regionalism and South Asia must come up strongly in such an environment of international politics.

Before moving to discuss the African Charter on Human and Peoples’ Rights (ACHPR), I would like to mention a weakness of the AU Charter as compared to the SAARC Charter, and that is the AU Charter does not even mention of the question of cooperation among States and as contrast this feature is seen all over the Charter of SAARC.

\textbf{6.6.2 Lessons from the African Charter on Human and Peoples’ Rights for the Proposed South Asian Human Rights Mechanism}

The African Charter on Human and Peoples’ Rights has included all the kinds of rights in one document that is the first, second and third generation rights. Also the individual as well as the group rights etc. This is the first lesson for the proposed human rights system of South Asia that it should keep in mind that like ACHPR, all kinds of human rights which are relevant for the region can be included in one document.

In 1976, the AU adopted the Cultural Charter, in 1990 the AU adopted the African Charter on Children’s Rights and in 2003 it adopted the Protocol on the Rights of Women, which highlights that the region has been continuously developing the human rights system. In case of South Asia, the adoption of the Social Charter is also an indication that the region is awakening to the increasing demand for the regions own human rights solutions.

In chapter I of the ACHPR from Article 1-39 all the rights have been offered to individual as well as the groups, which include the NGOS. In South Asia also this provision is of great relevance as I have discussed earlier also in this chapter. The ACHPR provided for only one organ of the human rights system, that was the African Commission on Human and Peoples Rights. This African Commission not a part of the OAU structure since it was created separately by way of ACHPR.
Articles 30-44 provide for the establishment of the Commission. For South Asia also I would like to propose a Commission outside the structure of SAARC, at least in the beginning, so that it does not interrupt the routine functioning of the organisation. And like the Inter-American experience it can be included in the SAARC structure later.

The part II of the Chapter two of the ACHPR highlights various functions of the Commission which include the promotion of the rights, interpretation of the Charter, and to perform any function as assigned by the AHSG of the OAU. I have mentioned earlier in this chapter also that for the proposed SAARC human rights system also I foresee that the organs of this proposed system do a lot of educational and awareness related works in the region.

Further, Article 45(3) of the ACHPR attaches the interpretative role to the Commission under which any member State of the OAU or the OAU organ or recognized institutions may seek an interpretation of the ACHPR by the Commission. This function is also analysed to be an Advisory function of the Commission. The Commission in its promotional functions appoints Special Rapporteurs like the UN and On-Site visits as the European and Inter-American counter parts, as explained earlier in this chapter. The enforcement of the recommendations of the Commission rests with the AHSG of the OAU. It is evident that already all the human rights regimes are adapting and adopting functions and procedures of each other. Similarly, for a new human rights system it is highly desirable to keep in consideration the suitable features of all such methods and procedures.

For this study, one of the key features of the ACHPR is the absence of the African Court of Human Rights in the ACHPR. The ACHPR is the only regional human rights Charter which does not provide for regional human rights courts since the region was too diverse and backward to accept such kind of legal


50 For further details, see: Rachel Murray, 2008, pp. 22-23.

obligations. It is exactly for the same reason that under SAARC, if a human rights system is planned it better not include the human rights court as it may add to the reluctance of the countries to adopt the human rights document.

The efforts towards an African Court of Human Rights began in early 90s. The OAU adopted a Resolution to improve the effectiveness of the Commission which triggered the developments towards the deliberations on the establishment of an African Court.\textsuperscript{52} It was also provided in the Protocol that the Court will offer Advisory opinions under Article 4, to all the OAU States, the OAU organs or recognized institutions. I have been emphasising on the advisory role of the Courts for the proposed South Asian Human Rights System throughout this chapter, because it would be welcomed by the region’s counties for its non-obligatory nature.

For the African Court’s Contentious Jurisdiction, under the Article 5, the Commission, the States as well as the NGOs and groups could submit a case. The individuals could do so under Article 34 (6). This feature also highlights the importance attached the NGOs in Africa as it is done in South Asia. It is evident how the African system is capable of offering some direction to the proposed south Asian system for human rights. The next system I would derive some inferences from is the youngest one, the Arab System of Human rights.

6.7 Lessons from the Arab Human Rights Mechanism

In the third chapter, I have mentioned that I am including the Arab System of Human Rights in this study not for its functional aspect since there is hardly any. However, I have included the Arab system for the relevance of the Arab Charter. As mentioned in the fourth chapter, South Asia has a huge Muslim population and, therefore, the Islamic human rights approach is to be kept in mind while thinking of the South Asian Human Rights System. The Arab Charter also includes all kinds of human rights like its African counterpart, which may be a lesson for South Asia and the SAARC.

Also one of the unique features of the Arab Charter is that it mentions God as the source of all human rights, hence it adds to the ethical aspect to human rights

system. The Arab Charter has perhaps the longest list of non-derogable human rights as mentioned in Article 4 (2) of the Charter. Article 7 of the Charter allows death penalty which is a lesson not to be taken by the South Asian region since it is against the universal human rights principles and also the region cannot allow such practices to prevail especially when the region is already in the clutches of extremist Islamic pseudo-governments like the Taliban, in addition to the terrorist outfits in the region which are misusing the name of Islam while killing the innocent people. If a provision like death penalty is introduced in a human rights document of the region, this situation will develop from bad to worse.

Like the ACHPR, the Arab Charter also mentions the Right to Development in Article 37 which is very crucial right for a developing region like South Asia. I have already discussed the region’s vulnerability in the era of globalization and hence for such a situation, such human rights may rescue the region from exploitation. The Arab Charter, however, does not provide for a Human Rights Commission or even for a Human Rights Court in the Charter. Instead it provides for a Human Rights Committee with very limited powers.

In 2007, there was proposed and Arab Charter on Democracy for the Arab region. As per the recent 2011 revolts against the autocratic regimes in Arab countries by the youth, it is observed that the region has moved towards setting up of democratic regimes. It is seen as a positive step towards the strengthening of the Arab Charter also, as it may help in bringing up democracy-friendly amendments in the Charter.

On the very first look it appears to be a half hearted approach. However, in South Asia, such an approach might be of help in order to develop a culture of human rights in region. Here it is important to mention that the Arab System of human rights has been in force since 2008 only. Hence it is not an established system especially in comparison to similar systems in other regions. Even then the Arab human rights initiatives can be of some inspiration to South Asia for its human rights efforts.

### 6.8 Lessons from the Asian initiatives on Human Rights

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From within Asia also, there can be some lessons to bear in mind for proposing the South Asian system of human rights. As mentioned in chapter four, the ASEAN and the APF have been involved in human rights promotion and protection in some cases even in the absence of a human rights declaration of the region. That means that a region need not necessarily be bound to have a declaration and then go to the so-called next phase of having a Convention of binding nature etc. etc.

Moreover, South Asia being a part of Asia can take benefit of this feature of other sub-Asian systems and may skip the stage of having a declaration completely. In case of SAARC, there is already a Social Charter which no other Asian organisation has adopted. Whenever a South Asian human rights system is designed it will be emphasising on the economic, social and cultural rights which are already mentioned in the Social Charter. Therefore, the SAARC Charter needs to be highlighted and strengthened so that it can be used as the beginning of a human rights system of the region. I have dealt with the Social Charter in the next Chapter.

Another unique feature of human rights works within Asia is the role of the Non-Governmental Organisations in the promotion of human rights. Resultantly, there is already a Commission on Human Rights at non-governmental level, as discussed in chapter four under ASEAN. Although this Commission is a consultative body it works round the year to spreads awareness on the wrong doings of the States regarding human rights.

The Charter of the Asian Parliamentary Assembly (APA) was adopted, in principle, at the First Session of the APA Plenary in November 2006. It was adopted, after some amendments, in the second meeting of the APA, 19-21 November 2007, in Tehran, the Islamic Republic of Iran. Article 2 of the Charter which mentions the Principles of Establishment of APA mentions ‘Encouraging and promoting human rights and opposing terrorism and recognizing the rights and freedom of nations’ as one of the main principles of this body. Further in Article 10 which explains the Bureau of the Assembly it is

mentioned that ‘The Assembly shall have a President, Four Vice-Presidents, and one Rapporteur, taking into consideration equitable regional distributions’ wherein South Asian countries were to be duly represented. This is a supporting development for the proposed and much talked about South Asian Parliament because the region of Asia is already having such a body working.

Taking a lesson from the APF, my next proposed idea for South Asia would be regarding regionalization of the National Human Rights Institutions. In order to satisfy the States regarding their fear for getting their sovereignty curbed by entering into a regional agreement for ‘internal matters like human rights’, the States may gradually be pulled into the culture of regional human rights by establishing a group of National Human Rights Institutions for sharing of news and consulting their counterparts on non-political matters. This is an overview of what the APF has done in the region.

6.9 Conclusion

In this chapter I have tried to draw inferences from all the human rights mechanisms existing at this time in the world and to compare these with the South Asia. I have tried to compare the organizations working to promote and protect human rights with the SAARC. While doing so I tried to highlight the similar features of the two compared organizations and also tried to point out which aspect of the SAARC can be further nurtured to play a role for human rights protection at regional level. While doing so I have also mentioned the region’s specific demands and how caution should be used in drawing lessons from the existing systems of human rights.

Also there was an attempt that while studying two organizations in comparison it is kept in mind that what feature of human rights monitoring emerged at a nascent stage and which appeared at a matured stage. So that the features of the nascent stage are analysed more since at the point of proposing a new human rights mechanism only these should be considered.

Secondly, in this chapter I have compared the particular mechanism of human rights offered by the organizations. Wherein I discussed the human rights documents to understand the nature of human rights included in that and why. Also it was highlighted which documents are non-binding and which are of
binding nature so that the difference of the impact could be understood and then applied at the proposed mechanism in the concluding chapter.

The organs working to ensure human rights promotion and protection were also closely studies in this chapter and similar possibilities were looked for in the SAARC structure. Also the roles and functions of the human rights organs were analysed and would be applied in the concluding chapter. A clear distinction between the human rights role played by the charter based organs and the ones specially created for human rights protection is also done in the chapter. It is also mentioned when there were any dual roles attached to one organ for example, the ECOSOC of the UN plays the role of Charter based organ also and as a treaty based organ also. Questions like ‘Can such a duality of roles be planned for the proposed system’ are also addressed in the chapter.

I have taken into consideration the features of the less established mechanisms as well, for example, the Arab mechanism, because the Arab Charter articulates the Islamic approach of human rights and in South Asia this approach holds a lot of relevance since the people of South Asia are followers of this religion. Therefore, it may be helpful to keep this charter in consideration while framing the South Asian Charter of Human rights.

I have also included the sub-regional approach of the other regions which is working for human rights in different pockets of one region, so that a ground for a sub-regional mechanism at South Asia level could be strengthened. I have tried to justify the need for the proposal for a South Asia Human Rights system by (1) bringing out the similarities of the regions under consideration so that the excuse of internal conditions of South Asia as a hindrance to any human rights initiative in the region are ruled out to some extent, (2) by highlighting the existing provisions in the SAARC Charter which can be worked upon for such an initiative, (3) by citing examples of other sub-regional human rights approaches including the Asian ones.

In the next and the final chapter of my research I am attempting a road map for South Asian Human Rights system on the basis of the arguments built up in all the previous chapters.