

Status of Indigenous and Minority Groups' Rights in South Asia: A Need for a Regional Mechanism to Protect the Most Vulnerable

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Abstract

The establishment of a regional legal mechanism for the protection of the rights of indigenous people and minority groups is a legal issue pertinent in South Asia today, especially in the context of the Rohingya persecution in the neighboring Myanmar, and the rise of the extreme right-wing regime in the largest democracy, India. Although the countries in the region have made various national level efforts to ensure the protection of the rights of these groups, the reality is that they still suffer de facto (and sometimes, de jure) discrimination. Measures, therefore, must be adopted to counter the existing discrimination. Since collective regional efforts are viewed as being 'better suited' for the protection of minority rights, this 'regional' issue can be addressed by formulation of a 'regional' human rights document from which a 'regional' complaint mechanism can emanate. For the formation of a regional human rights complaint mechanism, three key issues must be addressed. Firstly, realistic bases for the establishment of a regional mechanism must be identified. Secondly, a model for a new South Asian complaint mechanism must take into account and possibly incorporate the 'Third World Approach to International Law (TWAAIL)'. Thirdly, it is imperative to ascertain the kind of approach that will be taken with regard to the rights in question.

Keywords: *Indigenous people, minority groups, discrimination, TWAAIL, regional complaint mechanism, UNDRIP, South Asia*

Introduction

South Asian Forum for Human Rights (SAFHR), a regional network, convened in Kathmandu in 1998 and urged the South Asian Association for Regional Cooperation (SAARC¹) members, *inter alia*, to adopt a South Asian Charter for Human Rights and to establish a South Asian Human Rights Commission.² This platform was important for a region that is lauded for recognizing and emphasizing the need for participation of

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¹ Countries in South Asia which include Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka established the SAARC following the signing of the SAARC Charter on 8 December 1985. Later, in 2007, Afghanistan joined as the eighth member.

² The South Asian Collective, *South Asia State of Minorities Report 2016: Mapping the Terrain*, Books for Change, New Delhi, 2016, p.12.

the civil society in various regional matters including social³ and environmental⁴ issues. Today, over two decades later, the recommendation has yet to come to fruition. This does not mean that the region has not seen any development in human rights matters. However, two regional conventions aimed at child welfare⁵ and combating trafficking⁶ respectively only amount to temporary respite in an otherwise dismal picture of continuous inattention given to human rights. In such a state of neglect, any assumptions about the presence of regional efforts to recognize and protect the rights of indigenous and minorities in the region would be farfetched.

South Asia, by virtue of its huge population, naturally encompasses tremendous diversity. Each of the countries has either minority groups, or both minority and indigenous groups, who have suffered either due to the formal discrimination perpetuated through the constitutional and legal frameworks or through the existing situation of domination that is imposed upon them in practice, by the other sections of the society.

Such ground reality is not surprising when the political scenario and priorities of the countries are put into context. Although all of the States in the region have embraced the democratic system of governance, the full realization of the same needs time. Countries in the region have young constitutions⁷, with aspirations yet to take full flight thereby putting them into the categories of what Albert Chen dubs as ‘hybrid constitutionalism’⁸.

Further, an emphasis towards building an identity as a nation-state as well as the one-dimensional favoring of economic development through economic globalization⁹ has pushed the issue of indigenous and minorities to the background.

However, development and indigenous or minority issues should not be seen as rival concepts as the link between human rights and development is well established.¹⁰ Indeed, ensuring rights, for example, those of minorities would be a step in the right direction towards both democratization as well as inclusive development,¹¹ which contributes towards achieving the Sustainable Development Goals (SDGs).¹²

In such a backdrop, the paper argues that it is imperative that the States give more due regard to this population and further embark upon a transnational mechanism

³ SAARC Social Charter, arts. II(2)(xii), VI(5).

⁴ SAARC Convention on Cooperation on Environment, art. III(1)(d).

⁵ SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia.

⁶ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

⁷ The Constitutions of the SAARC countries (with year in the parenthesis): Afghanistan (2004); Bangladesh (1972); Bhutan (2008); India (1950); Maldives (2008); Nepal (2015); Pakistan (1973); Sri Lanka (1978).

⁸ Albert H. Y. Chen, ‘The Achievement of Constitutionalism in Asia: Moving Beyond ‘Constitutions without Constitutionalism’’, in Albert H. Y. Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century*, CUP, Cambridge, 2014, p.14.

⁹ Rahul Mukherji, ‘India and Economic Globalization’, in Bhumitra Chakma (ed), *South Asia in Transition: Democracy, Political Economy and Security*, Palgrave Macmillan, Chennai, 2014, p. 91.

¹⁰ John Clammer, *Cultural Rights and Justice: Sustainable Development, the Arts and the Body*, Palgrave Macmillan, Singapore, 2019, p. 19.

¹¹ The South Asian Collective (n 2), p. 4.

¹² Stefano Errico, *The Rights of Indigenous Peoples in Asia: Human Rights-based Overview of National Legal and Policy Frameworks Against the Backdrop of Country Strategies for Development and Poverty Reduction*, International Labour Organization, 2017, p. 1.

concerning human rights protection that could also provide the marginalized population with a remedy in case of breach of their rights. The paper further illustrates examples to emulate and proposes a possible basis upon which such a mechanism may be substantiated.

Indigenous and Minority Peoples in International Law:

Indigenous rights find a central focus in the international human rights agenda as they have been recognized as the most marginalized and vulnerable.¹³ The International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989¹⁴, a revision of ILO 107 of 1957¹⁵, at the time of its promulgation was the 'most concrete manifestation of the growing responsiveness to indigenous peoples' demands' under International Law. It marked a departure from the earlier notions of 'integration and assimilation' that existed in the world community.¹⁶ Later, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1993 (Minorities Declaration)¹⁷ and United Nations Declaration on the Rights of Indigenous Peoples, 2007 (UNDRIP)¹⁸ were adopted by the General Assembly. Although, it is glaring that neither of those instruments has assumed a treaty format.

As to who is who, indigenous people may or may not be minorities. However, consideration of one without the other seems incomplete as it can be said that often indigenous peoples tend to 'epitomize the minority syndrome'.¹⁹ The distinction is difficult to make: for example, *Veddhas* are both indigenous and minority to Sri Lanka whereas Hindus, as a whole, are neither indigenous nor a minority in India. However, the same Hindus would be a minority in Pakistan or Bangladesh or even within India in the States of Jammu and Kashmir or Mizoram.

The most frequently cited definition²⁰ of indigenous group is the one provided by Jose Martinez Cobo²¹, which resembles that of ILO169²². Likewise, the most widely

¹³ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, CUP, Cambridge, 2007, p. 1.

¹⁴ *Indigenous and Tribal Peoples Convention*, C169, adopted on 27 June 1989.

¹⁵ *Indigenous and Tribal Populations Convention*, C107, adopted on 26 July 1957.

¹⁶ S. James Anaya, *Indigenous Peoples in International Law*, OUP, New York, 1996, p. 47.

¹⁷ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, UNGA A/Res/47/135.

¹⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, UNDRIP A/RES/61/295.

¹⁹ Shaheen Sardar Ali & Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives*, Curzon Press, Surrey, 2001, p. 7.

²⁰ S. James Anaya, *International Human Rights and Indigenous Peoples*, Wolters Kluwer, New York, 2009, p. 28.

²¹ 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. Jose Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, 1986, U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4, para. 379.

²² C169 (n 14), art. 1(b).

accepted definition of minorities is the one provided by Francisco Capotorti,²³ who gave the definition in relation to article 27 of International Covenant on Civil and Political Rights, 1966 (ICCPR)²⁴. Interestingly, the UNDRIP and Minorities Declaration both fail to define indigenous and minorities in their respective texts.

According to the definition of Capotorti, the following criteria²⁵ are to be met to qualify as a minority: a) Numerical Inferiority, b) Non-dominant position, c) Nationality, d) distinguishing ethnic, religious, or linguistic characteristics, and e) Collective will.

Any definition of ‘indigenous’ contains subjective and objective criteria. Among the South Asian countries, Nepal has been applauded for successfully adhering to this approach.²⁶

The subjective criterion involves the ‘self-identification as belonging to an indigenous people’. While objective criteria include, firstly, ‘descent from populations who inhabited the country or geographical region at the time of the conquest, colonization or establishment of present State boundaries, and secondly, they ‘retain some or all of their own social, economic, cultural and, political institutions, irrespective of their legal status’.²⁷

The inclusion of the word ‘colonization’ in the definition poses a difficult proposition because even though much of South Asia was formally colonized, the dominant factions today are not the colonizers. Rather, even they, like the indigenous peoples, were part of the fabric of this land before the wave of modern colonization began in the 15th century. In this conundrum, even the word ‘conquest’ is of little help because any reference to history to trace an exact conquest of the lands in the State countries, for example, the *Khas-Aryas* in Nepal, or Bengali Muslims in Bangladesh, would result in great controversy and, at best, be highly inconclusive.

Other significant international instruments in relation to the protection of indigenous and minority rights include the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); International Convention on The Elimination of All Forms of Racial Discrimination, 1965 (CERD); Convention on the elimination of all Forms of Discrimination Against Women, 1979 (CEDAW); Convention on the Rights of the Child, 1989 (CRC); Discrimination (Employment and Occupation) Convention 1958 (ILO 111); and International Convention on the Prevention and Punishment of the Crimes of Genocide, 1948.

All the South Asian Countries are party to CERD, CEDAW, and CRC, while all the countries except Bhutan are parties to ICCPR, ICESCR, Genocide Convention, and

²³ ‘A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language’. Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York, 1991, p. 98.

²⁴ *International Covenant on Civil and Political Rights*, 999 UNTS 171, adopted on 16 December 1966.

²⁵ Borhan Uddin Khan & Muhammad Mahbubur Rahman, *Protection of Minorities: A South Asian Discourse*, EURASIA-Net, Dhaka, 2009, pp. 3-7.

²⁶ Errico (n 12), p. 2.

²⁷ C169 (n 14), art. 1(b).

ILO 111. Only Nepal is a party to ILO 169.

In the case of South Asia, all the indigenous people invariably fall in the category of minorities although, obviously, not all minorities are indigenous. Owing to the above, for the overarching purpose of this paper, indigenous and minority populations have been taken together with proper distinctions drawn as and when required in the subsequent paragraphs.

Bleak Picture of Minority and Indigenous Protection in South Asia:

Many accounts show that the minority in the South Asian region are subjected to ‘discrimination in the delivery of basic rights²⁸’, wrought with ‘low literacy rates²⁹’, and embroiled or have embroiled in ‘violent ethnic conflicts³⁰’. In fact, under the 2018 ‘Peoples Under Threat’ briefing issued by Minority Rights Group International, groups from Afghanistan and Pakistan are placed in the top ten highest rated countries.³¹ Bangladesh, India, and Nepal prop up the list while Sri Lanka made it in 2017³². This shows vulnerability. Subsequently, the States have been castigated for their inability to adequately protect these rights.³³

In Afghanistan, among others, the religious minority of *Sh’ia* and ethnic minorities of *Hazara*³⁴ have been the primary target of attacks,³⁵ which has raised ‘grave concerns regarding the right to freedom of religion or belief and the protection of minorities³⁶’. In Bhutan, the adoption of the ‘One Nation One People’ policy in 1989 led to the imposition of the practices of the *Ngalong* Buddhist elite³⁷ and, among others, led to the prohibition of Nepali language in schools thereby compromising the right to education for children from ethnic minorities³⁸.

The atrocities committed by the Army in the Chittagong Hill Tracts and the associated

²⁸ The South Asian Collective, *South Asia State of Minorities Report 2018: Exploring the Roots*, Books for Change, New Delhi, 2018, p. vii.

²⁹ Diane Church, *Key Issues for Religious Minorities Rights in Asia*, Minority Rights Group International, p. 2.

³⁰ Ahmad Saeed Khan et al., *Update of Material for Specialized Media*, EURASIA-Net, Dhaka, 2009, p. 5.

³¹ Minority Rights Group International, *Peoples Under Threat 2018*, 2018, pp. 10-15.

³² Minority Rights Group International, *Peoples Under Threat 2017*, 2017, pp. 11-12.

³³ The South Asian Collective (n 2), pp. 6-7.

³⁴ Grant Farr, ‘The Hazara of Central Afghanistan’, in Barbara Brower & Barbara Rose Johnston, *Disappearing Peoples? Indigenous Groups and Ethnic Minorities in South and Central Asia*, Left Coast Press, California, 2007, p. 153.

³⁵ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders’ submissions on Afghanistan*, 6 November 2018, A/HRC/WG.6/32/AFG/3, para. 39.

³⁶ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Afghanistan*, 15 November 2018, A/HRC/WG.6/32/AFG/2, para. 27.

³⁷ Human Rights Council, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Bhutan*, 7 February 2014, A/HRC/WG.6/19/BTN/3, para. 21.

³⁸ Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Compilation Bhutan*, 24 February 2014, A/HRC/WG.6/19/BTN/2, para. 46.

Chittagong Hill Tract Accords (1997)³⁹, are the most publicized instances of violation of indigenous rights in Bangladesh.⁴⁰ The lack of recognition of the *Adivasi* indigenous community following their categorization as merely ‘*Bangalee*’ is another matter of great concern.⁴¹ Also, even though the Constitution provides for a reservation of 50 women lawmakers, there is no such provision to include other minorities or indigenous groups.⁴²

In India, by far, the most pressing issue surrounding the indigenous peoples is their forced eviction and violation of their land rights⁴³ from their traditional lands by various corporations, national and multinational.⁴⁴ A well-known illustration of this was the issue involving the Indian MNC of Vedanta Limited and the indigenous Khonds in Orissa.⁴⁵ Also, the commercial takeover of forests and the killings, including those in the Northeast (for example in Manipur⁴⁶) and Gujarat riots⁴⁷ are of particular note.

Nepal has faced a lot of criticism abroad for its treatment of the *Madhesi* people. Allegation of the newly promulgated Constitution being racist and regressive in violation of CERD has been levied against the government. Also, the representation of Indigenous Peoples guaranteed in the parliament has been labeled as not being ‘free’.⁴⁸

For the Maldives, the institutionalized religious intolerance, requiring adherence to Islam to be granted citizenship, has had a great impact on the small number of minorities in the island country.⁴⁹ Sri Lanka has been alleged to have installed institutional⁵⁰ efforts to wipe out the Tamils in the country. Similarly, the situation of indigenous *Veddba* and *Malayaha Tamilar* is worrying.⁵¹ Especially the *Veddbas* have been suffering due to the

³⁹ Bangladesh Indigenous Peoples Forum, *National Seminar on Indigenous Peoples in Bangladesh: Human Rights and Sustainable Development Goals*, Dhaka, 2015, p. 4.

⁴⁰ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Bangladesh*, 19 March 2018, A/HRC/WG.6/30/BGD/2, paras. 62-65.

⁴¹ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders’ submissions on Bangladesh*, 13 March 2018, A/HRC/WG.6/30/BGD/3, para 67.

⁴² *Constitution of the People’s Republic of Bangladesh*, 1972, art. 65 (3).

⁴³ Cultural Survival, *Observation on the State of Indigenous Human Rights in India*, Prepared for The United Nations Human Rights Council Universal Periodic Review 2016 27th Session Third Cycle, pp. 3-4.

⁴⁴ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders’ submissions on India*, 27 February 2017, A/HRC/WG.6/27/IND/3, para. 81.

⁴⁵ Virginius Xaxa, ‘Identity, Power, and Development: The Khonds in Orissa, India’, in Suzana Sawyer & Edmund Terence Gomez (eds), *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State*, Palgrave Macmillan, 2012, p. 180.

⁴⁶ Human Rights Council (n 44), para. 82.

⁴⁷ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on India*, 22 February 2017, A/HRC/WG.6/27/IND/2, para. 67.

⁴⁸ Lawyers’ Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) et al, *Alternative Report of the Indigenous Peoples of Nepal to the State Report Submitted by the Government of Nepal to the Committee on the Elimination of Racial Discrimination*, Kathmandu, 2018, p. 5.

⁴⁹ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Maldives*, 2 March 2015, A/HRC/WG.6/22/MDV/2, para. 43.

⁵⁰ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Sri Lanka*, 28 August 2017, A/HRC/WG.6/28/LKA/2, para. 72.

⁵¹ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Summary*

encroachment of their land rights and their exclusion from the governance.⁵²

Finally, Pakistan has long had to deal with national and international condemnation for only recognizing the religious minorities amid the lack of recognition of racial, ethnic, and linguistic minorities.⁵³ This includes the non-recognition of *Sindhi, Balochi, Rebari, Kehal, Jogi, Kalash*, etc. or indigenous people of Gilgit-Baltistan⁵⁴ and no corresponding policy on the indigenous and tribal peoples.⁵⁵ This has violated the rights of the concerned peoples through a lack of access to education and official documentation in the mother language and cultural appropriation.⁵⁶

National Constitutional Frameworks, Legal Measures and Efforts Being Made in the Member Countries:

Among all, the Constitution of Nepal is the youngest, having been promulgated in the year 2015. The preamble recognizes the multi-ethnic, multi-lingual, multi-religious, multi-cultural character of the country and aims at weeding out discrimination.⁵⁷ The Constitution guarantees social justice and participation, a practice initiated in 2007,⁵⁸ in the various state levels, of marginalized communities, including minority and indigenous groups.⁵⁹ Nepal has recently promulgated contribution-based social security laws.⁶⁰

The oldest Constitution in the region of India, recognizes indigenous customary law. An example of such customary law includes the 1908 Chhotanagpur Act.⁶¹ Constitution also created 'scheduled tribes' and associated schedules five and six apply in relation to them.⁶² The Government 'earmarks 15% of its outlay' on various empowerment schemes and programs.⁶³ The National and State Commissions for Minorities monitors complaints from minority communities.⁶⁴

of Stakeholders' submissions on Sri Lanka, 8 August 2017, A/HRC/WG.6/28/LKA/3, paras. 81-85.

⁵² *The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights*, 2017, p. 7.

⁵³ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Pakistan*, 4 September 2017, A/HRC/WG.6/28/PAK/2, para. 94.

⁵⁴ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders' submissions on Pakistan*, 23 August 2017, A/HRC/WG.6/28/PAK/3, paras. 100-103.

⁵⁵ IFAD, *Country Technical Note on Indigenous Peoples' Issues: Islamic Republic of Pakistan*, 2012, p.11.

⁵⁶ Cultural Survival, *Observations on the State of Indigenous Human Rights in Pakistan Prepared for The 28th Session of the United Nations Human Rights Council Universal Periodic Review*, Cambridge, 2017, pp. 5-7.

⁵⁷ *Constitution of Nepal*, 2015, Preamble.

⁵⁸ Department of Economic and Social Affairs, *Promoting Inclusion through Social Protection*, United Nations, New York, 2018, p. 100.

⁵⁹ Human Rights Council, *National Report of Nepal*, 6 August 2015, A/HRC/WG.6/23/NPL/1, para. 39.

⁶⁰ *Contribution Based Social Security Act*, Nepal, 2017, (*Yogdan ma aadhaarit Samajik Surakshya Ain* 2074).

⁶¹ Amrita Mukharjee, 'Customary Law and Land Rights: The Cautionary Tale of India, Jharkhand, and the Chotanagpur Tenancy Act', in Jennifer Hendry et al. (eds), *Indigenous Justice: New Tools, Approaches, and Spaces*, Palgrave Macmillan, London, 2018, p. 97.

⁶² *Constitution of India*, 1950, sch. 5, 6.

⁶³ Human Rights Council, *National Report of India*, 23 February 2017, A/HRC/WG.6/27/IND/1, para. 146.

⁶⁴ *Ibid*, para. 147.

Pakistani efforts to address the indigenous and minority concerns can be seen in include the observance of 11th August as Minorities Day since 2011, reservation for minorities in the national assembly, Senate, and Provincial Assemblies, quotas in jobs, provincial Minorities Affairs Departments.⁶⁵ The State has also added further strength to the National Commission for Minorities.⁶⁶ Similarly, a Hindu Marriage Act, 2017 has been promulgated and a similar law for Christians is in the pipeline.⁶⁷

The Constitution of Bangladesh recognizes Islam as the state religion but allows for other religions to be practiced in peace and harmony.⁶⁸ Law Commission in Bangladesh has proposed an Anti-Discrimination Bill to ‘empower the underprivileged sections of the society’ including *Dalits*, *Harijans*, and transgender.⁶⁹ The National Education Policy requires basic education to include indigenous language teaching at the primary level for all indigenous communities.⁷⁰

Afghanistan, despite being an Islamic State, provides for freedom to followers of other faiths to exercise and perform their religious rituals within the bounds of the law.⁷¹ To this end, the Afghan Ministry of Justice has drafted a law on religious minorities to ‘protect their rights and freedom’.⁷²

In addition to the above, three NHRIs in the region, those of Afghanistan, India and Nepal have been accredited with A status meaning full compliance with Paris Principles while another three (Bangladesh, Maldives, and Sri Lanka) have a B status meaning partial compliance with the Paris Principles.⁷³

Possible Basis for a Regional Mechanism:

In order to argue for a regional mechanism, three key issues must be addressed. Firstly, the recognition of a foundation upon which to build, secondly, examples from elsewhere to emulate and thirdly, debates, and issues to be resolved and reconciled. It is to be noted that such a mechanism should not be limited to indigenous and minorities’ rights. Rather a comprehensive mechanism that also encompasses, monitors and remedies the issues under consideration presently is desired.

⁶⁵ Human Rights Council, *National Report of Pakistan*, 4 September 2017, A/HRC/WG.6/28/PAK/1, para. 75.

⁶⁶ *Ibid*, para. 27.

⁶⁷ *Ibid*, para. 75.

⁶⁸ *Constitution of the People’s Republic of Bangladesh* no. 42, art. 2A.

⁶⁹ Human Rights Council, *National Report of Bangladesh*, 26 February 2018, A/HRC/WG.6/30/BGD/1, para. 123.

⁷⁰ Directorate of Primary Education Ministry of Primary & Mass Education Government of the People’s Republic of Bangladesh, *Indigenous Peoples Framework: Primary Education Sector Development Program*, Dhaka, 2010, p. 6.

⁷¹ *Constitution of Afghanistan*, 2004, art. 2.

⁷² Human Rights Council, *National Report of Afghanistan*, 13 November 2018, A/HRC/WG.6/32/AFG/1, para. 50.

⁷³ ‘Chart of the Status of National Institutions’, *Global Alliance of National Human Rights Institutions* available at https://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf, accessed on 6 April 2019.

a. Locating a foundation:

One reason for optimism in finding a common ground is the present political scenario of the region. Each country strongly reflects democratic values and a commitment towards better protection of human rights although the recent confrontation between the two big powers in the region, India, and Pakistan, may be seen as having thrown cold water over any such optimism. In any case, such differences seen at the top political level must be set aside to ensure a better avenue to protect the people and their rights. Indeed, only at the beginning of the century, such optimism would have been ill-placed as countries such as Nepal, Sri Lanka and Afghanistan (yet to be a member at that time) were in the midst of armed conflict whereas Pakistan was under the rule of a Military General.

In such a milieu, a basis can be founded upon two facts. Firstly, the above-mentioned efforts being made by the individual countries show a willingness, despite the obvious shortcomings, to promote human rights. Secondly, the fact that all the States in the region are parties to the major human rights documents. In fact, other than Bhutan, all the countries are party to all the relevant treaties as outlaid above. Also, only Bhutan and Bangladesh abstained from voting during the adoption of UNDRIP.⁷⁴ These facts show that none of the countries in the region could be labelled unenthusiastic vis-à-vis human rights protection.

At the same time, it has been to be noted that a 'regional, multilateral approach to constructing and entrenching minority rights' safeguards might be better suited to protect minorities, than national or international approaches that are clearly failing'.⁷⁵ An apparent willingness but a failure in results means an opportunity to adopt new measures and a need to find a new structure for the same.

b. Possible structure:

A regional framework of human rights is much more desirable and effective as opposed to a general law of nations, which in many cases is detached from the traditional values of a particular state or region.

Any mechanism in South Asia for the protection of Human Rights, in general, must first include a formulation of a Human Rights document. Such a document would also need to discern the mechanism that is to be installed. Inspiration for the same could be drawn from the South Asian Charter on Minority and Group Rights, 2008 drafted by the International Centre for Ethnic Studies (ICES).⁷⁶ Likewise, a recent agreement among the NHRIs in the region to work towards establishing a human rights protection mechanism could be a great impetus.⁷⁷

⁷⁴ 'United Nations Declaration on the Rights of Indigenous Peoples', *United Nations – Indigenous Peoples Department of Economic and Social Affairs* available at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>, accessed on 6 April 2019.

⁷⁵ The South Asian Collective (n 2), p. 8.

⁷⁶ David Keane, 'Draft South Asian Regional Charter on Minority and Group Rights: A Comparative Regional Analysis', vol 8, *European Yearbook of Minority Issues*, 2011, p. 269.

⁷⁷ 'A seminar involving the NHRIs of South Asia has emphasized that human rights violations increasingly affect the lives of people across borders', 3 August 2015, *Asia Pacific Forum of National Human Rights Institutions* available at <https://www.asiapacificforum.net/news/south-asian-nhris-discuss-regional->

It is pertinent that although human rights provisions are few and far between in official SAARC instruments, there has been recognition of the ‘right to development’⁷⁸ in instruments such as SAARC Social Charter. A reference to the right to development cannot be too far detached from the indigenous and minority rights. Any difference lies only in the mode of ‘legal mobilization’⁷⁹.

The development includes an ‘active, free and meaningful participation’ while the right to development, among others, include the right of peoples to self-determination.⁸⁰ These tenets are also hallmarks of indigenous and minority rights discourse.

Mindful of the above, it is recollected that the regional mechanisms have been formed in Europe, Americas, and in Africa. While there is not a single mechanism administering the whole of Asia, the adoption of the ASEAN Charter promises to be a step in the right direction. Amid these choices, South Asia could be best served by emulating the example set by the Inter American Human Rights Mechanism.

Although similar to Europe in structure, the practical implications brought about by the American structure, an inhabitant of the ‘global south’ would be of more relevance to South Asia. A South Asian Court of Human Rights or a similar body accepting complaints would be desirable. In fact, the ratification of 1st additional protocol of ICCPR by Maldives, Nepal, and Sri Lanka as well as other individual complaints mechanisms under treaties South Asian countries are party to, means that these countries are not alien to the idea of complaints against State beyond its jurisdiction. However, any emulation has to take into account and possibly incorporate the ‘Third World Approach to International Law (TWAAIL)’.⁸¹

c. The issue of treatment of rights:

Once the structures are put in place, it is imperative to ascertain the kind of approach that shall be taken with regards to the right. In line with TWAAIL, the indigenous rights must be seen differently from the English notion of Property law, which does not fit with the communal notion of indigenous landholding.⁸² Therefore, while the steps taken by CANZUS⁸³ countries merit compliments, a blank emulation of the same would not fit the uniqueness of South Asia.

It would definitely mean that not just a State or an individual are subjects under this mechanism. Rather, due to the collective nature of the rights, the whole of

human-rights-protection-system/, accessed on 6 April 2019.

⁷⁸ The South Asian Collective (n 2), p. 9.

⁷⁹ Maja Janmyr, ‘Indigeneity vs Development: Nubian rights mobilization in Egypt’, in Giselle Corradi et al (eds), *Critical Indigenous Rights Studies*, Routledge, New York, 2019, p. 28.

⁸⁰ *United Nations Declaration on the Right to Development*, 1986, UNGA Res 41/128, preamble.

⁸¹ Salvador Herencia Carrasco, ‘The rights of indigenous peoples in the jurisprudence of the Inter-American Court of Human Rights: a ‘Third World Approaches to International Law’ assessment to advance their protection in the Inter-American Human Rights System’, in Giselle Corradi et al (eds), *Critical Indigenous Rights Studies*, Routledge, New York, 2019, p. 161.

⁸² Mukharjee (n 61), p. 104.

⁸³ *Ibid*, p. 99.

the minorities and indigenous groups are recognized. It is so because having a redress mechanism similar to one under article 27 of ICCPR, may not be the most effective solution for South Asia. Thus, the mechanism must include, in addition to individual complaints, a way for filing a collective complaint.

Finally, with regard to the nature of rights that needs to be prioritized, the paper argues that indigenous and minorities must be afforded all the rights regardless of any artificial distinction between Civil and Political Rights (CPR) and Economic, Social and Cultural Rights (ESCR). Any attempted reasoning taking sides in the 'bread versus liberty debate' is untenable.⁸⁴ It has been argued by those like UNESCO, citing the failure of MDG that one of the reasons for failure in exclusion of minorities' rights was because of excessive focus on the ESCR. On the flip side, authors such as Salvador Herencia Carrasco argue that prioritizing CPR deteriorates the aspirations of indigenous and minorities by neglecting ESCR.⁸⁵

However, the paper endorses the view that any notion attempting to perpetuate the divisibility of rights has already been dispelled within International law.⁸⁶ And any effort to ensure the rights of the indigenous and minorities must include efforts to adduce equal prioritization to both these kinds of rights. At last, it is to be underlined that this mechanism shall be complementary to the national jurisdictions.

Conclusion:

The paper attempted to portray the present situation of the indigenous and minority population in South Asia. Showing the lapses in the various countries, it established the minority population as vulnerable. At the same time, the paper also presented some of the efforts made by the concerned States as reflected, *inter alia*, in their constitutional and legal framework. This contrast was presented for two purposes: firstly, to show that there was a gap and that gap needed to be plugged and secondly, to show that there were efforts being made, despite shortcomings, which pointed towards willingness on part of the States to better the human rights situation under their jurisdiction. Next, the paper tried to find a basis upon which such a mechanism could be substantiated. In doing so, the paper reflected upon the various commitments that the States have undertaken internationally and works done nationally. Further, the paper argued that the South Asian region should adopt a model and implement it in a manner reminiscent of the human rights system of the Americas. Finally, the paper suggested that the treatment of rights must be made a whole debunking any argument trying to dichotomize or divide any right under consideration. A mechanism made in this manner would be able to address an issue that the SAARC has not addressed yet, that of human rights. This comprehensive mechanism would, additionally, also protect the rights of the most vulnerable indigenous and minorities.

⁸⁴ Ramesh Thakur & Oddny Wiggen, 'Introduction: South Asia's manifold challenge to the international community', in Ramesh Thakur & Oddny Wiggen (eds), *South Asia in the World: Problem Solving Perspectives in Security, Sustainable Development, and Good Governance*, United Nations University Press, Tokyo, 2004, p. 9.

⁸⁵ Carrasco (n 81), p. 161.

⁸⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd edition, Cornell University Press, London, 2013, p. 31.