

From Strasbourg to the Asia-Pacific: The Need and Road to a Regional Human Rights Tribunal

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ABSTRACT

The significance of regional efforts to minimize if not eliminate the misery of persons with disabilities (PWDs) is undeniable. The United Nations (UN) fosters this definite need and encourages the establishment of regional human rights mechanisms in the form of courts, tribunals and commissions because they can take better account of regional conditions and peculiarities.¹

Asia and the Pacific are only areas of the world that do not have a regional human rights court or commission. A brief view of the significance of the regional efforts and recommendation for the establishment of a regional court for Asia Pacific region is conversed in this paper. The importance of the issue is discussed in the light of impact of United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) on the case law of European Court of Human Rights (ECtHR), the most effective regional human rights court in the world by examining some landmark cases to show its role in turning the lives of PWDs.

Significant Impact of the Convention on the Case law of European Court of Human Rights

The UNCRPD is a novel human rights treaty that was negotiated and drafted between 2001 and 2006. The one among its many interesting features is in relevance to European Union (EU). It was the first occasion on which the European Community took part in the drafting procedure and signing of an international human rights treaty.² Further, UNCRPD became the first international human rights convention to which the European Community is a party.³ UNCRPD, therefore, proved to be the first of its nature that is open to ratification by international organizations like EU. Although European Union initially did not favor the multiplication of the number of separate human rights conventions for each potential group and did not favor the

¹ Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, A/RES/41/153 1986 <<http://www.un.org/depts/dhl/resguide/r41.htm>> accessed 12 on Aug 2013

² Gráinne de Búrca "The EU in the Negotiation of the UN Disability Convention," *European Law Review* 35(2010):18

³ L. Waddington "A New Era in Human Rights Protection in the European Community: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community" papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581 accessed June 12, 2019.

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adoption of an international legal instrument on disability rights. Rather, it favored to strengthen and support the “UN Standard Rules for the Equalization of Opportunities of Persons with Disabilities 1993.”⁴ These rules of the United Nations on disability were not legally binding and could be only used as a basic policy making instrument to pave the way for economic and technical cooperation.⁵

Human rights of PWDs have been protected by Council of Europe by means of European Convention on Human Rights (ECHR) and the robust case law of the ECtHR. However, it is noteworthy that the case law of the ECtHR and the new “Council of Europe Disability Strategy 2017–2023” has largely been affected by UNCRPD.⁶ The adoption of the UNCRPD by European Union is deemed as a cause to create more sensitivity towards the protection and enforcement of the rights of PWDs both internationally and at regional level (in European context). This can be witnessed through obvious impact of the UNCRPD on the case law of the ECtHR on disability issue at regional level. The increasing role of the UNCRPD in influencing and shaping disability case law of the ECtHR shows the interconnectivity of the UNCRPD, ECHR, and ECtHR to offer maximum protection to PWDs.

The influential role of the UNCRPD can be provided through the analysis of the citation and reference made to the Convention in the decisions of the ECtHR. The first case of the ECtHR that referred to the UNCRPD is *Glor vs. Switzerland*.⁷ In *Glor*, the ECtHR referred to the UNCRPD. For the first time, it was stated by the ECtHR that “there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.”⁸ *Glor vs. Switzerland* recognized the violation of Article 14 of the UNCRPD on liberty and security of person⁹ because *Glor*, being a diabetic, was declared medically unfit to serve military. The reference in *Glor* to the UNCRPD was made soon after it was entered into force.¹⁰ It is noteworthy that the UNCRPD was referred in the decision of *Glor* prior to its entry into force for Switzerland. Following *Glor*, two decisions of the ECtHR in *Alajos Kiss vs. Hungary*¹¹ and *Jasinskis vs. Lithuania*¹² again referred to UNCRPD, even though the relevant facts in both cases occurred before the UNCRPD had been signed by the respondent States (Hungary and Lithuania).¹³ However, these two cases vary from *Glor*. In *Alajos* and *Jasinskis*, the respondent States signed the UNCRPD after the facts of the cases happened but prior to the decision of the Court, while in

⁴ <https://www.un.org/esa/socdev/enable/dissre00.htm> accessed April 16, 2020.

⁵ Ibid.

⁶ Silvia Favalli, “The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023:

from Zero to Hero,” *Human Rights Law Review* 18(2018):517.

⁷ *Glor vs. Switzerland* (Application no. 13444/04)2009.

⁸ Ibid, Para 53.

⁹ Convention 2006, Article 14.

¹⁰ Jarlath, Clifford. “The UN Disability Convention and its impact on European Equality Law,” *The Equal Rights Review* 6(2011) 20.

¹¹ *Alajos Kiss vs. Hungary*, Application No 38832/06, 20 May 2010.

¹² *Jasinskis vs. Lithuania*, Application No 45744/08, 21 December 2010.

¹³ Favalli, “The United Nations Convention,” 526.

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Glor, Switzerland had not yet signed the UNCRPD before the decision.¹⁴ In the first two cases, judges of the ECtHR referred to and assumed that both of the respondent States had followed the philosophy of the UNCRPD. Conversely, the Court in *Glor* referred to the UNCRPD notwithstanding that “it was impossible to presume that the respondent State had adhered to the principles of the UN Convention because Switzerland had not even signed the Convention when the Court finally made its judgment.”¹⁵ It reflects the role of the UNCRPD in safeguarding the rights of PWDs, regardless of the observance of the UN Convention by respondent State.¹⁶ In *Stanev vs. Bulgaria*,¹⁷ the Court once again referred to UNCRPD even though Bulgaria had not ratified it by the time the decision was made, although signed. Such references to UNCRPD by ECtHR prior to the ratification of the UNCRPD by respondent States reflect the growing importance of UNCRPD. It further signifies the importance of granting legal capacity (*Stanev vs. Bulgaria*) to PWDs by international instruments.¹⁸ UNCRPD can be, therefore, cited as a groundbreaking instrument that protects the legal capacity of PWDs at international level.¹⁹

In other cases, reference to the UNCRPD is made by the ECtHR showing its ancillary role.²⁰ In *Valentin Campeanu vs. Croatia*,²¹ the ECtHR as well as the Council of Europe Commissioner for Human Rights significantly concluded that “the provisions of the European Convention concerning the human rights of PWDs should be interpreted in the light of the UNCRPD.”²² Apart from its ancillary role to the ECHR in some case, UNCRPD provides foundations to the decisions in ECtHR in other cases. For example, in *S.H.H. vs. United Kingdom*²³ a direct comparison was made between the key provisions of the UNCRPD and the general principles of international law. In this case, an Afghan applicant acquired his disability by a rocket hit. His application for asylum was turned down. He took the plea that his removal to Afghanistan will amount to the breach of Article 3 of the ECHR and that his removal

¹⁴ Ibid.

¹⁵ Ibid, 527.

¹⁶ Oliver Lewis, “*Stanev vs. Bulgaria: On the Pathway to Freedom*,” *Human Rights Brief* 19 (2012): 2-7

¹⁷ *Stanev vs. Bulgaria* Application No 36760/06, 17 January 2012.

¹⁸ Ibid, para 244.

¹⁹ Oliver Lewis, “Advancing Legal Capacity Jurisprudence,” *European Human Rights Law Review* 6(2011):704.

²⁰ *Dordevic vs. Croatia* Application No 41526/10, 24 July 2012; *Z.H. vs. Hungary* Application No 28973/11, 8 November 2012; *R.P. and Others vs. United Kingdom* Application No 38245/08, 9 October 2012; *S.H.H. vs. United Kingdom* Application No 60367/10, 29 January 2013; *M.H. vs. United Kingdom* Application No 11577/ 06, 22 October 2013; *Ruiz Rivera vs. Switzerland* Application No 8300/06, 18 February 2014; *Valentin Campeanu vs. Croatia* Application No 47848/08, 17 July 2014; *M.S. vs. Croatia* Application No 36337/10, 19 February 2015; *Butrin vs. Russia* Application No 16179/14, 22 March 2016; *Blokhin vs. Russia* Application No 47152/06, 23 March 2016; *I.C. vs. Romania*, Application no. 36934/08, 24 May 2016; *Fernandes De Oliveira vs. Portugal* Application No 78103/14, 28 March 2017; *N. vs. Romania* Application No. 59152/08, 28 November 2017; *Mockut_e vs. Lithuania* Application No 66490/09, 27 February 2018.

²¹ *Valentin Campeanu vs. Croatia* Application No 47848/08, 17 July 2014.

²² Ibid, para 42.

²³ *S.H.H. vs. United Kingdom* Application No 60367/10, 29 January 2013.

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will expose him to more risk of violence due to his disability.²⁴ However, Court found no potential violation of Article 3 of the ECHR on inhuman or degrading treatment. However, it admitted that the ECHR needs to be interpreted in accordance with the general principles and rules of international law and cannot be applied in vacuum.²⁵ It further admitted the significance of UNCRPD that provide help in informing the scope of Article 3 of the ECHR.²⁶ In *Sergeyeva vs. Russia*, ECtHR recognized UNCRPD as standard settler in protecting PWDs against discriminatory practices.²⁷ *Kacper Nowakowski vs. Poland*²⁸ and *Hiller vs. Austria*²⁹ also highlighted the importance of the UNCRPD in setting principles in protecting the rights of PWDs. The dissenting judgment in *Sahin vs. Turkey* affirmed the interpretation of the ECHR in the light of the provisions of the UNCRPD to the possible extent.³⁰ This particularly reflects the use and role of UNCRPD in developing international consensus on the rights of PWDs.³¹

A brief overview of the above cases shows the profound influence of the UNCRPD on the case law of ECtHR. The resulting innovative case law of the ECtHR led towards the adoption of the new “Council of Europe Strategy on the Rights of Persons with Disabilities 2017–2023.” The objective of the strategy is to “achieve equality, dignity and equal opportunities for PWDs.”³² To achieve this purpose, five required rights-based priority areas consist of “equality and non-discrimination”, “awareness raising”, “accessibility”, “equal recognition before the law”, “freedom from exploitation, violence and abuse.” These priority areas are secured by UNCRPD in its various provisions.³³

Need for an Asian-Pacific Regional Tribunal of Human Rights

UNCRPD sketches the social model framework that applies to all persons with disabilities equally. However, factors like less opportunity and local incapability of States Parties result in severe violations to enforce human rights of PWDs. Article 44 of the UNCRPD provides for the establishment of “regional integration organizations.” “Regional integration organization” shall mean:

“An organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention.”³⁴

To overcome local and domestic incapacity to enforce rights of PWDs, litigation in

²⁴ Ibid, para 60.

²⁵ Ibid, para 94.

²⁶ Ibid.

²⁷ *Sergeyeva vs. Russia* Application No 16899/13, 29 March 2016.

²⁸ *Kacper Nowakowski vs. Poland* Application No 32407/13, 10 January 2017.

²⁹ *Hiller vs. Austria* Application No 1967/14, Merits, 22 November 2016.

³⁰ *Sahin vs. Turkey* Application No 3065/12, 30 January 2018.

³¹ Ibid. at Dissenting Opinion of Judge Lemmens, para 4.

³² Council of Europe, Human Rights: A reality for all – Council of Europe Disability Strategy 2017–2023.

³³ Favalli, “The United Nations Convention,” 535.

³⁴ Convention 2006, Article 44.

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regional tribunals and the subsequent case law creates an environment that leads to better enforcement of human rights of victims.

According to the new report by the regional arm of United Nations, Asia and the Pacific will not achieve any of the 17 “sustainable development goals” (SDGs) by 2030 for its scattered approach.³⁵ GA of the UN emphasized on the countries in Asia-Pacific region to make regional arrangements and agreements for the advancement and protection of human rights and passed a number of resolutions including resolutions in 1977,³⁶ 1978,³⁷ 1979,³⁸ 1980³⁹ and 1981.⁴⁰ Since 1980s, GA through its efforts in 1986,⁴¹ 1988⁴² and 1990,⁴³ is constantly demanding States in this region to create a regional human rights mechanism. The Vienna Conference also reiterated the demand for regional and sub-regional arrangements.⁴⁴ Human rights of PWDS can be best addressed in regional tribunals because they provide a blend of international standards and domestic legal and social situation.

Asia is far the largest continent in the world in terms of area,⁴⁵ however, Asia and the Pacific are the only regions on globe which is without regional court, tribunal, or commission. In comparison to Asia Pacific region, there have been visible developments in case laws on disability issue in all three regional tribunals of Europe, Africa, and America. By touching various innovative aspects of disability, rich and productive case law is being produced by these regional courts that helps in realizing the human rights for PWDs. Inter-American Commission in a landmark case of Victor Rosario, placed responsibility on the State to ensure moral, physical, and mental integrity of persons with mental illness.⁴⁶ It was believed that the high court of Ecuador could not decide the Congo case the way the interregional body did it.⁴⁷ Another unreported case that arose in Paraguay gives another success story of the of American Commission to promote and protect the rights of persons with mental disabilities where Commission granted immediate relief to 460 individuals imprisoned in State-run neuro-psychiatric hospital. Similarly, the European Court of Human Rights (ECtHR) proved to be a tremendous forum and of an alternative legal

³⁵ ESCAP Asia and the Pacific SDG Progress Report 2019 <https://in.one.un.org/un-press-release/asia-pacific-not-on-track-to-achieve-any-sustainable-development-goal/> accessed August 12, 2019.

³⁶ G.A. Res 32/127, U. N. Doc. A/RES/32/127 (16 December 1977).

³⁷ G.A. Res. 33/167, U. N. Doc. A/RES/33/167 (20 December 1978).

³⁸ G.A. Res 34/171, U. N. Doc. A/RES/34/171 (17 December 1979).

³⁹ G.A. Res 35/197, U. N. Doc. A/RES/35/197 (15 December 1980).

⁴⁰ G. A. Res. 36/154, U. N. Doc. A/RES/36/154 (16 December 1981).

⁴¹ G. A. Res. 41/153, U. N. Doc. A/RES/41/153 (1 December 1986).

⁴² G.A. Res. 43/140, U. N. Doc. A/RES/43/140 (8 December 1988).

⁴³ G. A. Res. 45/168, U. N. Doc. A/RES/45/168 (18 December 1990).

⁴⁴ Vienna Declaration and Program of Action (1993)37.

<<http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>> accessed August 12, 2019.

⁴⁵ Parameshvara Deva, “Mental health and mental health care in Asia,” *Journal of the World Psychiatric Association* 1(2002):118-20.

⁴⁶ *Víctor Rosario Congo vs. Ecuador*, Case 11.427, Report No. 12/97, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 257 (1997).

⁴⁷ Michael L. Perlin, “Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the U.N. Convention on the Rights of Persons with Disabilities,” *The Geo. Wash. Int’l L.Rev.* 1(2012):44.

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venue to bring human rights violations of mental and physically disabled directly to it. With its precedent-setting role, ECtHR in *J.D. and A vs. The United Kingdom*⁴⁸ decided that differential treatment of an individual due to his/her care providing responsibility in connection with his/her disabled child is a form of “disability-based discrimination” under Article 14 of the ECHR. In *Çam vs. Turkey*, ECtHR held that non selection of the claimant on the ground of her blindness as a music teacher and no attempt by the school to make reasonable adjustment is the breach of Article 14.⁴⁹ In African region, *Purohit and Moore vs. The Gambia* is a landmark case of the African Commission which found that the legislation in force in the Gambia, namely the “Lunatics Detention Act” (LDA) still uses the term “lunatics” and “idiots,” that contradicts the “African Charter on Human and Peoples Rights”.

In all instances given above, regional courts better interpreted the law considering international standards and domestic legal and social situation with substantial and considerable impact on the lives of PWDs.⁵⁰ As an attempt, the governments of Asia and Pacific assembled at “Economic and Social Commission for Asia and Pacific” (ESCAP) Conference in Incheon in 2012. The principal aim of this gathering was to find and confront barriers stopping PWDs from participating in economic, social, and political life.⁵¹ Period from 2013 to 2022, Asian and Pacific Decade for PWDs was announced through adoption of regional strategy.⁵² The language of the UNCRPD that invoke a social model by denying a pure medical model, enables and empowers PWDs to be the masters of their own fates with dignity and non-discrimination and such regional tribunal can best play their role in achieving the objective.

On May 12, 2021, online regional consultation for Asia Pacific was held. There were 90 participants in total. Pakistan was also represented in online regional consultation.⁵³ Various concerns were raised, and recommendations were made during the session particularly on the issue of independent living and inclusion PWDs in community.⁵⁴ Realization of mentioned recommendations can be best achieved through attempts to establish regional tribunal.

Concluding Thoughts

The existence of regional human rights courts and commissions has been an essential element in the enforcement of international human rights in those regions of the world where such tribunals exist. Monitoring and implementation of the UNCRPD at national level provides States vast discretions to design its domestic and national frameworks. Besides, a detailed guideline on national mechanism for monitoring and

⁴⁸ *J.D. and A vs. The United Kingdom*, Applications nos. [32949/17](#) and [34614/17](#) para 82.

⁴⁹ *Çam vs. Turkey*, ECtHR 2016Application no. [51500/08](#)

⁵⁰ Mashood A. Baderin, “Recent Developments in the African Regional Human Rights System,” *Hum. Rts. L. Rev.* 5 (2005):137.

⁵¹ Economic and Social Commission for Asia and the Pacific (ESCAP), Annual Report (2013). 162<<http://www.unescap.org/pdd/publications/survey2013/download/index.asp>> accessed March 9, 2020.

⁵² Ibid.

⁵³ Committee for the Rights of Persons with Disabilities.

<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> accessed June 2021.

⁵⁴ Convention, Article 19.

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implementation of the Convention has been provided in Article 33, it is silent on allocation of duties to domestic national human rights entities by State. As a result, the approach towards disability does not remain standardized and varies extremely in different jurisdictions that may result in human rights violation of the PWDs. An effective regional enforcement body in form of regional tribunal can be helpful. In case of infringement of PWDs' rights, regional court as alternative legal venue can take better account of the regional conditions and peculiarities of the PWDs.⁵⁵ Such a body may help to eliminate or at least reduce the use of the defense of cultural relativism towards universality of PWDs rights. It is witnessed from the interconnectivity of the UNCRPD and case law of the ECtHR which offers for the need of new aspects in protecting the rights of PWDs.

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⁵⁵ Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, A/RES/41/153 1986 <<http://www.un.org/depts/dhl/resguide/r41.htm>> accessed May 12, 2018.

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