
HUMAN RIGHTS SYSTEMS AND MECHANISMS

Experiences and
Reflections

Working Paper Series Number 6: August 2019

FORUM-ASIA

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Human Rights Systems and Mechanisms: Experiences and Reflections

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Preface

International, regional, and national human rights systems and mechanisms are crucial for the creation of an ecosystem where human rights are protected and promoted. While the United Nations (UN) plays a leadership role in setting human rights standards and ensuring their promotion and protection, it does not operate in isolation. At the regional level, the Association of Southeast Asian Nations (ASEAN) set up specific human rights mechanisms to address and promote human rights, notably through the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). When in 1993 a UN General Assembly resolution adopted the Paris Principles, the UN established a new global framework defining the mandate and function of national human rights institutions (NHRIs). NHRIs play a crucial role in linking international and regional human rights systems and mechanisms, with the implementation at the national level.

Following previous series on business and human rights, Sustainable Development Goals (SDGs), and civic space, this Working Paper of the Asian Forum for Human Rights and Development (FORUM-ASIA) looks at how main human rights systems and mechanisms operate at the national, regional, and international levels, reflecting on their achievements, challenges, and ways forward.

Strengthening human rights mechanisms and systems at national, regional, and international levels is a key priority for FORUM-ASIA. In order to do so, we continue to engage and hold them accountable through our offices in Geneva, Jakarta and Kathmandu, as well as through the remarkable work on the Asian NGO Network on National Human Rights Institutions (ANNI), whose Secretariat is proudly hosted by FORUM-ASIA.

This Working Paper serves as a resource tool for advocacy and capacity development initiatives, combining views and reflections from experts across the region. It also highlights the work conducted by ANNI and key partners such as the All India Network of NGOs and Individuals working with National Human Rights Institutions (AiNNI) and the Commission on Human Rights of the Philippines to advance human rights within and beyond Asia.

On behalf of the Secretariat, I would like to convey my appreciation to all contributors of this Working Paper, as well as colleagues who worked together on this quality knowledge initiative. As FORUM-ASIA aims to foster solidarity and advocacy avenues for the promotion and protection of civic space, human rights, and sustainable development, it is of essence to meaningfully engage human rights systems and mechanisms at all levels.

John Samuel
Executive Director
Asian Forum for Human Rights and Development (FORUM-ASIA)

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Civil Society and National Human Rights Institutions: the Role of the Asian NGO Network on National Human Rights Institutions (ANNI)

Shanna Priangka Ramadhanti*

Abstract

Since 2005, the Asian Forum for Human Rights and Development (FORUM- ASIA) together with non-governmental organisations in the region has been following developments concerning national human rights institutions (NHRIs) in Asia. Their engagement with NHRIs and relevant fora, combined with the need to closely monitor NHRIs' development and establishment, led to the formation of the Asian NGO Network on National Human Rights Institutions (ANNI). This chapter presents a critique of the growth of ANNI, highlighting main achievements and challenges.

Emergence of national human rights institutions

In the last four decades, most countries have signed, ratified, or acceded to the major human rights treaties negotiated over the past 60 years under the auspices of the United Nations (UN).¹ Under international human rights law, each state who is a party to an international human rights treaty has a duty to respect, protect, and promote human rights. However, it is arguable that some states have yet to implement the commitments embodied in the treaties.

The international human rights system is at best a residual system that not

only promotes domestic action and monitoring; but where domestic systems are ineffective or inadequate, this system provides some limited measures of international action. Recognising the limitations for international mechanisms to ensure states' implementation of their human rights obligations, the international community sees the importance of ensuring a strong national/ domestic human rights mechanism, one of which is through the national human rights institutions (NHRIs).

An NHRI is broadly defined as a body established by a government under the constitution, or by law or decree, the functions of which are specifically designed in

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terms of promotion and protection of human rights.² The initial recognition of the importance of NHRIs for the protection and promotion of human rights was in 1946, when the United Nations Economic and Social Council (UN ECOSOC) asked member states to consider establishing their own “local human rights committees”.³ In 1978, a Seminar on National and Local Institutions for the Promotion and Protection of Human Rights was held in Geneva, Switzerland by the UN Commission on Human Rights. During the seminar, guidelines on the functions of national institutions to protect and promote human rights were drafted, and member states that were yet to have a national institution were encouraged to establish one.⁴

However, it was not until the Paris Workshop and the Second World Conference on Human Rights (in 1991 and 1993, respectively) that the number of NHRIs increased significantly. At the 1991 Paris Workshop organised by the French NHRI, *Commission Nationale Consultative des Droits de L’Homme*, in cooperation with the UN Commission on Human Rights, the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (known as the Paris Principles) were drafted and adopted. The Paris Principles were then endorsed by the UN Commission on Human Rights in 1992 (current Human Rights Council) and UN General Assembly in 1993.⁵ The importance of NHRIs was reiterated at the 1993 Second World Conference on Human

Rights in Vienna in a statement called the Vienna Declaration and Programme of Action (VDPA). Moreover, VDPA paved the way towards the establishment of more NHRIs globally due to significant priority given by the first UN Human Rights High Commissioner in implementing the VDPA’s recommendation on NHRIs.

NHRIs’ work at the national level also significantly contributes to the promotion and protection of human rights at the regional and international levels. Recognising this important role, NHRIs agreed to establish an international committee to coordinate and encourage the establishment of independent NHRIs, known as the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). This later changed its name to the Global Alliance of NHRIs (GANHRI) in 2016. In order to have more effective coordination, it decided to also establish four regional coordinating committees of NHRIs for Africa, the Americas, Europe, and Asia-Pacific.

In Asia, NHRIs were mostly established after the adoption of the Paris Principles. The different international and domestic impulses behind the establishment of NHRIs in Asia provide part of the explanation for the varied experiences of NHRIs.⁶ The two major international influences that have shaped the legislative framework of the NHRIs in the Asia-Pacific Region are the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum of National Human Rights

Institutions (APF). NHRIs in the region that formally comply with the Paris Principles have great emphasis on the protective functions – something that distinguishes NHRIs in the Asia-Pacific region from others, particularly in Europe, where the research and promotional functions of NHRIs are emphasised.⁷

Most regions in the world have established regional human rights mechanisms, such as courts, commissions, and related institutions to monitor human rights protection at the regional level.⁸ Taking into consideration the diversity, complexity, and the size of the Asian region, it is very challenging to establish an effective regional mechanism. To date, only the Southeast Asia sub-region has human rights bodies, namely the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) with their own limitations and challenges.

Formation of the Asian NGO Network on National Human Rights Institutions (ANNI)

Since 2005, the Asian Forum for Human Rights and Development (FORUM-ASIA) together with non-governmental organisations (NGOs) in the region have been following developments concerning NHRIs in Asia. For the longest time, the Asian region was the only region without a regional human rights mechanism. At the same time, NHRIs in Asia were then the

most organised and coordinated regional grouping due to their close cooperation with each other through the APF. Moreover, the APF invited representatives of NGOs (national and international) to attend its annual meetings and conferences, contribute to the debate and the final statement emanating from the conference.⁹ FORUM-ASIA and NGOs in the region recognised early on that NHRIs will be instrumental in fostering a culture of human rights in the region, thus the need to closely monitor their development and establishment.

In 2006, FORUM-ASIA facilitated the annual performance assessment of ten NHRIs in Asia. A regional report based on those evaluations was published as the outcome of national consultations and researches conducted in ten countries in South Asia, Southeast Asia and Northeast Asia. This regional report was then presented during the 11th Annual Meeting organised by APF in Suva, Fiji in August 2006.

After presenting the report to the APF, FORUM-ASIA continued the discussion on NHRIs and hosted a Regional Consultation on Cooperation between NHRIs and NGOs. After three days of extensive discussions, in December 2006 the Asian NGO Network on National Human Rights Institutions (ANNI) was created.

ANNI is composed of NGOs and human rights defenders (HRDs) from countries within the Asia region that have established NHRIs, and from countries

that have yet to establish NHRIs but have made commitments to do so. In countries where there are NHRIs, the members of the ANNI work to ensure that these NHRIs are independent and effective to better protect HRDs and human rights in general.¹⁰ In countries where there are no NHRIs, the members of the ANNI work with civil society groups and representatives of government towards the establishment of an NHRI that would be in compliance with the Paris Principles.¹¹ The work of ANNI is coordinated by FORUM-ASIA in the latter's capacity as the Secretariat. Decisions and key policies of ANNI, however, are decided by the ANNI members during its regular meetings.

ANNI's first and primary work is its annual report titled "ANNI Report on the Performance and Establishment of NHRIs". The annual reports of ANNI are a compilation of assessments by ANNI members on the performance of NHRIs in their countries. For ANNI members from countries without NHRIs, their reports provide developments regarding the establishment of NHRIs in their countries. ANNI has evolved to coordinate submissions of NGOs for the performance review of NHRIs by the Global Alliance of NHRIs' Sub-Committee on Accreditation (GANHRI-SCA), develop strategies for influencing NHRIs, provide interventions in relation to NHRIs-related issues, and share experiences on how NGOs and NHRIs can engage and develop a productive relationship.

Main trends of NHRIs in Asia

The Paris Principles spell out minimum international standards for an NHRI's structure, competence, and working procedures.¹² These principles provide guidelines for how NHRIs are to be independent from the government and reflect the pluralism of society in its membership. They address both promotional and protection aspects of the mandate, and even provide some direction concerning the quasi-judicial competence of NHRIs that possess such powers – a common feature of many NHRIs in Asia.¹³

Over the course of time, ANNI has noted how NHRIs face challenges in effectively promoting and protecting human rights in accordance with the criteria set out in the Paris Principles. The political landscape across the region continues to be a determining factor, both in ensuring the establishment of NHRIs and in strengthening existing NHRIs to fulfil their mandates effectively. Democratic backsliding and the resurfacing of authoritarian regimes have emerged as a dominant trend over recent years in many Asian countries. This trend poses a major threat for NHRIs to be able to operate independently and effectively.

Independence remains an ongoing critical issue for many NHRIs in Asia as it is essential for an NHRI to be effective in implementing its mandates, specifically on the protection of human rights. One of the common issues pertaining to this is the lack of independent members

within the NHRI due to the selection and appointment process. Some of the processes are politicised and the commissioners are chosen in an arbitrary manner with little or no consultation with civil society.

When it comes to independence, the lack of financial resources remains a challenge. Many NHRIs in the region suffer from limited budgets, with some even threatened with budget cuts by the government. The very limited budgets of NHRIs reflect the indifferent attitude of Asian governments towards the promotion and protection of human rights, as well as the government's desire to keep close control of NHRIs.¹⁴

In terms of effectiveness, the most common trend is that NHRIs in the region tend to focus more on the promotion mandate rather than the protection mandate. One clear indication of the inefficiency of NHRIs on human rights protection is their slow (or even no) response to alleged violation of human rights, especially the ones allegedly committed by government authorities and armed groups.¹⁵ There are many reasons for this, but the most common is the lack of adequate powers of investigation and political will. Moreover, most NHRIs do not have any power to enforce the recommendations from their investigations.

Other persistent challenges include structural problems, lack of trust from civil society, functional deficiencies, as well as lack of adequate mechanisms

for enforcement of human rights recommendations. Additionally, NHRIs and their representatives continue to face threats and reprisals for undertaking human rights work in accordance with their legal mandate.

Challenges and achievements of ANNI

Similar to the challenges faced by NHRIs, the political condition in the region has affected the work of ANNI. The contraction of civic space in the region and the limitation of resources have made it challenging for ANNI members to operate. Moreover, ANNI members face threats, risks and reprisals for their legitimate and peaceful work on human rights.

Another key challenge for ANNI is the negative perception by some NHRIs in Asia. ANNI is still perceived as a network that mainly criticises NHRIs rather than considering them allies or partners. Some NHRIs have this perception as the ANNI Reports do include criticisms of the NHRI when it fails to perform its mandates in accordance to the law and international standards. In this regard, it is important to note that ANNI members address human rights issues in their respective countries on a daily basis. In dealing with day-to-day operations of NHRIs, criticisms would eventually inform their human rights work. The establishment of NHRIs undoubtedly signals a possible avenue to address human rights concerns domestically; and for HRDs and civil society, NHRIs arguably remain useful institutions that can make

immense contribution to the protection and promotion of human rights. Direct criticisms, as well as acknowledgements, in the report is one of the efforts made by ANNI to establish and develop accountable, independent, effective, and transparent NHRIs in Asia. ANNI also shows great support for NHRIs and makes necessary intervention when NHRIs are facing reprisals.¹⁶

There is also a lack of awareness within civil society on issues relating to NHRIs. In some cases, civil society is not aware of the challenges and issues of NHRIs as there is little engagement with them. Therefore, it is crucial for NHRIs to establish a genuine consultation mechanism with civil society. In addition to this, ANNI also tries to establish a national network within the country to raise awareness on the importance in monitoring NHRIs and advocating for their establishment and strengthening them.

Despite these challenges, ANNI's achievements have been recognised at the regional and international levels. One of the ground-breaking advocacy actions that was carried out by ANNI and its member is in relation to the re-accreditation of the Human Rights Commission of Malaysia (SUHAKAM) in 2008.¹⁷ ANNI initiated the idea of a shadow report to the ICC and supported ANNI members from Malaysia, Suara Rakyat Malaysia (SUARAM) and ERA Consumer, in influencing the accreditation process.¹⁸ The attempt to use ICC and its procedures to effect change introduces a new dynamic into the relationship between state, civil

society and the NHRI. The ICC then also formalised the NGO reports as part of the accreditation process. The advocacy was later acknowledged in the 2009 APF meeting by Dr. Homayoun Alizadeh, an OHCHR representative. He acknowledged "the important role played by NGOs from the Asia-Pacific region for their exemplary advocacy and commitment for making NHRIs throughout the region stronger and effective".¹⁹

Another milestone achieved by ANNI is on the establishment process of NHRIs. In 2017, the Presidential Office Human Rights Consultative Committee (POHRCC) of the Republic of China (Taiwan) and ANNI members Covenants Watch and Taiwan Associate for Human Rights (TAHR) invited Ms. Rosslyn Noonan (former New Zealand Human Rights Commissioner and former Chairperson of GANHRI) to lead a task force to Taiwan for a one-week visit to conduct an assessment of the on-going process of establishing an NHRI. Under the auspices of ANNI, FORUM-ASIA and APF, the task force has provided expert advice to the Government of Taiwan on setting up the appropriate infrastructure for the establishment of a Paris Principles-compliant NHRI. The findings from this task force were submitted to the Government of Taiwan in a joint report prepared by APF and FORUM-ASIA/ANNI.

Conclusion

NHRIs remain to hold an important role in the promotion and protection of human rights in the region, even more as Asia has yet to set up a human rights mechanism that would cover the whole region. NHRIs

are instrumental in the transmission of human rights norms into domestic systems and ensuring national compliance with global standards.²⁰ These institutions have also emerged as important actors in shaping human rights norms at the international and regional levels.

Therefore, ANNI is of the view that the work of NHRIs must constantly improve and evolve in response to contemporary challenges and increasing sophisticated tactics employed by States. If NHRIs fully uphold human rights principles and are able to be independent and effectively function, then they would be able to fulfil social expectations and hold promises that their establishment creates. Furthermore, NHRIs will also be able to claim that they are a key ally and discerning partner in human rights protection and governance.

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The Experience of the All India Network of NGOs and Individuals Working with National and State Human Rights Institutions (AiNNI)

*Henri Tiphagne**

Abstract

The All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) owes its formation to the participation in the annual conferences of the Asia Pacific Forum (APF) of national human rights institutions (NHRIs) and the lessons learnt from civil society that have successfully challenged the accreditation process of their respective NHRIs. Despite all the challenges, since 2010 AiNNI has been constantly monitoring and engaging with the State and NHRIs. This chapter looks into the origins, achievements and highlights of AiNNI.

The formation of AiNNI

The National Human Rights Commission of India (NHRC) was initially formed through an ordinance which was later passed as the Protection of Human Rights Act, 1993¹ in the Indian Parliament. During the days of formation, pertinent human rights advocates of those days, like the late Mr. K. G. Kannabiran were extremely critical about statutory institutions to protect human rights as compared to the protection for human rights that could be obtained through the subordinate criminal courts, High Courts and the Supreme Court of this country, under their writ jurisdiction. In spite of such critical

observations during the initial stages, the NHRC established itself much better than what was actually expected in its initial years. The Chairperson and the members genuinely functioned as a team, and in all areas that the NHRC was to establish itself definite progress was made.

Complaints handling became one of the most important functions of the NHRC, accompanied with the careful development of procedural guidelines. Special efforts were then initiated in the field of research, establishment of Special Rapporteurs, publication of the periodic annual reports and NHRC's role in the formation of the Asia Pacific

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Forum (APF) of national human rights institutions (NHRIs). The NHRC was sensitive to criticisms made by civil society organisations (CSOs) and gradually they were incorporated within the framework of the NHRC's development. Special efforts were always made to ensure that the Chairperson and Members heard the voices of civil society, especially the most critical ones. Gradually, before the end of NHRC's first decade, this effort was institutionalised in the formation of the National Core Group of Non-Governmental Organisations (NGOs).

It is however important to recall the words of the late Mr. K. G. Kannabiran, an eminent human rights lawyer, activist and former president of People's Union for Civil Liberties (PUCL) who suggested that the problem in human rights in India *"is the existence of a political system that guards and supervises an exploitative order ... Setting up a human rights commission will not humanize state agencies"*.²

There are many who agreed with Mr. K. G. Kannabiran's feelings. NHRC has a very specialised architecture involving a Chairperson (a former Chief Justice of Supreme Court of India) along with four Members (two are former Judges) and ex-officio members who are from among the Chairpersons of the National Commission for Women, the National Commission for Minorities, the National Commission for Scheduled Caste, the National Commission for Scheduled Tribes. This then would in effect provide NHRC as a very unique institution working for the

human rights of all people in India. As years passed by, critics started expressing their concerns and one such first report was brought out by the South Asian Human Rights Documentation Centre, New Delhi titled *"Judgement Reserved: The case of the National Human Rights Commission in India"* (2001) edited by Mr. Ravi Nair.³

People's Watch, the organisation that I was engaged with on human rights from its inception in the year 1995, has increasingly engaged with NHRC particularly through its complaints handling programme. Later, People's Watch came out with its own report titled *"From Hope to Despair: The complaints handling mechanism of National Human Rights Commission of India"* in September 2006. People's Watch then stated that although India's NHRC was established mainly as a means of deflecting international criticism, the creation of a national institution devoted to the protection and promotion of human rights evoked great hope amongst human rights groups across the country. *"From Hope to Despair"* was based on the experience of People's Watch with the NHRC with a detailed analysis of 80 cases filed between September 2001 and April 2005, highlighting the failure of NHRC's complaint handling and frustration of those who had placed their hopes in the institution. These were perhaps the only two critical reports registered on the performance of the NHRC until the walkout of NGOs at the 5th Conference of the APF in Mongolia in 2005. It is this walkout that led to the formation of the

Asian NGOs Network on National Human Rights Institutions (ANNI) in 2006. It was in 2007 that ANNI commenced the publication of its annual reports on the establishment and performance of the NHRIs in Asia. From 2007 onwards, the ANNI reports consistently had a chapter on the Indian NHRC.

The association of People's Watch with ANNI was the basis of learning from the positive experiences and the best practices of the different NHRIs in Asia, as well as to draw inspiration from the work of the very dedicated civil society activists in the Asia-Pacific Region. The first of the strong lessons came from Sri Lanka, where the Sub-Committee on Accreditation (SCA) had, due to the intervention of CSOs in the re-accreditation process, ensured the downgrading of the Sri Lankan Human Rights Commission in the year 2007 to 'B' status, meaning not fully in compliance with the Paris Principles.⁴ This was one of the first examples of the downgrading of a full member of the then International Coordination Committee (ICC) now known as the Global Alliance on National Human Rights Institutions (GANHRI). This experience was a sign of hope. In 2009 the Human Rights Commission of Malaysia (SUHAKAM) was celebrating its 10th anniversary of the passing of its enabling law of 1999 and faced the possible downgrading to 'B' status⁵ by the ICC of NHRIs. SUHAKAM was boycotted by 42 CSOs with urgent intervention being undertaken. This collective effort led to Malaysia amending the Human Rights Commission of Malaysia Act of 1999 in 2009. And thereafter it was also only in

the second session in November 2009 that the ICC-NHRI confirmed SUHAKAM's 'A' grade status,⁶ again pursuant to the amendment made to its founding statute as per the recommendations of the SCA.

These signs of hope of the engagement of CSOs in successfully intervening in the affairs of their respective NHRIs generated hope that People's Watch would be able to achieve the same in India by joining hands with several other civil society partners. People's Watch already had the privilege of its Executive Director serving on the National Core Group of NGOs in the NHRC from 2001 onwards, and continuing in the reconstitution Core Group in the year 2006. This brought People's Watch closer to appreciate the inner dynamic functioning of the NHRC. It was this internal experience, coupled with learnings from Sri Lanka, Malaysia and the impetus provided by ANNI through its regular annual reports and annual conferences that led to the formation of the All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) in Goa in February 2010. This was how AiNNI was born and its formation lies in the lessons learnt from the partners of ANNI in the Asia Pacific Region. As a civil society platform, AiNNI owes its origin to the experiences it gained through its participation in the annual conferences of the APF and the lessons learnt from civil society successfully challenging the accreditation process of their respective NHRIs in Sri Lanka and Malaysia.

Achievements

The first achievement of AiNNI was the “NGOs Report on the Compliance with the Paris Principles by the NHRC of India” submitted to the ICC of NHRIs on 22 January 2011.⁷ The report was initiated in 2009, after gaining confidence from Sri Lankan and Malaysian experiences with the ICC. The most interesting aspect of the report was that it featured a quote stated by Ms. Margaret Sekkagya, the Special Rapporteur on the situation of human rights defenders, stated during her visit to India on 21 January 2011.⁸ The Special Rapporteur called for the functioning of the NHRC to be reviewed with a view to strengthening the NHRC by broadening the selection criteria and diversifying its composition; expending one year limitation calls; and calling for an amendment of protection of the human rights act with full and meaningful consultation with civil society. The chapters in this report deals with the establishment, independence, composition, appointment process, tenure and organisational infrastructure of the NHRC. Another highlight of the report was the epilogue titled “The Current Leadership of NHRC”, referencing almost 23 articles between 7 December 2010 and 17 January 2011, all relating to Mr. Justice K.G. Balakrishnan, the then Chairperson of NHRC. The report was endorsed by 333 individuals and organisations, and comprised 30 annexures all based on information obtained through almost 250 Right Information Act applications filed by AiNNI.

It was this report that resulted in the 2011 SCA report recommending NHRC to be re-accredited to ‘A’ status,⁹ with five powerful observations to make in relation to composition and pluralism; appointment of the Secretary General; appointment of Director General of Investigation; the relationship of the NHRC with civil society; and complaint handling function on the annual report of the NHRC.

The next achievement was a submission of the report during the next accreditation of NHRC on November 2016. There were many suggestions made to AiNNI not to submit a report in 2016 due to challenges that People’s Watch had been subjected to between 2012 and 2014 for having hosted the Secretariat of AiNNI. But AiNNI decided to go-head and submit its second alternate report in the accreditation process of NHRC in 2016. The report was taken into consideration by the SCA, decided for the first time in the case of the NHRC that its reaccreditation would be deferred to the second session in 2017.¹⁰ The persistence on the part of AiNNI, the collective endorsement made to the AiNNI report, and the valid issues raised in the report were solely responsible for this deferment of the NHRC reaccreditation process. The SCA once again noted seven concerns, two more than in the year 2011 and once again highlighted the issues of selection and appointment; composition; pluralism; appointment of the Secretary General and Director of Investigation; political representations on NHRC; co-operation with other human rights bodies;

NHRC compliant handling process; and its annual report.

This deferred application came up for consideration in November 2017, two months prior to the 25th Anniversary of the NHRC. This time AiNNI submitted the report in association with the South Asian Human Rights Documentation Centre from New Delhi. The SCA recommended that the NHRC is accredited with 'A' status.¹¹ The surprising aspect for many of us in civil society working closely with NHRC was that the NHRC's proposing amendments to its enabling law was sufficient for the SCA to commend its efforts to address the previously noted concerns in 2011 and 2016. Therefore, while recommending 'A' status to the NHRC in its 25th anniversary year, the SCA noted once again for the third time in succession the issues of composition; pluralism; selection and appointment of Secretary General; involving police officers in investigation; cooperation with other human rights bodies; and its annual report.

These have been the greatest achievements of AiNNI has continuously, over a period of eight years, utilised the SCA as the platform for ensuring better compliance to the Paris Principles.

With the experience that AiNNI had on working closely with the NHRC, in 2015, it cooperated with, and brought together for the first time in Indian history almost 170 functionaries of National and State Human Rights Institutions from across the country to discuss issues related to their independence, transparency

and effectiveness. At the national level, in addition to the NHRC, the country established separate NHRIs dealing with women, minorities, children, scheduled castes, scheduled tribes, right to information, persons with disabilities, and the issues of manual scavengers. These Commissions have also spread across all states and union territories, but not even once had the Government or the NHRC made any effort until then to bring all of them together. Indeed this experiment of AiNNI was historic and a learning process to realise the genuine interest of most members who participated across the country about the need for statutory bodies with independence.

It was this experiment resulted in AiNNI conducting a series of capacity building programmes between the year 2016 and 2018 for functionaries of State Human Rights Institutions in the South, North, East, West and North-East regions of India, aimed at acquainting the functionaries with the Paris Principles. The capacity building programme was also simultaneously conducted for civil society activists, especially representing vulnerable communities so that their participation in the daily functioning of State Human Rights Institutions is gradually increased and improved. In addition to this, AiNNI has always been following issues through its periodic press releases and frequent memorandums submitted to the government on issues of appointments of members to the NHRC without following the recommendations of the SCA of the GANHRI.

Challenges and lessons learnt

Immediately after AiNNI's first intervention with the SCA in January 2011, People's Watch, the Secretariat of AiNNI, kept being continuously visited by authorities from the Ministry of Home Affairs. This resulted in the legal body holding People's Watch and hosting AiNNI to suffer a series of three consecutive suspensions of 180 days each of its registration to receive foreign funding. In 2017, in a counter affidavit filed by the Ministry of Home Affairs, it was categorically clear that it was the functioning of People's Watch and entities such as AiNNI and others engaging with United Nations' human rights mechanisms that was responsible for it losing its foreign funding registration under the Foreign Contribution (Regulation) Act. This continues even today after almost 1700 days.

This has affected the functionalities of AiNNI for a very long time, particularly between 2016 and 2018 during the accreditation process of the NHRC, resulting in People's Watch not even being considered a fit organisation to be invited to any of the NHRC events connected with its 25th anniversary celebration. However, it is important to note that the year after that 25th Anniversary, in 2019, and after

the capacity building assessment of the NHRC by the United Nations Office of the High Commissioner of Human Rights, United Nations Development Programme, and the APF, there have been significant efforts at wanting to make up for the best and build bridges with civil society. AiNNI's National Working Secretary was invited as a special invitee for the NHRC Core Group on NGOs meeting held on 30th June 2019. AiNNI welcomed this move and believes that it is a recognition of its consistent efforts in monitoring the functioning of the NHRC in India, a model to almost 169 other human rights institutions in the country.

It has been a difficult task for CSOs. In spite of all the challenges it had to face, AiNNI is determined to move forward with hope because the NHRC belongs to everyone, and is primarily our duty to ensure its standard grows higher and higher beyond international standards.

It is the duty of civil society to take ownership in the process of enhancing the standards of all National and State Human Rights Institutions in the country. This responsibility has to be carried out collectively with passion. HRDs working with NHRIs have to imbibe this value, being prepared for long term engagement, as there is not a short-term remedy when working with NHRIs.

Endnotes

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Commission on Human Rights of the Philippines: A Beacon for the Dignity and Human Rights of All

*Jose Luis Martin C. Gascon**

Abstract

In 1987, a new Constitution included strong provisions on human rights, economic development and people's empowerment, hoping to never repeat the earlier Martial Law years. This strong commitment to human rights was operationalised through the creation of the Commission on Human Rights of the Philippines (CHRP). However, in light of its human rights work and cooperation with other human rights mechanisms, CHRP became a target of the current administration. This chapter takes stock of the achievements and challenges of the CHRP through its interactions with the national, regional and international human rights mechanisms.

In a human rights based approach to governance, the State or Government has certain obligations such as its primary responsibility to:

- Respect human rights while ensuring each person's human rights are not violated;
- Protect human rights from third parties (non-state actors such as business, civil society and individuals) who could infringe upon the enjoyment of such rights;
- Fulfil responsibilities by taking positive steps to realise human rights.

The international system, particularly the United Nations (UN), has recognised since its earliest days that the implementation of human rights obligations is primarily a domestic responsibility. For almost 70 years it has encouraged the development and establishment of specialised, local or national mechanisms to fulfil such obligations.

In 1990, there were fewer than 20 National Human Rights Institutions (NHRIs) around the world, including the Commission on Human Rights of the Philippines (CHRP).¹ In 1993, the UN General Assembly adopted the Paris Principles relating to the status

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and functioning of national institutions for the promotion and protection of human rights. This instrument established and legitimised the role of NHRIs and led to the increase of national institutions in the succeeding years. To date, there are 120 NHRIs across the globe.²

In 1987, prior to the Paris Principles, the Filipinos ratified a new Constitution with strong provisions on human rights, economic development, checks against political graft and corruption, and people empowerment with the hope never to repeat the earlier Martial Law years. Embedded in the basic law was a strong commitment to human rights, particularly operationalised through the creation of the CHR. It could be argued that – as with other triumphs against authoritarianism happening globally – the Philippines example was a leading light for a lasting democratic era here and abroad.

Despite human rights guarantees in the Constitution, violations remain. Space for human rights defenders continues to be challenged, key rights such as freedom of association, the right to organise and the right to information are being curtailed, nay suppressed.

Challenges confronted by the CHR

Because of its human rights monitoring work, including cooperation with the UN, the CHR has become one of the visible targets of this current administration. The CHR is being vilified in the media as a hindrance to implementation of

the policies of the Government and receives blatant threats to be defunded and abolished.

It is not just the CHR that is being attacked by the State. The CHR, in its 14 March 2018 statement (and succeeding press releases and reports at the national level and to international human rights mechanisms), noted with grave concern the vilification of human rights mechanisms and human rights defenders:³

...over recent discourses from the Philippine government that has consistently questioned the legitimacy of international human rights mechanisms in ensuring the rule of law and human rights in the country. This is despite the fact that the Philippines has been a signatory to a number of treaties on human rights, in turn, have given authority to these bodies to monitor the situation and recommend measures in improving the human rights condition in the country.

At the same time, we note the qualified expressions of openness by the government to receive experts to assess the human rights situation in the Philippines. The government is open to investigations, officials say, except for those who they allege of being biased.

The Commission, however, notes that expressions of concern on the human rights situation in the country should not be construed as partiality. As in

the case of UN Special Rapporteurs, investigations are opportunities to clarify and collaborate in pursuit of better protection and promotion of human rights on the ground.

Instead, Agnes Callamard (Special Rapporteur on extrajudicial, summary or arbitrary executions) has been constantly a subject of government tirades. Victoria Tauli-Corpuz (Special Rapporteur on the rights of indigenous peoples) has been included in a petition to declare her as a “terrorist.” And, recently, even the Philippine security sector was advised by the President to ignore human rights probe by international human rights bodies due to perceived lack of merit and bias.

We caution the government against dispensing allegations without proof. Rather than attacking human rights bodies and human rights defenders, we urge the government to display sincere commitment to transparency and the rule of law by allowing unhampered investigations to take place... [emphasis supplied]

The September 2018 report of the UN Assistant Secretary General, tasked to look into reprisals, has highlighted among many countries the situation of human rights defenders in the Philippines, including the CHRP, and brought to the international arena the current state of human rights at the local level.⁴ The CHRP has been approached by grassroots organisations, indigenous peoples,

farmers, youth and rights activists who have sought protection against harassment, intimidation and trumped-up charges. The CHRP is verifying and investigating these cases, and providing protection based on our guidelines and procedures on investigation and provision of assistance.

Taking stock of the challenges, achievements through engagement with regional and international human rights mechanisms

Our mandate includes “*the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection.*”⁵ We enforce this mandate through the main pillars of the CHRP: human rights protection, human rights promotion and human rights policy.

While we advocate for the protection and promotion of the rights and dignity of all in the country and the rights of overseas Filipinos and their families, we also have an obligation to engage with regional and international human rights mechanisms as vested by the Paris Principles.⁶ As NHRIs are independent from the State, we can formulate programmes and projects directly with all entities. The CHRP can enter into human rights activities with governments and/or civil society, NHRIs

in other countries, and other non-state actors, provided independence is not sacrificed so that the monitoring function is still exercised.

South East Asia National Human Rights Institutions Forum (SEANF)

One of the CHRP's networks in the Asian region include the South East Asia National Human Rights Institutions Forum (SEANF). SEANF is a group of six NHRIs in South East Asia, composed of the CHRP and Komisi Nasional Hak Asasi Manusia (Komnas HAM) of Indonesia; Suruhanjaya Hak Asasi Manusia (SUHAKAM) of Malaysia; Myanmar National Human Rights Commission (MNHRC); National Human Rights Commission of Thailand (NHRCT); and Provedoria dos Direitos Humanos e Justiça (PDHJ) of Timor Leste.

The CHRP has been proactive in the programmes of the forum, especially in the annual and technical working group meetings where NHRI members review, collectively decide on, and recommend action points for implementation at the regional and national levels. SEANF undertakes joint projects or activities to address issues of common concern such as migrants, refugees and asylum seekers, statelessness, business and human rights, and older persons.

The CHRP also has entered into agreements with NHRIs to monitor the human rights situations of the Filipinos and their families. In March 2019, a Memorandum of Understanding (MoU)

has been signed between SUHAKAM and Komnas HAM, with the CHRP as observer. Through this MoU, the three NHRIs aim to collaborate and support each other in addressing issues related to statelessness in Sabah from a human rights perspective. SUHAKAM, Komnas HAM and the CHRP will also work closely together with their respective governments on issues pertaining to stateless persons and persons at risk of statelessness in Sabah. They shall conduct joint research to understand and address the geopolitical nature and historical impetus of this issue.⁷

Asia-Pacific Forum of National Human Rights Institutions

The CHRP is a member of the Asia-Pacific Forum (APF) – one of the four regional groupings of NHRIs that make up the Global Alliance of National Human Rights Institutions (GANHRI). Our membership to APF gives regional as well as international recognition, and again the CHRP is more influential in effecting human rights promotion and protection, by serving as a bridge between the national, regional, and international mechanisms. It is through regional membership that appointment of an NHRI to be part of the Sub-Committee on Accreditation (SCA) is determined. I am privileged to have been elected in February 2017 as the Asia-Pacific representative at the SCA for a three-year term. Together with other NHRI representatives from the three other regions, we strive to strengthen the mandates of NHRIs through

meticulous review of accreditation and re-accreditation applications.

In January 2019, the CHRP and the National Human Rights Committee of Qatar signed a Cooperation Agreement. This has given a platform for both NHRIs to monitor their respective governments' enforcement of national laws and obligations under international treaties relating to the protection of the rights of Filipino workers and their families. This agreement is a significant milestone in the effort towards human rights protection. We might be able to explore ways of cooperation so that both NHRIs will be able to advance our respective mandates.

International human rights mechanisms

At the international level, the CHRP brings to the fore the human rights situation in the country and our human rights advisories to the Philippine Government. Our engagement with the UN system, particularly the treaty-based bodies, Human Rights Council, the Universal Periodic Review and Special Procedures as well as membership in the working groups of GANHRI, are crucial in calling the attention of the State on its human rights obligations. This is part of our mandate to "monitor the Philippine Government's compliance with international treaty obligations on human rights."⁸

As an example: When the Philippines reported and was reviewed for the third cycle at the 27th session of the UPR Working Group in 2017, the CHRP monitored the

entire process and provided advisories to the Government on the recommendations the State has accepted, noted and not fully supported. 95 States made statements at the interactive dialogue. A total of 257 recommendations were made. On 22 September 2017, at the 36th Session of the Human Rights Council, the Philippines responded to the recommendations, with the Human Rights Council adopting the outcome and the report of the UPR Working Group:⁹

"Of the 257 recommendations received by GPH,¹⁰ a total of 103 were accepted and fully supported, given that these recommendations clearly gave due recognition and respect to the State having implemented them or to its current efforts in implementing the same.

A total of 154 recommendations were noted...

... Moreover, among the 99 recommendations were those perceived to insinuate, advertently or inadvertently, that the State has not taken any action whatsoever on the concerns raised despite having substantially reported the same both in the National Report and during the interactive dialogue. Full acceptance of these recommendations would denigrate the State's current serious efforts that already address the issues raised.

...The State could not support a total of 55 recommendations.

While GPH continues to carry out its responsibilities in upholding respect, promotion, and protection of human rights, the State could not agree to the recommendations' premises and contexts. Most of the recommendations were sweeping, vague and even contradictory, especially in the context of the Philippines' democratic processes. A few of the recommendations, however, may merit future consideration by GPH depending on the results of internal processes to be undertaken relative to the recommendations, including a review of specific treaties or conventions and multi-stakeholder consultations."

The CHRPH views the acceptance of the recommendations to be indicative of the Government's recognition of the above as issues of human rights in the country. This shows that the Government is aware of these issues and is able to commit (or continue to commit) towards working to address them. However, in the same light, the CHRPH highlights that the acceptance was made in furtherance of commitments that the Government has already made in the past, bearing in mind its previous and current initiatives. The CHRPH regards this as an anachronistic approach to the UPR process that also envisions to drive States to action for the future. If the Government is truly committed to fulfilling its obligations on human rights, it must be able to accept recommendations that would alter its previous and current initiatives, redirect its attention to new

matters of concern, and reshape policy and legal frameworks. The Government would have to be responsive to the changing human rights landscape.¹¹

Recommending States in the UPR, the treaty bodies and the human rights community are greatly concerned about the Government's agenda in reinstating the death penalty. The passage of House Bill No. 4727¹² and the pending bills before the Senate is in contravention of the Philippines' obligation under international human rights law, particularly the Second Optional Protocol to the International Covenant on Civil and Political Rights. The CHRPH urges legislators to heed the legal assertions in the study that it conducted with international law expert Dr. Christopher Ward, Senior Counsel at the New South Wales Bar and Honorary Professor at the Australian National University.

The study entitled, "In Defense of the Right to Life: International Law and Death Penalty in the Philippines"¹³ clarifies that the Philippines has exercised its sovereignty to become party to international treaties that absolutely prohibit the re-introduction of the death penalty in the Philippines. The study considers the Philippine Constitution, international law, state practice and domestic jurisprudence and concludes that it is impermissible for the Philippines to withdraw from those treaties. Neither is there any ability for the Philippines to raise constitutional provisions as arguments against the validity or interpretation of

those treaties. In view of the absolute nature of those treaties, the enactment of the current legislative measure is a blatant breach of international law; and it constitutes an internationally wrongful act subject to international responsibility.

The CHRP believes that the global momentum on the abolition of the death penalty will continue, and that the Philippines, in this regard, must stop its spiral into such a regressive and illegal policy. Our latest video statement at the 40th Session of the Human Rights Council underscores the unwavering advocacy against the death penalty.¹⁴

National Inquiry on Climate Change (NICC)

In 2015, a petition was filed before the CHRP by various petitioners, one of which is Greenpeace, against Carbon Majors and Oil Companies. This attempted to establish a nexus between climate change and human rights, prompting the CHRP to conduct the National Inquiry on Climate Change. The objective was to (1) determine the impact of climate change on the human rights of the Filipino people and if the top fossil fuel producers of the world, or the so-called Carbon Majors are fuelling climate change; and (2) cross-examine an investigative process that the CHRP has embarked on may interest other NHRIs in the handling of human rights cases with trans-boundary character.

Although the CHRP did not have enforcement jurisdiction, or compulsory process against the parties, it had the duty

to inquire into the matter brought before it. One of the challenges encountered was that the CHRP could not compel respondents to appear before it or impose any sort of damage against any of the parties. Several hearings were conducted both within the Philippines as well as outside the country, particularly in New York and London, in collaboration with the New York Bar Association and London School of Economics, as well as in the Netherlands. The inquiry panel received testimonies of witnesses and considered the opinions of more experts and academics on the issue.

The CHRP concluded its hearings last December 2018. A report of the findings will be released during 2019.

Global Compact for Safe, Orderly and Regular Migration (GCM)

The CHRP also played a role in the adoption process of the Global Compact for Safe, Orderly and Regular Migration (GCM) together with other NHRIs across the globe. Adopted on 10 December 2018 by 164 UN member states in an international conference in Marrakech, Morocco,¹⁵ the GCM is a monumental achievement where member states, civil society, NHRIs and all relevant stakeholders have come together to address all aspects of migration with promotion and protection of human rights at its core.

As the Asia-Pacific member of the Task Force Migration of the GANHRI, the CHRP has been actively engaged from the beginning of the GCM negotiations. The

role of NHRIs has been identified in the GCM itself,¹⁶ and in the various phases of implementation of the GCM at the national level.

After the adoption, the real hard work of implementation, follow up and review begins. The CHRP is keen on continuing its engagement with the Philippine Government in the development of a National Action Plan. The full implementation of the GCM through a National Action Plan can only be realised if the State will collaborate with other stakeholders like civil society, academia, media, trade unions, diaspora organisations, and migrants themselves. The CHRP can assist the State in bringing together the various stakeholders in a multi-stakeholder dialogue and consultation. Against this backdrop, the CHRP is anticipating the fulfilment of the rights of overseas Filipino workers and their families in the implementation of the GCM, as well as internationally binding treaties relevant to migration and human rights, including the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.

Engagement of the Commission on Human Rights in the sessions of the Committee on the Status of Women (CSW)

The Sessions of the Committee on the Status of Women (CSW) are known to be one of the largest gatherings of global leaders, civil society organisations, private sector organisations, and representatives

of UN agencies. During these sessions, participants discuss various subjects relating to the promotion of gender equality and women empowerment. The CHRP actively participates in the annual sessions of the CSW as well as its side-events. Its participation involves advocating for the full and independent participation of NHRIs in the meetings of the CSW, since currently NHRIs do not have any standing in their own right to participate in CSW sessions and can only attend as part of their country government's delegation. Prior to attending the sessions of the CSW, the CHRP engages with the Philippine Government to encourage authorities to lobby for the inclusion of a stand-alone paragraph in the Agreed Conclusions, urging the CSW Secretariat to establish modalities to further enhance the participation of NHRIs and their networks in future sessions of the CSW. The CHRP likewise urges the Government to participate in and co-sponsor NHRI side-events within the sessions and provides guidance and support when necessary.

GANHRI Working Group on Ageing

The CHRP, as member of the GANHRI Working Group on Ageing, campaigns for a binding treaty on the rights of older persons. In the recently concluded 10th Session of the UN Open-Ended Working Group on Ageing (OEWGA),¹⁷ the Philippines has taken a more active role in the discussions with the election of the Philippines as Vice Chairperson of the working group, and with the participation

of the CHRP as member of the panel for the session on education, training, lifelong learning, and capacity-building. At the crux of the debates – on whether a multilateral binding human rights instrument on older persons is needed – both the Philippine Mission and the CHRP, albeit representing a relatively young country, expressed strong support for the immediate adoption of an International Convention on the Rights of Older Persons.

Prior to the election of the Philippines in the OEWSGA, the Government has signified support for the advocacy work of NHRIs for the rights of older persons. Then Ambassador Teodoro Locsin Jr. at a side event during the 9th session of OEWSGA, “cited the various efforts of the Philippine government to support the elderly, including sustained implementation of the social protection programs, laws penalizing age discrimination in employment, establishment of income generating projects, updated guidelines on the care of the elderly, upgraded public healthcare facilities, and the five-year framework plan for senior’s health and wellness. He stated that more areas of productive cooperation with Commission on Human Rights is encouraged.”¹⁸

The CHRP looks forward to continuing its coordination with the Philippine Government in making more visible the human rights situation of older persons in the country and advancing legislation and programmes to promote and protect their rights. The enactment of the bill to provide for the creation of a council for the welfare of older persons¹⁹ for instance,

is one step forward for the progressive realisation of the rights of older persons.

Collaboration

I wish to conclude by emphasising another significant aspect of human rights advocacy, and that is collaboration. Civil society that includes grassroots organisations, trade unions, national and international non-governmental organisations is usually the “first responder” in human rights situations. The Paris Principles highlight the important role played by civil society and recommends that NHRIs should:

“... develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.”²⁰

The CHRP offices are located in the Central/capital and in the regions but we do not have presence in communities where violations often occur. Civil society presence in these communities is essential. NHRIs should continue nurturing good partnership with human rights defenders and human rights organisations, and build alliances with diverse groups such as faith-based organisations, legal volunteers, and bar associations. Another key strategy is to bring in the coalition of the willing local governments who can work with us.

Early warning mechanisms are crucial, and the CHRP strives to improve its quick reaction teams, together with lawyers, forensic experts so that we can immediately respond when incidence occurs. Regular dialogues with human rights defenders are also important, as we are forewarned of potential threats, and developments, so we can create early warning for threats, assaults and attacks and inform our partners.

Collaboration and alliance with other NHRIs and regional and international networks provide another layer of support and reinforcement. When the Lower House of Congress attempted to defund the CHRP, the calls from local, regional and international communities and fellow NHRIs echoed throughout the world and pressured our Government to reinstate our budget.

“They can do their worst, I’ll do my part” and *“always stand our ground in terms of our mandate”* as I have remarked in my media interviews. The CHRP will continue to perform its duties and responsibilities as enshrined by the 1987 Philippine Constitution, the laws that enable our mandate, the Paris Principles and international human rights treaties.

Endnotes

1. From A Manual on National Human Rights Institutions, Asia Pacific Forum, May 2015, Chapter 1, page 7. “The official report of the Paris workshop in 1991 lists the

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A Decade of AICHR: Progress, Challenges and Opportunities*

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Abstract

Since its formation in 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) has made notable progress but also encountered challenges. As AICHR celebrates its 10th anniversary, this chapter considers how this regional human rights mechanism can move forward in light of the challenges and lessons learnt. Furthermore, it looks into ways for AICHR to better engage with critical stakeholders such as civil society groups, and evolve to protect the human rights of its people, remaining relevant to their struggle in the region.

From 2009–2019, the Association of Southeast Asian Nations (ASEAN) region has witnessed widespread and systemic human rights violations perpetrated by state authorities, as well as abuses by non-state actors.¹ In Myanmar, the Rohingya ethnic minority has faced systematic violence, discrimination, and segregation. These, according to the United Nations (UN) Human Rights Council-mandated Fact-Finding Mission on Myanmar report, could amount to genocide. In the Philippines, aside from increasing restrictions on freedom of expression, largely through the curtailment of online and offline press, and moves toward populist authoritarian policies, large-scale extrajudicial killings in the name of “war on drugs” have reportedly resulted in the

death of over 27,000 people, most of them from poor and marginalised communities.

ASEAN, governed by the ASEAN Charter, is committed to promote and protect human rights in the region.² It has 3 main pillars: the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was founded on 23 October 2009 at the 15th ASEAN summit. AICHR comprises of 10 representatives appointed by each member state. The institution works under the ASEAN Political-Security Community and shall report its activities to the ASEAN Foreign Ministers’ Meeting (AFMM). Furthermore, the institution carries aspiration as an

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overarching institution for promoting and protecting human rights in the region. AICHR, as an individual representative and a regional human rights institution, is guided by 14 specific mandates and functions as set out in the Terms of Reference (TOR).³

2019 is the 10th anniversary of AICHR. During the first decade, the institution has made notable progress and, at the same time, encountered challenges. The following sections will deliberate about these aspects, as well as how AICHR can move forward and continuously evolve to protect the region's human rights in order to remain relevant to the people's struggle in the region. The review is based on AICHR's mandate in the TOR that is clustered into standard setting and institutional building (TOR 4.2), implementation of activities and strategies (TORs 4.1, 4.7, 4.11, 4.12), engagement with stakeholders (TORs 4.8, 4.9), and response to human rights violations/protections (TORs 4.1, 4.7).

On setting the standard to promote and protect human rights in ASEAN

As an overarching regional institution to promote and protect human rights, AICHR is mandated by ASEAN Member States (AMS) to set the standard on theoretical and ideological understanding, as well as practices pertaining to human rights that shall be adopted by all AMS. One of AICHR's mandates in accordance to the TOR is to develop an ASEAN Human Rights Declaration (AHRD) that was finally

adopted in 2012 together with the Phnom Penh Statement on the Adoption of the AHRD.

The AHRD was supposed to be a manifesto of aspirations on how human rights need to look like and should be upheld in the region. However, many stakeholders have conveyed disappointment and criticism against the document. In particular, it was pointed out how this document waters down international human rights standards by imposing wide-ranging restrictions that can be utilised as an escape route by AMS to neglect its duty to uphold human rights. Some of the contested provisions are located in its General Principles that mentions that the enjoyment of the rights provided in the Declaration to be "balanced with the performance of duties",⁴ subject to "national and regional contexts", and to considerations of "different cultural, religious and historical backgrounds".⁵ All rights set out in the AHRD may also be restricted on a wide array of grounds including "national security", "public morality", and "general welfares of peoples in a democratic society".⁶

Progress and challenges on strengthening the institution

On institutional building, there is evidential proof that AICHR as an institution has been systematically weakened by AMS who have lack of concern on human rights. This is exemplified by how AICHR representatives are selected.

In the past decade, seven out of ten representatives of AICHR were selected through direct appointment at the discretion of the respective AMS. Only three countries, namely Indonesia, Malaysia, and Thailand have implemented open selection through civil society organisations (CSOs) can send representative(s) to the selection, and be part of the selection committee for their respective AICHR representative.

As the majority of its representatives are directly selected by the respective AMS, AICHR has a tendency to work based on the interest and political will of the AMS they are representing, rather than being driven by people's needs for protection. This triggered major concerns on AICHR's impartiality, independence, and professionalism on performing its mandate. Rather than becoming an independent institution, AICHR has been hiding behind the ASEAN "non-interference principle" and "consensus-building". Inevitably, this is hindering its ability to become a more responsive and efficient institution to protect human rights. In comparison to other regional and international human rights mechanisms such as the Economic Community of West African States (ECOWAS), AICHR has the weakest protection record with no function to receive complaints.

To overcome this challenge, the previous AICHR, in particular Thailand and Indonesia, planned to establish complaints or correspondence procedures, or at least respond to letters of complaints addressed to AICHR.⁷ Former Malaysian

representative to AICHR, H.E. Edmund Bon Tai Soon, proposed a communications procedure with an initial formula that requires minimum commitments from the AMS, tailored to ASEAN's circumstances, while accommodating the requirements of ASEAN's principles. The former representative also offered his services to draft a proposal to establish this communications procedure.⁸ Until now, there has been no positive response from AICHR to this proposal, and AICHR has not responded to any letters of complaint addressed to it.

On implementation of activities and strategies

From 2010–2018, AICHR spent over six million US\$ conducting 121 activities.⁹ These included standard setting and institution building, capacity building, public awareness, engagements with various actors, human rights mainstreaming, as well as alignment with relevant ASEAN Sectoral Bodies. Some notable activities including the adoption of the ASEAN Enabling Masterplan 2025 (Masterplan): "Mainstreaming the Rights of Persons with Disabilities" showed how an overarching institution should lead the development of key policy actions for the three ASEAN community pillars with close consultations involving relevant Sectoral Bodies and stakeholders, with due regard to universally accepted standards.¹⁰ The Masterplan is considered as a unique document and a success case of how rights of vulnerable groups can be mainstreamed through the AMS and ASEAN entities.

It should be acknowledged that AICHR has undertaken a number of activities with a view to mainstream human rights across the three community pillars of ASEAN, as well as into the works of other stakeholders, including ASEAN Sectoral Bodies, the Judiciary, and Law Enforcement Officials.¹¹

These activities led to discussions and debates on human rights within the ASEAN system. Yet, there is no impact analysis of AICHR activities and their relevance to the actual human rights situation on the ground. AICHR, as a regional human rights institution, needs to go beyond implementing activities, and conduct an impact assessment on the extent to its activities have improved human rights mainstreaming in ASEAN countries, and how they have impacted those who participated in them.

AICHR's engagement with stakeholders

As a regional human rights institution, AICHR has a mandate to consult, as may be appropriate, with other national, regional, and international institutions and entities concerned with the promotion and protection of human rights,¹² and to engage in dialogue and consultation with entities associated with ASEAN, including CSOs.¹³ Both ASEAN and AICHR mandates affirm the position of AICHR as a regional body to enhance regional cooperation in complementing national and international efforts on the promotion and protection of human rights. In other words, for AICHR to

be an effective human rights mechanism, it cannot work in silos. Cooperation with national and international mechanisms, together with other entities such as CSOs, are quintessential for AICHR to provide holistic protection for human rights in the region. This cooperation, however, was not fully functional in the past decade.

Relationship with national human rights institutions (NHRIs)

On the inception process of AICHR, propelled by Article 14 of the ASEAN Charter that enshrined the need to establish an ASEAN human rights body, four NHRIs (Indonesia, Malaysia, Philippines, and Thailand) have agreed that the nature of the relationship between NHRIs and the regional body should be catalytic, complementary, and cooperative with each other.¹⁴ The four NHRIs have initiated discussion through the ASEAN Human Rights Institution Forum (later on to be known as the South East Asia National Human Rights Institution Forum or SEANF) on the feasibility for the NHRIs to expedite the establishment of an ASEAN human rights body in 2008.

A cooperation between the NHRIs and a regional human rights body would bring advantages to both. On the one hand, the NHRIs, as a Paris Principles-compliant body, can strengthen the ASEAN human rights body in various ways: it can cooperate on monitoring compliance with international instruments; receive and share information with regional mechanisms with regard to complaints related to human rights

violations; coordinate activities at the national level; contribute on capacity building; and assist the regional mechanism in forming cooperative ties with other regional systems.¹⁵ On the other hand, NHRIs can leverage on their relationship with the ASEAN human rights body, particularly on working together to assist in the establishment of future NHRIs in the region, and on discussing sensitive issues that might not be possible to be discussed in the national setting due to risks of repercussion and pressure from AMS.

Reflecting on this, cooperation with NHRIs can significantly strengthen AICHR's mandate, such as to "develop common approaches and positions on human rights matters of interest to ASEAN"¹⁶ and "to prepare studies on thematic issues of human rights in ASEAN".¹⁷ In the past decade, however, this function and cooperation have yet to be fully implemented. The NHRIs were notably excluded during the development process of the AICHR TOR and AHRD.¹⁸ Despite several attempts conducted by SEANF to convey interest on building cooperation with AICHR, such as providing technical support for AICHR to develop and implement policies in the region through a rights-based approach, the follow up for the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers¹⁹ projects that none of the cooperation has come to fruition.

Overall, the relationship between AICHR and NHRIs has been overlooked. Having only six AMS with NHRIs makes it difficult for AICHR to reach a consensus as to how they would engage with NHRIs as a whole. At the same time, AICHR has yet to develop its own Rules of Procedure prior to engaging with external parties.²⁰

Relationship with international human rights mechanisms

One of the purposes of AICHR is to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights (UDHR), the Vienna Declaration and Programme of Action (VDPA), and other international human rights instruments to AMS are parties of.²¹ In fact, the creation of AICHR itself as a regional human rights institution is closely related to the VDPA that was adopted by the World Conference on Human Rights in 1993.²²

The connection between regional and international human rights mechanisms is also reflected in AICHR's TOR. AICHR needs to, among others, promote capacity building for effective implementation of international human rights treaty obligations undertaken by the AMS;²³ encourage the same to consider acceding to and ratifying international human rights instruments;²⁴ and consult, as may be appropriate, with other national, regional, and international institutions and entities concerned with the promotion and protection of human rights.²⁵

In the past decade, cooperation between AICHR and international mechanisms has not been at optimum. This is due to the fact that AMS have varying degrees of commitment and political will when it comes to upholding international human rights standards. So far, all AMS have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC); and Convention on the Rights of Persons with Disabilities (CRPD). The degree of commitment, still, varies from one state to another. It should be noted that majority of AMS have yet to ratify most of the Optional Protocols (OPs) to these three treaties, especially those that involve communication and complaint procedures.

The relationship between AICHR and international mechanisms is also affected by the growing sentiment of AMS against international human rights mechanisms under the pretext of “The West” intervening in national sovereignty and security. For example, Myanmar had publicly refused to cooperate with the Independent International Fact-Finding Mission (IFFM) on Myanmar in the investigation related to human rights violations pertaining to Rohingya and other ethnicities in the country – later even denouncing the findings. In a parallel way, The Philippines has withdrawn from the International Criminal Court (ICC) as a result of President Duterte’s negative sentiment towards the ICC and the possible investigation into the extrajudicial killings. As AICHR is very dependent and driven by the political

will of AMS, the backward and hostile attitude from the majority of them toward international human rights mechanisms makes it difficult for the AICHR to engage.

As a regional body, AICHR should be independent but still work to complement other human rights mechanisms. This shall include fully complementing and cooperating with international human rights mechanisms in demanding accountability from AMS for human rights violations taking place in their countries, both perpetrated by State and/or non-state actors. Ideally, where gaps are identified in implementing human rights treaties or in respecting and protecting human rights more generally, every attempt should be made to address such gaps, including at the regional level. In ASEAN, AICHR is the regional body that should be taking up this task, while the AMS should ensure that it has the mandate, resources, expertise, and independence needed to carry it out.²⁶ However, the reality has shown otherwise, and ASEAN and AICHR have been oftentimes used by AMS as a shield to prolong human rights crisis.

Relationship with CSOs

To perform its duty, AICHR needs to engage and dialogue with CSOs. AICHR has strengthened its relations with accredited CSOs over the past few years, particularly by establishing AICHR’s CSO Participation Guidelines enacted in 2015, granting consultative status to CSOs.

Since the establishment of the guidelines, the number of applications from CSOs for Consultative Relationships with the AICHR

has been increasing.²⁷ This might serve as an indication of increasing visibility of AICHR's work and the interest of CSOs to engage with it. Currently, AICHR has at least 30 CSOs with Consultative Relationship working on areas of civil and political rights, women's rights, disability rights, children's rights, indigenous peoples' rights, migrant workers' rights, labour rights, the right to development, and the right to peace – among others.

Although engagement of CSOs with AICHR is set with the guidelines and its TOR, it still relies heavily on the assessment and proactiveness of individual representatives. Concerns remain among members of CSOs regarding their relationship with AICHR. There are persistent feelings of apprehension by CSOs over their interactions with AICHR, particularly on sensitive human rights issues. On a more structural level, the parameters within AICHR representatives determine whether to grant CSOs a consultative relationship are very vague. This implies that CSOs are not seen as meaningful partners within the regional mechanism – in contrast with their counterparts within international mechanisms such as the Universal Periodic Review (UPR) process.

Further, CSOs' participation in, or at least input into the development of AICHR's work plan is either non-existent or severely limited. Although work plans are circulated in regional and/or national workshops, CSOs have not had any opportunity to provide input, analyse, or strengthen workplans in view of their

familiarity with the human rights situation on the ground. This lack of engagement hinders evidence-based decision-making even further.

In 2018, 16 CSOs submitted a communication to AICHR to demand a more meaningful and participatory engagement between AICHR and CSOs, including creating an enabling environment for dialogue that is inclusive and free from discrimination.²⁸

Response to human rights violations

Regretfully, during the past decade, AICHR has failed to act meaningfully on emerging reports of serious violations in the region. It has shown deafening silence on the gross human rights violations in Myanmar, the mounting death toll from extrajudicial killings in the Philippines' "war on drugs", shrinking space for civil society in several ASEAN states, and rising intolerance as well as discrimination against vulnerable groups such as religious minorities and Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) persons in the region. ASEAN's approach to solidarity has often been at the cost of overlooking serious human rights violations and the rise of autocratic regimes in the region. This is contrary to the values espoused in the AHRD and the commitment it makes to the VDPA and the Universal Declaration of Human Rights.

AICHR's lack of political will, independence, and impartiality have made it succumb to the pressure of those AMS who are

violating human rights in the region. As a consequence, AICHR has been ineffective to exercise its protection mandate. Amidst the pressure, some progressive AICHR representatives have made considerable efforts to further human rights in the region by seeking to mainstream protection practices, build consensus on addressing sensitive human rights issues, and, on one occasion, release an independent – if limited – statement in response to egregious human rights violations against the Rohingya in Myanmar. It is hoped that the same representatives will continue their efforts in trying to diminish the barriers that keeps AICHR from engaging in human rights protection, given that these efforts have not yet succeeded in transforming AICHR into a body that actually protects human rights.

Nevertheless, AICHR as a whole needs to increase its commitment to human rights at the institutional level. AICHR needs to be independent and be strengthened so that it can enforce its powers to implement a meaningful and effective mandate for the protection of human rights.

Opportunities to move forward

Overall, there is evidential proof that AICHR, as individual representatives and a collective institution, has yet to live up to its mandate to promote and protect human rights in the region. It has failed to acknowledge the actual human rights situation in the region and to provide

timely, effective, and efficient protection to those who are in need. If AICHR wants to be relevant to the struggle of people in Southeast Asia, it must undergo major changes at the institutional and individual levels.

On standard setting, CSOs such as the International Commission of Jurists, Amnesty International, and FORUM-ASIA, have called for the need to amend AHRD. Being the departure point of ASEAN standards on human rights, AHRD needs to be amended to ensure that it upholds universally accepted standards. As long as the AHRD is ASEAN's key human rights document, there is a serious risk that any future ASEAN human rights convention would be based on the AHRD and its rights-diminishing General Principles. It is therefore imperative that ASEAN in general, and AICHR in particular, work to revise the AHRD to bring it in line with international human rights law and standards before any efforts are made to draft an ASEAN convention on human rights.

Further, AICHR as a regional human rights institution needs to be at the forefront of safeguarding human rights in the region. To do this, AICHR needs to work beyond its current modality of non-interference and consensus building. It must show bold action to respond to human rights crises by proactively requesting information from relevant AMS, conducting investigations and studies, and issuing public statements in a timely manner pertaining to the human rights situation in the region. To do

this, it should strengthen its engagement with NHRIs, UN Mechanisms, and CSOs, in order to establish a holistic human rights protection mechanism. AICHR needs to recognise and see the value of sustainable and meaningful engagement with national and regional mechanisms, as well as with CSOs to strengthen the institution.

One particular added value that can be the result of these engagements is the creation of the complaint mechanism. AICHR needs to seriously develop a complaint mechanism that can be accessed by all people in the region without exception. The complaint mechanism can complement already existing mechanisms at the national and international levels. Together with these mechanisms, and with the active involvement of CSOs as equal partners for checks and balances, AICHR can contribute to creating a holistic protection mechanism in every complaint can have a solution and follow up, including requesting responses from the relevant AMS.

On strengthening institutional building, AICHR needs to obtain trust and confidence from its people. These can only be done by maintaining the independence, impartiality, and professionalism of the institution. Having said so, institutionalising an open and just selection process for each AICHR representative is necessary.

As a starting point, FORUM-ASIA, together with a coalition of CSOs for AICHR selection, has developed in 2018 a set

of indicators for AICHR selection process that can be used by the selection panel to assess and evaluate the candidate. Based on AICHR's TOR and the Paris Principles, these indicators outline quintessential characteristics and traits that AICHR representatives should possess in order to execute his/her mandate to promote and protect human rights in their home countries, as well as in the region. The indicators include the area of: 1) knowledge and expertise; 2) leadership and communications skills; 3) accountability and participatory; and 4) independence, impartiality, and personal integrity. The set of indicators was introduced in Indonesia, Malaysia, and Thailand by a member of the coalition. As a result, Malaysia had its first AICHR open selection in history. In the future, hopefully, more AMS can adopt this modality.

All of these recommendations are necessary to be documented and institutionalised. Therefore, AICHR as an institution also needs to pressure AMS to strengthen and amend its TOR, in order to ensure a more elaborate and detailed protection mandate, professionalism and independence of representatives, existence of specific mandates related to protection - such as complaint mechanism- and a decision-making procedure that would not rely only on consensus building. This will only be realised if there is a serious commitment from each AMS to make the regional institution fully functional.

With the situation of human rights deteriorating in the region, added by

rising populist authoritarian regimes in ASEAN, AICHR as a regional human rights mechanism needs to step up its game. AICHR's proactive role is essential to protect the rights of its people and remain relevant to their struggle.

Endnotes

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Participation of Non-Governmental Organisations in the United Nations: Procedures, Impacts and Trajectories

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Abstract

Non-governmental organisations have always been an integral component of the United Nations (UN). They are to a large extent responsible for the centrality of human rights within the UN. In recognition of the value and effectiveness of civil society participation in the formative processes of the UN, the UN Charter explicitly provided for civil society participation in the UN. This article attempts to investigate this relationship between the UN and civil society, and how this relationship has evolved over time, particularly in the current global political climate.

Introduction: NGOs in the UN - A brief history

The adoption of the United Nations (UN) Charter with a robust human rights framework linking, for the first time, human rights to global peace, stability and development has transformed international politics and multilateralism. Human rights are recognised as a common standard to measure human achievement. In recognition of the value and effectiveness of civil society participation in the formative processes of the UN, the UN Charter explicitly provided for civil society participation in the UN, institutionalising the relationship between the UN and civil society.

Non-governmental organisations (NGOs) are intrinsic to the current international human rights architecture. Since its inception, NGOs are central to the UN's aspiration to make human rights one of the foundational elements of the post-Second World War global order. Perhaps the best articulation of this aspiration can be found in the Universal Declaration of Human Rights (UDHR). With the adoption of the UDHR in 1948, the UN General Assembly proclaimed the UDHR as "a common standard of achievement for all peoples and all nations."¹ Basis for this proclamation, as well as the global human rights architecture that sprung from the UDHR, are contained in the UN Charter (Charter). Specific references

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to human rights in the Charter marked a historic milestone.² “[R]eaffirm[ing] faith in fundamental human rights”³ is one of the key objectives of the UN set out in the Charter. This determination to re-establish faith in rights and freedoms signals the UN’s desire to essentially transform post-War multilateralism and diplomacy to one based on human rights, contours of which are outlined in the Charter. The Charter states that “friendly relations among nations” should be premised on “respect for the principle of equal rights and self-determination of *peoples*”,⁴ and that international cooperation should be aimed towards “promoting and encouraging respect for human rights and fundamental freedoms for all”.⁵

The Charter’s revolutionary embrace of rights-based language also marks a paradigmatic shift, at least in theory, in international approaches to global peace, security and stability. While earlier treaties referred to religious freedom, rights of minorities, or prohibition of slavery, none had directly linked peace, security and stability to respect for human rights and fundamental freedoms, as set in the Charter.⁶ It recognises that universal respect for human rights and fundamental freedoms underpins international peace and security. It mandates the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms” as preconditions for “stability and well-being are necessary for achieving peaceful and friendly relations among nations.”⁷ Perhaps, most importantly, the Charter unprecedentedly

provides for a specialised institution within the framework of the UN with a mandate to promote universal respect for human rights worldwide.⁸

This historic milestone, however, would not have been possible without NGOs. Had it not been for the commitment, determination, and pressure of a group of American NGO representatives assigned to the United States Delegation at the Conference on International Organisations in San Francisco in 1945, where the Charter was drafted, the Charter would have carried nothing more than only a passing reference to human rights.⁹ While the idea of NGO representatives participating as consultants of the United States delegation was unclear and their role uncertain and undefined, their contribution is reflected in the Charter provisions for human rights. Many observers hailed the participation of NGOs in the San Francisco Conference as “an innovation in the conduct of international affairs” and an “experiment in democracy in action on the diplomatic level” that made “important contribution[s]”.¹⁰

It was in recognition of the efforts and value of NGO contribution, demonstrated in the effectiveness of their lobbying in San Francisco that the Charter provided for formal institutional relations between the UN and NGOs. The Charter allows the Economic and Social Council (ECOSOC) of the UN to make arrangements for consultation with NGOs. Article 71 of the Charter reads:

“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”

Inclusion of these references to NGOs in the Charter, given the number of contentious issues such as the relationship between the UN and existing intergovernmental arrangements during the San Francisco Conference,¹¹ was in itself a victory. Since the adoption of the Charter, the UN has invariably insisted on the centrality of NGOs to the achievement of the aims and purposes of the UN. Similarly, NGOs have claimed their right to participate in or consult with the UN freely without fear of reprisals. Modalities and processes to allow NGOs to participate in the UN are elaborated in the arrangements for consultative relationship with NGOs adopted by the ECOSOC, as stipulated in the above provision of the Charter.

Arrangements for consultative relationship between the UN and NGOs

The provision in the Charter “for consultation with non-governmental organisations” is operationalised through the Arrangements for Consultation with NGOs contained in the ECOSOC resolution

1996/31, adopted on 25 July 1996. This resolution reflects the fourth major iteration of the “arrangements for consultation with non-governmental organisations” maintained by the UN to define modalities for relationships with NGOs. The first iteration of these arrangements was adopted by the ECOSOC in June 1946¹³ replacing a more comprehensive arrangement in February 1950. This was later revised with minor modifications in May 1968 with the ECOSOC resolution 1296 (XLIV)¹⁵ that remained in force until it was superseded by current arrangements in the ECOSOC resolution 1996/31 of July 1996. These arrangements govern the basis, scope and modalities for all consultative relationships between the UN and NGOs within the parameters of Article 71 of the Charter.

The main evolution throughout successive revisions of arrangements for consultation is the expansion of the NGO eligibility criteria that can seek consultative status with the UN. Until current arrangements were adopted, consultative status with the UN was limited to international organisations – “international in structure, with members who exercise voting rights in relation to the policies or action of the international organisation.”¹⁶ National organisations could only be admitted to consultative status “to help achieve a balanced and effective representation of non-governmental organisations reflecting major interests of all regions and areas of the world”; or if the ECOSOC so wishes, to draw upon the “special experience” they have.¹⁷

Adoption of the ECOSOC resolution 1996/31 opened doors for national

organisations to enter into consultative arrangements with the UN. Significant developments like this in the institutional frameworks for NGO engagement with the UN have followed watershed moments for human rights at the international level. The initial provisions in the Charter allowing NGO participation in the UN followed the successful advocacy at the San Francisco Conference by American NGOs to include a robust human rights framework in the Charter. This evolution of institutional frameworks admitting national NGOs into consultative arrangements followed successful lobbying by representatives of over 800 NGOs – two-thirds of them from grassroots level¹⁹ – at the Vienna World Conference on Human Rights in 1993 to affirm that all human rights are universal, indivisible, interdependent and interrelated.¹⁹

Besides this, the fundamentals of consultative arrangements between NGOs and the UN have remained essentially the same throughout these different iterations. The elementary principle that underlies successive updates of the arrangements is adherence to two key parameters set out in the Charter. Firstly, only ECOSOC is allowed to make such arrangements with NGOs. Secondly, ECOSOC can enter into consultative arrangements with NGOs that are “concerned with matters falling within the competence of the [ECOSOC] and its subsidiary bodies.”²⁰ Additionally, the arrangements require that the aims and purposes of NGOs be in line with the spirit,

purposes, and principles of the Charter, and that NGOs should support the work of the UN and promote knowledge of its principles and activities.

According to the ECOSOC resolution 1996/31, NGOs that are eligible to enter into consultative relationships with the UN are defined as “[a]ny...organisation that is not established by a governmental entity or intergovernmental agreement,” and “have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.”²¹ Additional criteria to be eligible for consultative relationship include alignment of aims and purposes of the organisation and the principles and purposes of the UN Charter; broad recognition of the organisation within the field of its competence; bureaucratic structure of the organisation with an established headquarters, executive officer and a democratically adopted constitution; and the organisation’s authority to speak for its members through authorised representatives.

As a State-centric institution, inevitable distinctions are made between the scope of the roles of member states and NGOs in accordance with the Charter. The fifty-four member states of the ECOSOC are entitled to vote on decisions of the ECOSOC, while non-member states or observer states and representatives of

specialised agencies can “participate, without vote, in its deliberations.”²² NGOs stand on the lowest rung in the hierarchy of levels of engagement with the UN. The role of NGOs admitted into consultative relationship is limited to “consultation” with the ECOSOC, i.e., to share their views, opinions, and expertise through written statements or oral presentations as provided for in the Charter and the arrangements for consultation. The ECOSOC resolution 2/3 as well as the three successive updates to the arrangements for consultations with NGOs affirm “this distinction, deliberately made in the Charter, is fundamental and that arrangements for consultation should not be such as to accord to non-governmental organisations the same rights of participation accorded to States not members of the Council and to the specialised agencies.”²³

On the basis of this distinction, the arrangements define guidelines and scope for consultation with NGOs by the ECOSOC, its commissions and other subsidiary organs, and ad-hoc committees, as well as for participation in international conferences convened by the UN. These guidelines outline specific requirements to be followed by NGOs in their attendance at meetings, submission of information and opinions in written statements, oral interventions during meetings, as well as guidelines for NGOs’ access to information related to meetings of the ECOSOC and its subsidiary organs.

The extent to which NGOs could contribute to deliberations of the ECOSOC is further

determined by the nature of consultative arrangements with the respective NGOs. The ECOSOC grants consultative status to NGOs in three distinct categories. First, the general consultative status, is given to organisations that are concerned with most of the activities of the ECOSOC and its subsidiary bodies. NGOs given general consultative status are required to demonstrate “substantive and sustained contributions to make to the achievement of objectives of the [UN]” in all matters that fall within the competence of the ECOSOC.²⁴ At the same time their membership is required to be broadly representative of major segments of society in a large number of countries in different regions of the world. NGOs in this category have a broader scope of consultation and higher level of access to UN. They can propose to place items of interest to the organisations in the provisional agenda of the ECOSOC, as well as commissions and subsidiary organs of the ECOSOC.

In contrast, the second major category of NGOs given consultative status – special consultative status – are those that have special competence in and are concerned specifically with only few areas of activity covered by the ECOSOC and its subsidiary bodies.²⁵ Consultation with these NGOs is limited exclusively to areas within the latter’s competence. The ECOSOC or the Secretary-General could place other NGOs that can make “occasional and useful contributions” within their competence to the work of the ECOSOC or other UN bodies on a list known as the Roster.²⁶

The ultimate authority of granting suspension or withdrawal of consultative status, as well as interpretation of principles and norms related to consultative status, lie with member states of the UN. They exercise this authority through the ECOSOC, and specifically, the Committee on Non-Governmental Organisations (NGO Committee). Despite several revisions of arrangements for consultations between NGOs and the UN, mechanisms related to applying for and granting consultative status have in general remained static over the past seven decades. The NGO Committee comprising 19 member states elected by the ECOSOC,²⁷ is tasked with reviewing and considering applications for consultative status and making recommendations thereon to the ECOSOC.

There are currently 138 NGOs in the general consultative status, 4,052 in the special consultative status and 971 on the roster, totalling 5,161 NGOs in consultative status with the UN.²⁸ Although only NGOs with consultative status with ECOSOC are able to engage directly with the ECOSOC and its subsidiary bodies, different UN human rights mechanisms have adopted more liberal criteria to allow NGOs to contribute to its work. For instance, consultation or engagement with Special Procedure mandates and the Universal Periodic Review (UPR) mechanism of the UN Human Rights Council as well as UN treaty bodies are not limited to NGOs in consultative status with the ECOSOC. These mechanisms perhaps allow the broadest possible consultation with NGOs

and civil society out of all UN entities. Engagement with the UN Human Rights Council – a subsidiary body of the General Assembly – is however limited to NGOs with ECOSOC consultative status.

The nature, dynamics, and scope of NGO engagement with the UN have evolved considerably since the adoption of the arrangements in 1996. Broader consultations between NGOs and special procedure mandates, together with the UPR mechanisms of the UN Human Rights Council and UN treaty bodies demonstrate these emerging shifts. The arrangements, however, do not accommodate these changes. One can argue that the existing arrangements for consultation with NGOs are too archaic and limiting in the current context of engagement between the UN and NGOs. This is best displayed in the negotiations on the UN Human Rights Council's resolutions on reprisals against those who cooperate with the UN. States that seek to prevent reprisals are often reluctant to cite these arrangements in these resolutions, while others that seek to limit NGO participation in the UN regularly invoke these arrangements. Implicit in this debate is the view that these arrangements provide an alibi for reprisals – states can legitimately retaliate against those that fail to comply with these arrangements in their interactions with the UN.

Current arrangements for consultation with NGOs do not espouse fully the extent to the exercise of the right to freedom of association is permissible under

international law. Right to freedom of association broadly includes the right to associate freely without formal structures – absence of a formal, administrative or a bureaucratic structure with an established office, an executive officer, or formal recognition as an NGO, does not preclude individuals from the exercise of their right to freedom of association as envisaged in the UDHR and the International Covenant on Civil and Political Rights (ICCPR).

Impact of NGO participation in the UN

On legitimacy of the UN

Intrinsic in the institutionalisation of NGO participation in the UN is the formal acknowledgment of the role and utility of NGOs to the purposes of the UN. But how does the UN benefit from NGO participation in the UN? Institutionalisation of consultation between NGOs and the UN implies a broader, more fundamental, yet tacit, agenda for the UN. It is one that foregrounds the willingness to mitigate an inherent deficiency in multilateralism and global governance – legitimacy. Multilateralism and global governance have remained exclusively the domain of nation states. Ostensibly democratic, multilateral institutions and international organisations have suffered from a serious lack of legitimacy primarily because their debates and decisions do not consider or reflect voices of the peoples on whose behalf, and for whom, these decisions are taken.

All prominent contemporary conceptualisations of legitimacy adhere to the principle that national as well as international law should be based on the assent of individuals.²⁹ In particular, in the Habermas' concept of legitimacy, any law or decision can claim legitimacy only if it meets with the assent of all possibly affected persons in discursive processes of laws or decisions that in turn have been legally constituted.³⁰ While meeting the assent of all concerned may not be conceivable given the resources and logistical difficulties, like other international institutions, the UN faces the charge that its decisions are disconnected from people about and for whom its decisions are made. The Charter boldly claims that it represents the determination of “we the peoples of the United Nations.”³¹ However, representation of the peoples, particularly during the formative processes of the UN was limited to governments. Notwithstanding the fact that governments are legitimate representatives of peoples under their respective jurisdictions at the UN and other international institutions, many governments lack robust democratic credentials to be able to genuinely represent their people. Institutionalisation of NGO participation in the UN is arguably a bid to make up for this possible legitimacy deficit that arises from misrepresentation of the peoples by largely undemocratic governments. Here, in the absence of a legitimate representation, NGOs represent “we the peoples” in decisions made for and on behalf of “we the peoples.” Or, at least, NGOs add another

layer of representation especially for the most marginalised, unrepresented or oppressed peoples. NGO participation in the UN is therefore fundamentally linked to the legitimacy of the UN itself.

The UN recognises this link between NGO participation and its legitimacy. The UN's own assertions about NGO participation appear to reflect cognisance of the usual charge against the UN that its State-centric decisions and discussions are often disconnected from the realities on the ground. Civil society is called on to bridge this disconnect. For instance, a recent report by the High Commissioner for Human Rights to the 38th regular session of the UN Human Rights Council focusing on the "procedures and practices in respect of civil society engagement with international and regional organisations"³² portray civil society participation as the antidote to this widely held perception that discussions and decisions of the UN are disconnected from realities on the ground. The report affirms that:

"Civil society engagement ensures that international discussions and decisions are informed by what is happening on the ground, that a full range of perspectives are heard, and that relevant expertise and experience feeds into decision-making. Where civil society engagement is restricted, responses to security threats, development challenges, environmental disasters and disease, among others, risk being ill-informed and weaker."³³

Furthermore, the arrangements for consultation with NGOs represent what

Habermas calls the institutionalisation of procedures and conditions for communication. This view suggests that the success of deliberative politics in legitimating outcomes depend on this institutionalisation, as well as on the interplay of deliberative processes with informally developed public opinion.³⁴ Key principles in the arrangements are designed to reconcile the lack of legitimacy that continue to beset international institutions primarily because the voices of the peoples that are most impacted by the decisions and outcomes of these institutions are effectively absent in their deliberations. Criteria for selection of NGOs that are accredited to consult with the UN are underpinned by the need to maximise the extent to which NGOs are able to legitimately represent broader groups of people and views in their respective areas of work. They view NGOs as conduits for people about whom the UN makes decisions or convene deliberations. Consultations with NGOs are the process that facilitates the interplay of deliberative politics with public opinion.

The basic eligibility criteria for NGOs to be accredited to consult with the UN require that they be independent from governments and have representative structures or democratic decision-making processes. NGOs in consultative relationship with the UN are required "to have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting

rights or other appropriate democratic and transparent decision-making processes.”³⁵ This presupposes that each NGO in consultative status represents a large number of members that have an equal say in deciding the interventions and positions of the organisation independent from the government. The arrangements further require that the authorised representatives of the organisation have the authority to speak for its members. That is, each NGO representative equates to a large number of other individuals that have a direct interest in or opinion on matters that fall within the competence of the ECOSOC.

Other requirements regarding the external characteristics of organisations seeking consultative arrangements similarly indicate the disposition to enhance legitimacy of the UN through consultation with NGOs, in lieu of direct participation of the public. Organisations seeking consultative status are required to “be of recognised standing within the particular field of its competence or of a representative character.”³⁶ This is based on the assumption that broader recognition or popularity of an organisation indicates that the organisation is backed by a large constituency of people who have an interest in or an opinion on issues represented by the organisation. Hence, consulting with the organisation is equivalent to consulting with everyone that identifies with the interests or opinions represented by the organisation.

The objectives or purposes of consultation with NGOs reiterated in the arrangements

for consultation are premised on the assumption that NGOs represent “important elements of public opinion”.³⁷ The ECOSOC resolution 1996/31, as well as previous versions of the arrangements, outline the two main objectives that ought to guide the decisions on consultative arrangements. First, the arrangement should enable the ECOSOC or its bodies to secure expert information or advice from organisations; and, second, it should enable organisations that represent important elements of public opinion to express their views.³⁸ Here NGOs are seen as purveyors for public opinion, as well as experts on information and advice. At the same time, the totality of NGOs in consultative status is expected to reflect major viewpoints or interests in the fields within the competence of the ECOSOC in all areas and regions of the world. That is, a limited number of NGOs given consultative status should represent the totality of opinions held by a wide spectrum of the public on a given field, exempting the need for broader public consultation while preserving the appearance of broader consultation.

The real measure of legitimacy of the UN is its ability to translate decisions into positive changes on the ground for the people who are affected by these decisions. As one observer puts it, “the institutionalised participation of non-governmental organisations in the deliberations of international negotiating systems would strengthen the legitimacy of the procedures insofar as mid-level transnational decision-making processes

could then be rendered transparent for national public spheres, and thus be reconnected with decision-making procedures at the grassroots level.”³⁹

On human rights and UN human rights mechanisms

The international human rights edifice depends largely on NGOs for its application. Nearly all states accept the validity of the international human rights framework. Over four-fifths of the 193 UN member states have ratified the two core covenants of the international bill of rights. 170 states have ratified the International Covenant on Civil and Political Rights (ICCPR), and 167 have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN human rights mechanisms rely heavily on NGOs in assessing the states’ compliance with international human rights obligations including the implementation of treaties. All monitoring mechanisms, in particular, treaty bodies and the UPR, depend on input and participation of NGOs for their assessment of states’ compliance with human rights obligations. The NGO input into these mechanisms make up a crucial component and an independent view, in the review of human rights performance of states. Special Procedure mandates of the UN Human Rights Council rely significantly on NGOs for their interventions in situations that concern their respective mandates as well as in their contribution to development of norms and standards.

Besides these, international human rights architecture is exceptionally state-centric. The world’s apex human rights body – the UN Human Rights Council (the Council) – consists of 47 states. Decisions of the Council are made exclusively by the member states. Scope of NGO participation in this mechanism, like all the other mechanisms of the UN, is limited to ‘consultation’ as stipulated in the ECOSOC arrangements for consultation with NGOs. As a result, direct power of NGOs to affect decisions of the Council is limited. They lack coercive capacities and material resources that states often wield to influence decisions of institutions such as the UN and the Council. NGOs’ power to impact decisions and outcomes of the Council or the UN, in contrast, lies in their ability to persuade and attract others with arguments and information.⁴⁰ They use the power of their information, ideas and strategies to alter the information and context within decisions are made.⁴¹ Most of their work in this regard can be termed persuasion or socialisation that often involves not only reasoning with targets of their advocacy, but exerting pressure, arm-twisting, encouraging sanctions, naming and shaming.⁴² This type of power exercised by NGOs finds parallels in Foucault’s conceptions of power of discourse. According to Foucault, discourses decide what is “right” and “wrong”, and, more importantly, discourses produce issues that are talked about, as well as the subjects and their identities⁴³ that in turn affect their behaviour and decisions.

From this perspective, NGOs wield enormous power at the Council. NGOs have been instrumental in landmark decisions of the Council. Recent examples include the decision of the Council to create a special procedure mandate on protection against violence and discrimination based on sexual orientation and gender identity, right to privacy, or to initiate a process to elaborate a binding treaty on human rights and transnational corporations. Similarly, collaboration between local, regional, and international NGOs is largely responsible for significant decisions of the Council country situations such as Myanmar, where a Council-mandated fact-finding mission has found credible evidence of genocide against Rohingya minorities intensifying calls for accountability. NGOs are primarily responsible for normalising the term “human rights defenders” in the international human rights discourse. When the UN declaration, now known as the Human Rights Defenders Declaration, did not include a single reference to ‘human rights defenders’, consistent efforts by NGOs elevated the term to be acceptable in official decisions of the Council that succeeded the UN declaration. All these outcomes were reached as a result of persistent efforts by NGOs to persuade key stakeholders through naming and shaming, framing and reframing of issues and debates, and building solidarity and coalitions beyond borders.

Conclusion: Trajectories

NGOs, despite their resilience, have not been immune to the current global trends. Rising authoritarian and fascist regimes across the world have threatened

the work of NGOs. Civil society and NGOs are not only the first casualties of such regimes, but attempts to throttle civil society represent the first signs of an impending adoption or turn towards authoritarianism. One of the most visible features of authoritarian governments is their aversion to and reprisals against NGOs and human rights defenders who cooperate with UN human rights mechanisms. Perhaps this is testament to the effectiveness of NGOs in delegitimising such governments in the eyes of their peers. Many governments continue to limit the scope of NGO participation in the UN through deliberative processes of decisions that seek to define – and expand – human rights norms and standards on civil society space, protection of human rights defenders or prevention of reprisals against those who cooperate with the UN. This current trajectory of global politics towards authoritarian, inward looking, and ethno-nationalist States requires NGOs to adjust their strategies beyond just tactical adjustments. Globally connected networks and coalitions of principled NGOs may just be the last line of defence of human rights and democracy.

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About FORUM-ASIA

The Asian Forum for Human Rights and Development (FORUM-ASIA) is the largest membership based human rights and development organisation in Asia with a network of 81 members in 21 countries across Asia. FORUM-ASIA works to promote and protect human rights for all, including the right to development, through collaboration and cooperation among human rights organisations and defenders in Asia and beyond. FORUM-ASIA seeks to strengthen international solidarity in partnership with organisations and networks in the global South.

FORUM-ASIA was founded in 1991, and established its Secretariat in Bangkok in 1992.

Since then, other offices have been opened in Geneva, Jakarta, and Kathmandu.

FORUM-ASIA has consultative status with the UN Economic and Social Council (ECOSOC Status) and a consultative relationship with the ASEAN Intergovernmental Commission on Human Rights (AICHR).

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“It is the duty of civil society to take ownership in the process of enhancing the standards of all National and State Human Rights Institutions in the country. This responsibility has to be carried out collectively with passion” – Henri Tiphagne, Executive Director, People’s Watch, National Working Secretary, AiNNI.

Human rights mechanisms and systems are essential for creating an environment where human rights are fully realised. At the international level, the United Nations (UN) sets human rights standards and consequently ensures their promotion and protection. Commissions in the Association of Southeast Asian Nations (ASEAN), namely the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) form arguably the most notable regional human rights system in Asia; while at the national level, national human rights institutions (NHRIs) provide an avenue to enforce international and regional human rights mechanisms.

Experiences outlined by our partners in the Commission on Human Rights of the Philippines (CHRP) and the All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI) reveal different strategies of both NHRIs and civil society to effect change; while years of FORUM-ASIA advocacy give insight to the national, regional, and international levels of human rights mechanisms.

These mechanisms and systems are with their own functions and mandates, and inevitably, with their own limitations and challenges. This working paper aims to elucidate on the experiences of such mechanisms and reflect on their achievements, challenges, and ways forward.

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