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Looking for Asia's Turn

A Study of (Sub)Regional Human Rights Mechanisms of South and
Southeast Asia through India and Thailand

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Abstract

Within the global human rights governance, the regional human rights mechanisms have hitherto come to occupy an indispensable space. Displaying the capacity to span the distance between international and local mechanisms, procedures, and instruments these systems have long been installed in almost all major regions of the world, except that of Asia. From the time of debates on drafting the Universal Declaration to now, the Asian region has been popularly characterised for its approach to human rights.

Immersed in diversities and home to almost half of the global population, Asia has experienced some powerful human rights movements, has a vibrant civil society and yet has failed to establish a regional human rights system. However, the hope here comes from the sub-regional mechanism in Southeast Asia and minute strides in South Asia.

This thesis therefore employs a descriptive approach to illustrate the existing human rights mechanisms in the South and Southeast Asia through the examples of India and Thailand. Studying these countries on national, regional and international human rights dimensions, provides a complex yet hopeful picture. While the impetus for a regional mechanism is missing, the local institutions display the capacities to flourish if they work in tandem.

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1 Introduction

Any discussion on human rights in Asia will always leave a grappling sense of semantics. The discussions I have had on this topic would usually begin with the “Asian Values” debate and end somewhere not far from there. In recent times, the Asian region has emerged as the site for some of the most powerful international human rights movement¹ and yet the region as a whole perpetually seems to be surviving in a mode of an existential crisis. The roots of humanist traditions in Asia like other parts of world are age-old and have evolved concomitantly. Be it the philosophical disquisitions like those in Mahabharata, or protection of religious minorities, or rules of war such as Laws of Manu or the Hammurabi Code, all point towards the existence of some forms of traditions of rights from older times.² In modern times, the continent has witnessed rise of different democratic regimes, systems and practices, experiments in democratisation, and even the lowest most egregious situations of human rights abuses. These are the events and lessons that all other parts of the world went through and came to develop frameworks that would provide support in such situations but Asian lesson did not yield same results.

As the human rights regime progressed globally, the contemporary society came to be imbued with institutions that would help in monitoring and regulation of the duty bearers. Regional systems were one such form of institutions that were intended for the protection of human rights. These systems have come to play a significant role in the international system for protection of human rights and have become a jurisprudence source. Europe, Africa, the Americas, and Middle East have all developed regional systems that provide support, uphold the human rights framework, supplement the domestic and international frameworks and even promote the human rights agenda. Since these systems originated they have come to occupy a pre-eminent space nigher to both the domestic and the international systems, an almost perfect spot. Research also suggests that the regional human rights systems have been validated to be more effectual and useful in the enforcing the mandate of protection and promotion of human rights than even the UN regime, as they function in complementarity to the global regime and

¹ Randall Peerenboom, ‘An empirical overview of rights performance in Asia, France, and the USA’ in Randall Peerenboom and others (eds), *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA* (Routledge 2006)

² International Federation for Human Rights, ‘Demystifying Human Rights Protection in Asia’ (2015) Background Paper 699a <www.fidh.org/IMG/pdf/asie669anglaisbassdef.pdf> accessed 18 November 2017 (FIDH)

also in the regional context, manifesting the particularities of the region.³ Despite these prominent advantages, a regional regime in the Asian context remains absent.

Asia is one of the worlds most politically, culturally, religiously, ethnically, socio-economically diverse region that is home to about 60% of the global population. When looking further into regional demographics, the region has countries as big as China or as small as Tuvalu, with all main religions of the world, varied set of languages, and heterogeneity in terms of economy levels, democratization, and spread of rule of law.⁴ It has also been the seat of multitude of human rights violations that have many time lacked redressal in the face of absence of a regional mechanism.

1.1 Relevance of the work and Research Questions

The physiognomy of Asian human rights seems inconclusive, the national framework gains the lead spot in hierarchy of promotion and protection of human rights and the regional system is amiss. These were the three conclusions I reached during the third week of studying human rights in my first semester. Despite belonging to the Asian region, the situation of human rights in Asia had never stood out so glaringly to me than before this. An overview of the literature in this regard triggered my interest, as all further enquiries into this mainly led to the sub-regional mechanism for South East Asia, the Association for South East Asian Nations (ASEAN). I understood that trying to fit the region into some generalizations was a parlous task and this in itself was an insight into the discourse of the masses. This discourse reminiscent of the “Asian Values” debate that is widely cited during discussions on Asian human rights tries to characterise Asia as a distinct region that vests its sovereignty in its diversity. Why not look at a lower level then? At the states. Thereafter a look at the Asian states yielded that despite the concerns raised by Asian states regarding western approaches taken by international organisations, the role of these organisations has been discernible in Asia, historically and geopolitically.⁵ The states in the region have been active participants and in turn actively influenced by the international organisations and international human rights norms and yet the call for regional mechanisms comes only from the civil society actors. I felt that if we approached this in a balanced approach that coalesces idiographic epistemology (that relates to

³ Lukes Weston and Hnatt, ‘Regional Human Rights Regimes: A Comparison and Appraisal’ (1987) Volume 20, No 4 Vanderbilt Journal of Transnational Law pp. 589-590

⁴ Jonas Grimheden, ‘Human Rights in the Asia-Pacific’ in Felipe Gomez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto 2009) pp. 948-949.

⁵ Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (Cambridge University Press 2012) pp.155-232.

unique situations) with nomothetic epistemology (that is about generalized conclusions) it would be an interesting process.

The prospects for the development of a human rights mechanism in the Asian region has been a theme of numerous studies and groups^{6 7}, more so after the establishment of ASEAN. For a long time, there have several initiatives from UN through different workshops for creating a regional human rights mechanisms, even resolutions were passed in this regard.⁸ These thoughts were reiterated at several forums, including Vienna World Conference in 1993 and ASEAN started looking towards formation of a system at their sub-regional level. The lack of replication of this idea by the other sub-regional organisation of South Asian Association for Regional Cooperation (SAARC) is an intriguing concept that in some manner showcases the functioning of the organisation and primacy of the viewpoints of the States. In both the organisations, research postulates that the member states have an inordinate amount of space and mana.

Thus looking at these regional organisations and then member States in their individual performances in international human rights domains could provide insights in functioning and the meeting and diverging points for both. Furthermore in this context, research on these aspects is being explored in their capacity to lead to the establishment of a regional system is relevant and strengthening.

1.2 Research Questions

The present thesis is envisaged to provide responses to the following questions:

- Is there any synchronicity in these States (India and Thailand) in their perspectives towards human rights?
- Is there a possibility of a regional system emerging from the working of the sub-regional systems or will it be better to have sub regional instruments such as the existing ones and improving those?

⁶ For example, the initiative by FORUM-ASIA, Regional Initiative for a South Asia Human Rights Mechanism (RISAHRM) and its reports.

⁷ Hidetoshi Hashimoto, *The prospects for a Regional Human Rights Mechanism in East Asia* (Routledge, New York, 2004)

⁸United Nations General Assembly (4 December 1986) Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region. United Nations Doc A/RES/41/153.

1.3 Structure

The thesis is aimed to populate the space of human rights in Asian context through identification of the global, regional and domestic dimensions and encapsulate the key actors and processes in this context. Within the limited space, the intention here is to bring about conversations about human rights status in Asia in a space wider than just ASEAN.

The first chapter of the thesis provides overview of the international system of the human rights existing with the United Nations and sheds light on the existing regional systems in Europe, Africa, and the Americas. The chapter aims to present the reader with a background information of the international system so as to help understand how its premise could aid the regional networks in their functioning and to also provide a comparative framework when the regional systems are described.

The second chapter introduces the Asian regional mechanisms of SAARC and ASEAN in their evolution, functioning and present status so as to understand the level of inculcation of human rights in these organisations.

In the third chapter and the fourth chapter we focus upon the two states taken up as Case studies, India and Thailand along international and domestic parameters. The third chapter includes a study of these states in context of the international framework via three procedures. These are the ratification of international human rights treaties, United Nations Special Procedures and the Universal Periodic Review. The engagement of States in these mechanism is pursued in this chapter. The fourth chapter looks at the domestic aspect in a dual framework of the State and non-State actors, wherein the National Human Rights Institutions (NHRIs) of both the States and the civil society are studied.

The final chapter provides conclusive analysis of the regional mechanisms of SAARC and ASEAN and of India and Thailand on international and domestic parameters in the existing situation. Thereafter the chapter concludes with observations regarding the regional mechanism based on the conclusive analysis.

1.4 Methodology

With regard to methodology, the information collected from the desk research served as the foundation for this thesis. The principal sources in desk research official document of United Nations, SAARC, ASEAN, AICHR, and ACWC, FRAME Project Articles, academic sources and documents pertaining to the national institutions, advocacy documents of civil society actors and academic articles and books regarding regional mechanisms in other regions and on ASEAN.

Semi-structured interviews with four experts from India, Thailand, and Geneva working in civil society, United Nations, and academic space were conducted. These experts were UN Official from the OHCHR's National Institutions, regional mechanisms and civil society section, Professor (Dr) Mathhew Mullen, Lecturer at Institute of Human Rights and Peace Studies, Mahidol University, Thailand, Dr Lenin Raghuvanshi, Founder and CEO, People's Vigilance Committee on Human Rights (PVCHR) India, and Mr. Ahmed Adam, UN Advocacy Programme Officer, FORUM-ASIA, Bangkok, Thailand. These interviews proved to be eye-opening in terms of understanding the functioning premise of ASEAN and Asian nations. This could provide a point of context for understanding other academic article and books on the topic.

2 Overview of the United Nations and Regional Human Rights Systems

2.1 Introduction

Internationally, human rights have been found to be accentuated in the work of different agencies and organs of the United Nations and trace the normative basis of their legal framework to the Charter of the United Nations (UN Charter). This chapter takes up a descriptive approach to present a brief profile of the United Nations framework with a special focus on certain bodies and mechanisms associated with human rights. Considering the scope and focus of the study, regional human rights mechanisms from Europe, Africa and the America have been taken up in compendious sections. Undertaking this examination of these systems is intended to be relevant to garner understanding of human rights mechanism at different levels (global and regional) in order to better comprehend the Asian situation and mechanisms.

2.2 The United Nations

In 1919, the League of Nations was established under the Treaty of Versailles, as one of the first international organisation aimed towards achieving peace and security and promoting international co-operation. This was the forerunner for the United Nations (UN) that came into existence in 1945 following the periods of fascism, Nazism and World War II. This name coined by Franklin Roosevelt was used in January 1942 in the Declaration by United Nations.

The United Nations, as set forth in its charter has the purpose of: maintaining international peace and security, developing friendly relations among nations (based on principle of equal rights and self-determination), co-operation in solving international economic, social, cultural and humanitarian issues and promoting respect for human rights and fundamental freedoms.⁹

The commitment to human rights is reiterated in Article 55(c) which in the broad context of 'International Social and Economic Cooperation' provides the Organisation (UN) to promote respect for human rights universally, and observance of human rights and fundamental freedoms, irrespective of any distinction such as sex, race or religion. This global responsibility however has been found to be confining as the tasks are limited to the General Assembly and the Economic and Social Council.¹⁰ While this article talks about global responsibility, Article

⁹ United Nations, Charter of United Nations Art 1.

¹⁰ Felipe Gomez Isa, 'International protection of human rights' in Felipe Gomez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto 2009) p.34

56 puts the responsibility on the States towards committing to follow through on the provisions of the previous article. The Charter also lists the principles that have been the guiding force for the work and functioning of the United Nations. The UN in 1945 started with 51 members and presently, there are 193 member states of the UN, two permanent non-member observer states (Holy See and State of Palestine) and 84 observer entities and organisations¹¹. The Association of Southeast Asian Nations (ASEAN) and South Asian Association for Regional Cooperation are entities with the observer status. The Secretary –General acts as the figurehead of leadership in the UN structure and thus could be attributed to be a representative and spokesman of the ideals of the organisation.¹² Regional systems or organisations such as the European Union are included with a special observer status that puts them as regional organisations speaking on behalf of the member states (allowed by the state). While the member states within their capacities are provided with full rights (including voting and initiative rights), the entities with the observer status enjoy limited participation.

There are six principal organs of the UN which include – the General Assembly, the Security Council, the Economic and Social Council, the Secretariat, the International Court of Justice, and the Trusteeship Council. All these principal organs were established during the founding of the organisation in the year 1945¹³ and aid in the realisation of the goals of the UN as envisioned in the Charter. While the principal organs have subsidiary organs, commissions, departments and programmes, the UN also has specialized agencies that are autonomous organisations contributing towards the fulfilment of the work of UN. There are 15 specialized agencies that include International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), Food and Agriculture Organisation (FAO), World Health Organisation (WHO), United Nations Industrial Development Organisation (UNIDO), International Monetary Fund (IMF), World Bank Group and others.

The United Nations has different bodies and mechanisms that are accountable for enforcing and monitoring implementation of the treaties. These mechanisms are divided into Charter-based and Treaty – based bodies. While the Charter-based bodies derive their existence and functioning from the UN Charter or by a Charter-based body, the Treaty-bodies are established based on provisions of the human rights treaties, generally for monitoring the compliance with

¹¹ Intergovernmental organizations such as the African Union, European Union, International Criminal Court and non-governmental ones like International Committee of Red Cross enjoy the observer status.

¹² Current Secretary-General of the UN is Mr. Antonio Guterres who took this office on 1 January, 2017.

¹³ United Nations, 'Main Organs' <www.un.org/en/sections/about-un/main-organs> accessed 10 May 2018

the treaty provisions. The Treaty bodies are briefly described in the coming chapters and thus this section will only focus on Charter-based bodies.

2.2.1 Charter-based bodies

2.2.1.1 The General Assembly

The United Nations General Assembly (UNGA) was established in 1945 as per the provisions of the Charter and is considered the primary deliberative, representative and the policy making organ of the United Nations. The representative status can also be indicated due to the fact that all member states of UN are members of the General Assembly, making it 193 members. All these members also hold voting rights. The UNGA elects a President each year and holds annual sessions and general debates to tackle matters pertaining to peace and security, budget, and new members (admission). Special sessions of the General Assembly are also held on request of Security Council or majority of UN members.

As provisioned in Chapter 4 of the UN Charter, the General Assembly enjoys a very broad mandate and some of the work undertaken by the UNGA involved standard setting, policy development, tackling situations and issues, and creating human rights bodies such as Human Right Council, or OHCHR. The work of the General Assembly (being one of the most important component) is undertaken by main and other committees¹⁴, and subsidiary organs. The subsidiary organs of the UNGA include Human Rights Council, International Law Commission, Disarmament Commission and others. It also is one of the bodies involving drafting and passing of resolution, though these are not legally binding.

2.2.1.2 United Nations Security Council (UNSC)

Established on provision of Article 24 of UN Charter, the Security Council is entrusted to promote the establishment and maintenance of global peace and security. The Security Council has a total of 15 members, of which five are permanent members¹⁵ and ten are non-permanent members elected by the General Assembly for a term of two years. The Council also determines any threats to the peace and security and also takes decisive role in dispute settlement between states/parties. The UNSC also holds the power for inculcations of drafting resolution and in contrast to the UNGA resolutions, the UNSC resolutions have a legally binding nature.

¹⁴ There are six main committees and procedural and standing committees, such as Social, Humanitarian and Cultural Committee or Legal Committee are committees set up to deal with issues of human rights.

¹⁵ The five permanent members also known as P5 are China, France, Russian Federation, UK and USA. These states enjoy the veto power in UNSC which can be translated to cause a huge impact on workings of the UN.

Furthermore in case of enforcing the implementation measures the Security Council can authorize sanctions and even military action or use of force.

2.2.1.3 United Nations Economic and Social Council (ECOSOC)

The Economic and Social Council is principal platform for conducting discussions on social, economic and environmental issues in the UN, and for policy review and dialogues for the same. This focused approach combining economic, social and even environmental makes it the focal point for reflections associated with sustainable development.¹⁶ The ECOSOC has 54 members, who are appointed for an overlapping three year term by the General Assembly.

The ECOSOC played the role of electing the members, receiving the reports and endorsing the decisions of the Commission on Human Rights till it was replaced by the Human Rights Council.¹⁷ The NGOs involved in working at different UN bodies work in a consultative status that is also granted by the ECOSOC.

2.2.1.4 Trusteeship Council

The Trusteeship Council in UN was established under the provisions of Chapter 12 of the UN Charter, for the purpose of administration and supervision of Trust territories placed under administration of other states. At the time this Council was established in 1945, 11 such territories were accounted which by 1994 had gained independence.¹⁸ Therefore its operation was suspended in the same year.

2.2.1.5 International Court of Justice (ICJ)

Defined as the primary judicial organ of the United Nations, the International Court of Justice was established under the provisions of Article 92 of the UN Charter. Situated at the Peace Palace, The Hague, the Netherlands, the ICJ handles and settles legal disputes submitted by Member States and provides advisory opinions to the legal questions asked by UN and its organs. The above mentioned mandate restricts the functioning of ICJ in not taking up individual disputes or complaints. The judgements provided by the ICJ like other judicial organs at national and regional levels are expected to aid towards interpreting the implementation of human rights instruments.¹⁹

¹⁶ United Nations (n.13)

¹⁷ Grazyna Baranowska and others *EU human rights engagement in UN bodies*. Leuven Centre for Global Governance Studies, 2014 < www.fp7-frame.eu/13-deliverable-5-1 > accessed 19 April 2018, p.39.

¹⁸ United Nations (n.13)

¹⁹ M Schmidt, 'United Nations' (2010) cited in M Mayrhofer et al, *International Human Rights Protection: Institutions and Instruments*. Leuven Centre for Global Governance Studies (2014) <www.fp7-frame.eu/02-deliverable-4-1> accessed 25 May 2018, p.10.

2.2.2 Human Rights Council

Created on 15 March 2006, the Human Rights Council (HRC) is counted as one of the most recent significant phase in history of UN within the context of its discourse on human rights. The Council was actually the transformation of the older Commission on Human Rights (CHR) that was created in 1946. The Human Rights Council consists of 47 member states that are elected by the UNGA, individually and directly, for a term of 3 years. In terms of representation at the Human Rights Council, 13 states from the Asia-Pacific region have seats in every period and both India and Thailand have served as members in the Human Rights Council.²⁰ The Membership of the HRC has possibility of suspension through a 2/3 majority vote in UNGA for states who commit gross and systematic violations of human rights.²¹

The Commission on Human Rights had been setup as a Charter-based institution by the ECOSOC under Article 68 of the UN Charter. In its first couple of decades it was focused solely upon the task of standard setting (including drafting of UDHR) and promotion of human rights.²² However the CHR failed to address situations of human rights violations due to the State sovereignty doctrine and even stated that it was not empowered to take actions on human rights complaints.²³ On facing criticism and pressure, some instances of grave violations across were addressed and a newer agenda of dealing with violations was added²⁴. In this regard two distinct procedures known as ‘Special Procedures’ through two resolutions of ECOSOC, Resolution 1235 of 1967 and Resolution 1503 of 1975 respectively were created. The Special procedures under 1235, included setting up of two instruments of Country specific and thematic procedure with a global mandate. Secondly, under 1503, confidential complaint process was introduced. These involved four mandate holders, the Independent Experts, Special Rapporteurs, Working Groups, and Special Representatives of the Secretary-General.

Meanwhile, following the end of Cold War period, the Commission still faced criticism. Its functioning had went through various reforms along four major phases of reform movements, some of which have been discussed above²⁵. The work being undertaken by CHR was waning

²⁰ United Nations Office of High Commission for Human Rights, ‘Membership of the Human Rights Council’ <www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx> accessed 25 May 2018.

²¹ Grazyna Baranowska (n 17) 33.

²² Carmen Márquez Carrasco and Ingrid Nifosi Sutton, ‘From the Commission on Human Rights to the Human Rights Council’ in Felipe Gomez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto 2009) pp. 237-238.

²³ Ibid 238.

²⁴ Situations of racism and colonialism in South Africa, and Occupation of Palestinian territories by Israel and situation in Chile in 1975 were some instances of violations taken up by the CHR.

²⁵ Special Procedures under Resolutions 1235 and 1503 were one of the reform phases in the years 1967-1968. Another important aspect of two phases was rise in membership of the Commission.

in effectiveness and efficiency and the last phase for reform came in 1998 session of the Commission. Some interesting aspects came up in the report of the High-Level Panel of 2004 on review of CHR entitled '*A More Secure World: Our Shared Responsibility*'.²⁶ The panel questioned the credibility of the Commission and an important recommendation was made regarding upgradation of Commission²⁷ to the 'Human Rights Council'.²⁸ The Secretary-General at the time, Kofi Annan advanced these views and also introduced a concept called the 'universal peer review'.

In the World Summit in New York in 2005, the decision to establish the Human Rights Council came about on 15 March, 2006 through the resolution 60/251 as the UN General Assembly's subsidiary body.²⁹ The Council is basically the body that handles responsibility of strengthening the aspect of protection and promotion of human rights, and to address the situations of violations of human rights and provide recommendations on these situations.³⁰ It also includes other mandates such as providing platform for discussion on human rights (and thematic issues), working in collaboration with governments, human rights institutions at regional and national level and civil society, providing recommendations to the UNGA in context of development of international law and more.³¹ Another important aspect or feature of Human Rights Council is the Universal Period Review procedure (UPR)³² which was basically a review of the human rights situations or records of all the member states of the UN. This review is an interactive process engaging different stakeholders and is based on information compiled from three different sources of, national report on performance of State on human rights and challenges faced, information compiled from relevant UN bodies and a compilation from other national stakeholders of the state such as the NHRIs, NGOs and other organisations. Every Member state is reviewed every four years and the UPR is in presently in its third cycle.

²⁶ Ibid.

²⁷ Secretary General Kofi-Annan in his own report in 2005, mentioned these points of States seeking membership of the CHR to create a protection mechanism for themselves against violations criticisms or to even criticise the other States. He proposed creating Human Rights Council as principal organ of UN or as the UNGA's subsidiary body.

²⁸ Carrasco and Sutton (n 22) 241.

²⁹ United Nations Office of High Commission for Human Rights, 'About Council' <www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed on 27 May 2018 (OHCHR).

³⁰ Ibid.

³¹ UNGA Res 60/251, Operative Paragraph 5 (3 April 2006) UN Doc A/RES/60/251.

³² Tracing back to the 'universal peer review' procedure that was provided by Kofi Annan in his 2005 report. However it should be noted that back in 1956 ECOSOC had also initiated a similar process of periodic reports on human rights but it was scrapped in 1967 by the CHR.

The HRC also has the process of Complaint procedure, established through a General Assembly resolution³³ so as to “address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstance³⁴”. The complaints can be submitted by the victims themselves or anyone acting on behalf of the victims of violations and are filtered through a working groups.

To provide support in working of the HRC, there is another body called the Human Rights Council Advisory Committee (HRCAC) consisting of 18 experts, who are elected by the HRC based on nominations from governments for a period of three years. Basically this Committee has the main responsibility of “providing expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice³⁵”.

2.2.3 Office of the High Commissioner for Human Rights (OHCHR)

The OHCHR was created on 7 January 1994, through a resolution of the UNGA, consequential of the efforts at the Vienna World Conference on Human Rights in 1993³⁶. This office is headed by the United Nations High Commissioner for Human Rights (HCHR), appointed by the Secretary-General for a term of four years, and the General Assembly approves this appointment. The High Commissioner bears the responsibility for the human rights activities and mandate of the UN, under the Secretary-General. The responsibilities carried out by the HCHR could be delineated along two dimensions, internal and external. The duties under internal dimension involve completing tasks given by UN bodies and providing recommendation to these bodies in context of promotion and protection of human rights, advancing the human rights mandate throughout the UN, and strengthening and mainstreaming the processes and bodies in UN Human Rights. The external dimension requires the HCHR to actively work towards full realization of human rights and prevention of violations of human rights, provide education, technical and financial assistance, and advisory services to member states and regional bodies, dialogue engagement with Governments, and measures for enhancing international co-operation for fulfilling the mandate of protection and promotion.

These were the principal organs and the main human rights bodies of the United Nations that work usually under the broad mandate of the protection and promotion of human rights and

³³ UNGA (n 32).

³⁴ Human Right Council Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1.

³⁵ Ibid (Art. 75)

³⁶ UNGA Res 48/141 (20 December 1993) UN Doc A/RES/48/141.

derive their existence from the Charter. Due to a limited scope of work and thesis focus, we are not delving into specialised agencies or other bodies and programmes³⁷ of the UN.

2.3 Regional Human Rights Protection Mechanisms

The regional mechanisms of human rights protection are often considered as fundamental component of the international protection system. The setting up of regional human right systems was recognized and expressed as far back as 1977, in a UNGA Resolution that talked about the importance of regional co-operation, encouraged States to consider regional arrangement and recognized the contributions made by the regional Commissions in the United Nations.³⁸ Though the UN has not worked towards creating any norms or standards for creating a regional system, the importance of regional systems has been expressed regularly in numerous resolutions by the General Assembly and Human Rights Council.³⁹

Regional arrangements have been understood to be more effective in implementation of the human rights mandate due to a number of reasons. They play a unique role as they localize the international instruments such as the treaties and declarations in the context of the particular regions and their concerns and consequently help in implementation of these instruments. In addition to this, the regional human rights system perform the functions that are attributed to different UN bodies at a local level, such as spreading awareness amongst the people on human rights, provide mechanism for protection of human rights of people, assist the governments in addressing human rights concern that are regional or local and provide a local input for enhancement of international norms and standards.⁴⁰

The regional human rights that are present today originated out of regional demands for such a framework and shared interests.⁴¹ There exist three regional human rights mechanisms globally, which are the European system, the Inter-American system and the African system. The first step towards the setting up of regional initiative was taken in Europe when the Council of Europe (CoE) was established. The European system was established in reaction to the violations from the Second World War and Nazi atrocities and so as to provide a defence

³⁷ These may include the International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), United Nations High Commissioner for Refugees (UNHCR) and many more.

³⁸ UNGA Res 32/127 (16 December 1977) UN Doc A/RES/32/127.

³⁹ UNGA Res 63/170 (20 March 2009) UN Doc A/RES/63/170. See also HRC Res 24/19 (8 October 2013) UN Doc A/HRC/RES/24/19.

⁴⁰ OHCHR, 'An Overview of Regional Human Rights System <bangkok.ohchr.org/programme/regional-systems.aspx> accessed on 18 June, 2018.

⁴¹ Jina Kim, 'Development of Regional Human Rights Regime: Prospects for and Implications to Asia' <https://www.sylff.org/wp-content/uploads/2009/03/sylff_p57-1022.pdf> accessed on 20 June 2018, p. 60.

against such totalitarian regimes. While the African system originated from shared interests of the African nations to establish collective security, protect their independence, territorial integrity of member states and to stand in solidarity, the Inter-American system is said to have resulted for protection of the democratic structures in the region.⁴²

2.3.1 The African System

The African Union (AU) established in 2002 replacing the Organisation of African Unity (OAU)⁴³ is the umbrella body that houses the institutions and instruments of the African regional system. The African Union has 55 member states presently, covering the whole of African continent, excepting Morocco. The main instrument for AU is the African Union Constitutive Act that includes provision for human rights.

2.3.1.1 Instruments

Within the African system the main human rights instrument, was adopted in 1981, titled, the African Charter on Human and Peoples' Rights (African Charter or Banjul Charter) and enforced in 1986. This Charter not only provides the rights for people as well as groups but also includes provisions specifying the duties for these stakeholders. While it has been said that some of the individual rights from the international bill of rights are not included, the group rights are detailed and even provide a legal binding to the provisions to the right to development which is unique to an international treaty⁴⁴. Other instruments focusing on specific rights like children's rights or women's rights or rights of refugees have been introduced in African system at regional and sub-regional level. Some of these instruments are: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003 adopted) also called Maputo Protocol⁴⁵, African Charter on the Rights and Welfare of the Child⁴⁶ (adopted 1990), African Youth Charter (2006), and the African Union Convention for the Protection and Assistance of Internally Displaced Persons (2009).

⁴² *ibid* pp.59-60.

⁴³ Originally the Organisation of African Unity was established in 1963 by 32 member states.

⁴⁴ Magnus Killander, 'African human rights law in theory and practice' in Sarah Joseph and Adam McBeth (ed), in *Research Handbook on International Human Rights Law* (Cheltenham, Edward Elgar 2010) pp. 15.

⁴⁵ It has provisions that include the rights from CEDAW and beyond its scope such as reproductive health rights or sexual rights.

⁴⁶ Includes provisions similar to the UNCRC and was also aimed to address issues beyond the scope of CRC such protection of child soldiers, or child marriages.

2.3.1.2 Bodies

There are 12 organs in the African system, created from provisions of the Constitutive Act, including, the Assembly which is considered the supreme organ, the AU Commission, the Pan-African Parliament, the Executive Council, the Court of Justice and more. To provide a comprehensive and concise view of the system, we will briefly discuss only two most significant bodies; the African Commission on Human and Peoples' Rights and the African Court.

- **The African Commission on Human and Peoples' Rights**

The African Commission is the primary body tasked for handling the mandate of protection of human rights for the region. This Commission was created in 1987 and is presently located in Banjul, the Gambia. It consists of 11 commissioner that are elected by the African Union Assembly for a period of six years. It has three main functions of issuing resolutions and declarations, fact-finding exercises, and review State reports to provide recommendations to enhance State functioning in implementing the provisions of the Charter and other documents. It is also involved in handling complaints or petitions regarding violations of human rights, even including petitions by individuals or organisations other than the victims (*Actio Popularis*).⁴⁷ Following the global model, the Commission has established thematic Special Rapporteurs and working groups.

- **The African Court on Human and Peoples' Rights**

Working in complementarity to the Commission, the African Court is the judicial organ that began working in November 2006. It was created based on the African Human Rights Court Protocol that entered into force in 2004. The Court handles cases for majority of States (who have ratified its Protocol) that are forwarded by the Commission. The Court deals with cases whereby the recommendations or measures provided by the Commission are not followed or the situations that include massive violations. It has been observed that the Court does not receive as many cases as should be expected in the region.

⁴⁷ F Viljoen, (2012) cited in M Mayrhofer and others, *International Human Rights Protection: Institutions and Instruments*. Leuven Centre for Global Governance Studies (2014) <www.fp7-frame.eu/02-deliverable-4-1> accessed 27 May 2018, p.26.

The African system also has a peer review mechanism established in 2003 and that has been subscribed by more than 30 states in the region.⁴⁸ Another important body in the African context is the African Committee on the Rights and Welfare of the Child that is a treaty-based body functioning along the lines of the UN Committee for the CRC.⁴⁹ Thus in a similar manner, it involves group of experts who are provisioned to monitor the implementation of the rights of children and provide reports for the same.

2.3.1.3 Effectiveness and impact

The African human rights system has been around for almost 30 years and still faces some challenges in implementation of its mandate. The region has widespread issues pertaining to both main sets of rights, in terms of economic development and service delivery of health and education services (socio-economic rights), and access to justice and torture practices (civil and political rights). The democratic structures in the region have continued to face challenges resulting in widespread authoritarian regimes and human rights abuses. The system developed for the region also seems to have certain structural issues as there are overlaps observed in functioning of the key bodies and the procedures seem to be struggling in being effective.⁵⁰

2.3.2 The Inter-American System

The Inter-American System spanning two American continents, functions as a regional system for 35 Member States who are all members of the Organisation of American States (OAS). The OAS was established in April 1948 based on the OAS Charter, as an institution with the purpose of promotion of peace, justice, democracy and human rights.⁵¹ This Charter included provisions for the rights of the individuals and also the obligations of the States in context of these rights. The OAS produced the American Declaration of the Rights and Duties of Man in 1948 that is understood to be the first such international instrument in this region, adopted even before the UDHR. This declaration led to the main body of the Inter-American system, called the Inter-American Commission of Human Rights.

⁴⁸ M Mayrhofer and others, *International Human Rights Protection: Institutions and Instruments*. Leuven Centre for Global Governance Studies (2014) <www.fp7-frame.eu/02-deliverable-4-1> accessed 25 May 2018, p.27.

⁴⁹ Mayrhofer and others (n 49) 27-28.

⁵⁰ Mayrhofer and others (n 49) 30-31.

⁵¹ Katarzyna Piątkowska, 'To what extent do regional human rights systems contribute to the promotion and protection of human rights globally?' (2013) *Acta Erasmiana. Varia* <www.repozytorium.uni.wroc.pl/Content/42402/002.pdf> accessed 13 June 2018, pp.13-14.

2.3.2.1 Instruments

- **American Declaration on the Rights and Duties of Man**

Adopted in 1948, the American Declaration provided the rights that had been provided in the OAS Charter and in complementarity, human rights. It contained both categories of economic, social, cultural, civil and political rights. Adopted as a soft-law instrument, this declaration came to be an important cornerstone for protection of human rights as it was emphasised upon and effectively interpreted by the Inter-American Commission and the Court.⁵²

- **American Convention on Human Rights**

This convention was adopted in November 1969, extending the powers of the Inter-American Commission on Human Rights and led to the creation of the Inter-American Court.⁵³ It is often considered as the most significant instrument and provides regulatory framework for mainly civil and political rights. The Convention has two Additional Protocols, one adding the Economic, Social and Cultural Rights to its mandate (called the San Salvador Protocol), and another on the abolition of death penalty. This has been ratified by 25 member states.

Other treaties and declaration addressing specific subject matters have also been adopted by the OAS, such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (adopted 1994), Convention on Forced Disappearance of Persons (1994), Convention Against All Forms of Discrimination and Intolerance (2013), and Inter-American Democratic Charter (2001) and more.

2.3.2.2 Bodies

- **The Inter-American Commission on Human Rights (IACHR)**

The Inter-American Commission was established based on the provisions of the OAS Charter in 1959. It is one of the primary institutions of OAS and is located in Washington D.C. The Commission is mainly tasked to protect human rights and promote observance of human rights and also serve in a consultative capacity to Member States. It has seven Commissioners that are appointed for a four-year term by the OAS General Assembly. Similar to the global and other systems, the Commission also has the power to appoint Special Rapporteurs, thematically and geographically. It can also handle cases or petitions of human rights violations against the States and even conduct on-site investigations, if need be.

⁵² Mayrhofer and others (n 49) 32

⁵³ Piątkowska (n 52)14.

- **The Inter-American Court of Human Rights (IAC)**

The Inter-American Court was created as an autonomous body in 1979 by the ACHR to enforce and provide the interpretation of its provisions. The Court has dual functions of being adjudicatory and advisory, whereby it issues judgments and rulings, and provides advice and opinions regarding legal interpretation of aspects of the ACHR. The IAC has seven judges, elected for a term of six years, by the State parties of the ACHR. However even those members which are not parties to the Commission can approach the Court for opinions regarding the interpretation aspect.

2.3.2.3 Effectiveness and Impact

The Inter-American System has been an important and inspiring source for human rights in the region. Its bodies have been remarkable in their functioning, for instance judgements of the Inter-American Court have been utilised internationally and by other regions for standard setting⁵⁴. The Court has been a particularly impactful body whose jurisprudence has enhanced protection of vulnerable groups and increased implementation of international instruments by the governments.⁵⁵

While the Inter-American system has been particularly impactful in enhancing the democratic structures in the region, it has also been plagued with failure on some aspects in regional situations⁵⁶. The local political systems in some instances have had an upper hand over the OAS.

2.3.3 The European Human Rights System

Europe is considered to have a well-rounded human rights system that has a plethora of organisations to fulfil its mandate. In context of human rights in Europe, there are two main organisations to look at, the Council of Europe (CoE) and the European Union (EU), whereby the CoE has a more elaborate and better system.

2.3.4 The Council of Europe (CoE)

The CoE is the primary institutions for protection of human rights in Europe. Based out of Strasbourg, France, it was established in 1949 with 10 member States and presently has 47 member States. CoE is aimed to “achieve a greater unite between its members for the purpose

⁵⁴ Mayrhofer and others (n 49) 36.

⁵⁵ Ibid

⁵⁶ Piątkowska (n 52) 15-16.

of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress⁵⁷”.

2.3.4.1 Instruments

The CoE has been remarkable in its treaty mechanisms, as it has adopted more than 200 treaties, a high proportion of which have been focussed on human rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the most significant instrument. There are other treaties that focus on certain specific issues such as European Social Charter (ESC), the European Convention on the Exercise of Children’s Rights, the European Convention on Action against Trafficking in Human Beings, and more.

- **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

As mentioned above, counted as one of the most significant instrument for human rights, the ECHR was adopted in 1950 and entered into force in 1953. It is mandatory to be ratified by member states of CoE to gain CoE membership (as per Additional Protocol 11) and thus enjoys ratification status amongst all CoE Member States. It mainly includes provisions on civil and political rights and also led to the establishment of the European Court of Human Rights. The ECHR has been considered remarkable for a number of reasons, as pointed out by Steiner, Alston and Goodman, “it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems, it has generated a more extensive jurisprudence than other parts of the international system; and it now applies to some 30% of the nations in the world⁵⁸”.

- **European Social Charter**

The European Social Charter (ESC) is instrument for codification of the social and economic rights and was adopted in 1961. It was revised in 1966 and came into force in 1999. This charter includes provisions for the obligations of States towards realization of Social and Economic Rights and a monitoring mechanism for supervising the fulfilment of these obligation. However the Charter is a little less effective as it has no judicial component, and is not obligatory for

⁵⁷ Statute of the Council of Europe art 1 <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> accessed 5 June 2018.

⁵⁸ H J Steiner, P Alston and R Goodman, *International Human Rights in Context, Law, Politics, Morals: text and materials* (3rd edn, Oxford University Press 2008) pp. 833.

States to be adopted in its entirety.⁵⁹ The European Committee of Social Rights (ECSR) has been set up for monitoring the compliance of the Charter by the Member states and involves examination by a group of experts.

2.3.4.2 Bodies

The CoE has several primary institutions that include, the Committee of Minister, the Parliamentary Assembly (PACE), the European Court of Human Rights (ECtHR), the Congress of Regional and Local Authorities, and the European Commissioner of Human Rights. Along with these key bodies, there are specialized bodies that are engaged in the function of monitoring implementation and compliance with human rights instruments. These bodies include, European Commission against Racism and Intolerance, European Committee of Social Rights and more.

- **Committee of Ministers**

The Committee is considered the principal decision making body of Council of Europe and comprises the Foreign Ministers of Member States or the Permanent Representatives from the States. It is entrusted with various responsibilities from furthering CoE aims, decision making on internal organisation and arrangement matters and objectives of CoE, to adopting the budget of CoE.⁶⁰ Considering its composition, it is evident that the Committee also engages in political dialogue with the Parliamentary Assembly and Congress of Local and Regional Authorities. Another important function of this Committee is the monitoring function, wherein the Member States are assessed on fulfilment of their obligations for maintaining democratic environment, upholding rule of law and observance of human rights as well as the supervision of the execution of decisions given by the European Court.⁶¹

- **The European Court of Human Rights (ECtHR)**

Established by Article 19 of the European Convention of Human Rights, in 1959, the European Court is based in Strasbourg, France and primarily functions as the monitoring body for the ECHR. Thus it is involved in monitoring compliance of ECHR by the States and handling complaints of human rights violations by States. It has one judge from each CoE member states, making it a total of 47 judges. The court takes up complaints by individuals, NGOs or group

⁵⁹ Mayrhofer and others (n 49) 49.

⁶⁰ Mayrhofer and others (n 49) 50.

⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 54.

of individual and also by one states against another state⁶². Structurally the Court has four main judicial structures, of single judges generally on admissibility, committee of three judges, chambers of seven judges and grand chamber of seventeen judges decide generally on cases affecting the ECHR interpretation or other significant issue.

2.3.5 The European Union (EU)

European Union or as it is widely known, the EU taking over from its predecessor, the European Communities, was mainly targeted to achieve economic integration⁶³. In 1992, the Treaty of Maastricht was adopted that brought in the concept of human rights into the domain of EU. This was the Treaty on European Union and it talked about human rights and fundamental freedoms as contained in the ECHR. Further actions in increasing the human rights discourse were being introduced in various instruments in 1993 in Copenhagen, then in Treaty of Amsterdam and in a historic step in Treaty of Lisbon. Certain articles in these treaties were forwarding the human rights principles in the European Union framework.

2.3.5.1 Instruments

Following these strides, the EU adopted particular instruments following the mandate of protection of human rights. Within these the Charter of Fundamental Rights of the European Union is considered significant. Some other instruments such as the Non-Discrimination Directives or those on external policies of EU were also adopted.

- **Charter of Fundamental Rights of the European Union (CFREU)**

The Charter was developed on the initiative taken by the Council of Europe involving Member States, representatives from EU and the civil society. It is a legally binding document that codifies both sets of rights, civil and political and economic, social and cultural. Upon studying the content, the Charter has overlapping traits with the ECHR concerning civil and political rights.

⁶² Article 33 of ECHR provides that the Member States could file complaints with the ECtHR regarding violations or breach of Convention and protocols.

⁶³ The founding treaties in this economical context, did not include any provisions for human rights.

2.3.5.2 Bodies

The major institutions in the EU include the European Council, the European Parliament, the Council of European Union, the Court of Justice, and the European Commission.

- **The European Court of Justice (ECJ)**

This Court located in Luxembourg, is tasked with incorporating human rights within the EU legal framework as well as ensuring interpretation and application of the EU law in the Member States. It also handles cases of dispute amongst Member States and EU bodies. The applications to the Court can come from individuals, organisations or companies in case violations of rights through EU law⁶⁴, and in such cases, usually the cases are referred by national Courts⁶⁵.

2.3.5.3 Effectiveness and Impact

The European Regional Human Rights system has been considered one of the most significant and pioneering mechanisms for the protection of human rights. The CoE has taken unsurpassable efforts to establish a system that has been exemplary and consists of a judicial organ considered far ahead of its contemporaries. The jurisprudence of the ECtHR has enhanced the functioning and interpretation of ECHR. However this enhancement has also lead to an escalating number of applications which has been problematic for the ECtHR to handle. Also the ECHR was found wanting in terms of absence of economic, social and cultural rights.

The development of EU as a heterogeneous body by including human rights principle was an encouraging step towards enhanced protection system for Europe. But it is understood that the original limited mandate of EU may make it problematic to embrace the human rights principles fully.⁶⁶

⁶⁴ H Tretter, (2012) cited in M Mayrhofer and others, *International Human Rights Protection: Institutions and Instruments*. Leuven Centre for Global Governance Studies (2014) <www.fp7-frame.eu/02-deliverable-4-1> accessed 27 May 2018, pp. 59.

⁶⁵ S Greer, 'Europe' in *International Human Rights Law* (Oxford University Press 2010) cited in M Mayrhofer and others, *International Human Rights Protection: Institutions and Instruments*. Leuven Centre for Global Governance Studies (2014) <www.fp7-frame.eu/02-deliverable-4-1> accessed 27 May 2018, pp. 59.

⁶⁶ Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) Vol 11:4 *Human Rights Law* < www.corteidh.or.cr/tablas/r27635.pdf> accessed 8 June 2018, pp.645-682.

2.4 Conclusion

The aim of this chapter was to introduce the human rights mechanisms that exist at the global and regional levels. The United Nations has been in the central role at the global human rights protection system, and have set up an extensive system that engages effectively with local bodies and is comprehensive in its mandate. The focused bodies have multi-layered functioning that helps the mandates to permeate through to the local level of implementation.

Below the global bodies lie the regional mechanism that in their creation and functioning have managed to efficiently demonstrate their success and space in acting as the bridge between the domestic and global institutions. These regional mechanisms are far reaching, diversified in their functioning, and impactful in effective implementation of the global mechanisms and instruments at the State level. The three systems taken from the newest to the oldest demonstrate the space that the regional systems have created in the human rights domain that is unquestionable and exemplary. While there is room for improvement, their existence and functioning is beyond important which leads one to reflect more on the absence of such a system in Asian region.

3 What is happening in Asia – A Look at Existing Mechanisms

3.1 Introduction

This chapter carries over the broader framework from previous sections and involves description of the sub-regional human rights mechanisms in the Asian region. Considering the scope of the study is confined to the South and South East Asia, the two mechanisms of South East Association for Regional Cooperation (SAARC) and Association for South East Asian Nations (ASEAN) have been discussed below with a focus on their human rights domains. Briefly the regional civil society with one example has been explored to provide an idea about the civil society organisations in the region.

3.2 Asia and human rights

Before delving into understanding the human rights mechanisms in Asia, a brief description into the Asian mind set and circumstance on human rights is important. The ‘Asian values’ discourse sets the starting point for discussion, wherein the premise propounds on the incompatibility of cultural traits with some rights and freedoms of international domain.⁶⁷ It focused on ‘strengthening of a third-world identity’⁶⁸, criticising the West (or western view of human rights) and disputing some civil and political rights. However what is often discounted here, is that this debate originated and was used as a focal point by only a fraction of states in Asia (mainly in South East⁶⁹ and China). Moreover it was not about rejection of human rights but rather the course of approaching certain rights and their implementation.⁷⁰ As the region faced economic crisis in late 1990s, this discourse started waning. Civil society from past few years had been creating public awareness countering this viewpoint, reaffirming traditional and cultural viewpoints that were pluralistic and defending the universality of human rights.⁷¹ The end of the crisis saw this discourse fragmenting and diminishing. The proponents went back to looking at their domestic interests. While this debate ended some present ASEAN member States carried over certain residual components towards their functioning in human rights

⁶⁷ FIDH (n 2) 7.

⁶⁸ *ibid.*

⁶⁹ The main proponents of this debate, such as Singapore and Malaysia were actually the States that shared most commonalities with the West.

⁷⁰ Helen Quane, ‘The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms’ (2015) Vol 15 *Human Rights Law Review* <cronfa.swan.ac.uk/Record/cronfa20598> accessed 19 October 2018 p. 285.

⁷¹ FIDH (n 2) 10-11.

domain. Today this has become a feature of ASEAN as well, coming to be known as the “ASEAN way” described as a “working modality that emphasises a non-confrontational approach⁷²”. It emphasises on non-intervention, voluntarism and consensus and some other Asian States also utilise this to reflect on their ways of functioning.

There have been a lot of efforts towards establishing a human rights mechanism in the Asian or even Asia-Pacific region as a whole, going as far back to a UN conference held in Kabul in 1964. More international and regional discussions on the issue followed, like an ad hoc study group targeting the promotion of regional mechanism in 1967, conference in Jakarta in 1993 exploring possibility of sub-regional bodies, and a series of annual conferences from 1994 onwards, till when 2007 proved to be a watershed for forming a Sub-Regional ASEAN body for human rights.⁷³

The Asian region in whole does not have any region wide mechanism, even without any human rights mandate. Instead, there exist many sub-regional institutions that involve the engagement of States on several issues, even human rights. The present study to provide focussed comprehension and insights in the vast region that is Asia, will be focused upon the two sub-regions of South Asia and South East Asia. Accordingly the two mechanisms existing in these sub-regions: South Asian Association for Regional Cooperation (SAARC) and Association of South East Asian Nations (ASEAN), will be studied.

3.2.1 South Asian Association for Regional Cooperation and Human Rights

3.2.2 A Brief Overview

In the year 1985, the South Asian Association for Regional Cooperation (SAARC) was established in Dhaka with the signing of SAARC Charter. The organisation has eight member states, namely Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The SAARC Charter was consistent in content and underlying framework with the Bangkok Declaration of 1967 for the foundation of ASEAN. This charter while emphasising on the region of South Asia, had similar objectives of promotion of the economic, social and cultural development and was based on similar principles of sovereignty, non-interference,

⁷² Asian Forum for Human Rights and Development, ‘Breaking the Silence and Unlocking Barriers for Human Rights Protection in ASEAN: A report on the Performance of the ASEAN Human Rights Mechanisms in 2015’ (2015) <www.forum-asia.org/uploads/wp/2016/10/Breaking-The-Silence-AICHR-Performance-Report-2015.pdf> accessed 17 March 2018, p. 4 (FORUM-ASIA).

⁷³ Grimheden (n 4) 950.

political independence, and territorial integrity.⁷⁴ The document failed to mention human rights.

Although till date SAARC has not created any regional human rights institution or adopted any particular document addressing human rights, there have been some developments in this regard. The rights of children have been particularly advocated in SAARC, and can be first traced to the declaration of Second SAARC Summit of 1986, held in Bangalore. The declaration talked about the forthcoming UN instrument on Rights of Child. Following this the rights of children had been in particular focus and all member states became parties to the UNCRC by 1995. This dedicated focus also led to the adoption of SAARC Convention on Regional Arrangement for the Promotion of Child Welfare in South Asia in 2002. Also during the same time, facing the issue of trafficking at an alarming rate the member states adopted the South Asian Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Later the rights of women were again emphasised in the 15th summit declaration in 2008, along with the rights of senior citizens. It is interesting to note that in 1991 the SAARC nations during the 6th Summit in Colombo specifically realised and commented upon the inter-dependence of civil and political right and economic and social rights. The rights of workers were brought to focus during the 7th Summit in Dhaka in 1993 and were reiterated in following summits. The promotion and protection of human rights by the member states was brought about in a number of summit declarations. There were some concrete results.

- **SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution**

This SAARC convention was adopted in the year 2002, as a binding agreement that was integrating many provisions associated with basic human rights. Looking at the name, it is evident that the Convention was primarily focused on prevention of trafficking of women and children, especially in member states that were sources of origin or destination or transit.⁷⁵ To achieve the requisite aim the Convention included provisions for creating a Task Force at the regional level for the purpose of monitoring and assessing the realization or enforcement of the Convention. Thereafter since 2007, this task force has had regular meetings to share ideas on

⁷⁴ Charter of the South Asian Association of Regional Cooperation (adopted 8 December 1985) (SAARC Charter) art 1.

⁷⁵ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (adopted 5 January 2002) art 2.

best practices, working on rehabilitation and repatriation of the victims, prosecution or extradition of offenders and legal assistance for victims.⁷⁶

- **SAARC Social Charter**

In eventual realization of importance of human rights, the SAARC member states adopted the SAARC Social Charter in 2004. This charter talked about the human rights of youth, elderly and disabled and included particular articles on rights of women and children. The Charter also talked about inclusion of marginalised and vulnerable groups in social development and promotion and protection of human rights and fundamental freedoms, with a particular focus on right to development. The Charter reiterated the requirements of the member States towards promotion and protection of human rights, as had been previously reaffirmed in the statements of the annual summits.

SAARC has also adopted some other initiatives that have been aimed towards the issues pertaining to health, mutual assistance on criminal matters, food security, and combating terrorism and drugs. These initiatives have been important instruments in the human rights agenda of SAARC.

Within the SAARC structure, there are apex bodies and recognized bodies, which are granted this status based on guidelines, rights and obligations provided in accordance with visions envisaged in SAARC Charter. Within these there are certain bodies such as the South Asia Initiative to End Violence Against Children, South Asian Association for Regional Cooperation in Law (SAARCLAW) that have especially working in context of human rights. In 2013, SAARCLAW adopted the Thimpu declaration whereby it recognized “human rights as core component of democracy and good governance and as a necessary ingredient for social and economic development and for fostering peace and progress in the region⁷⁷”.

Within the SAARC premise, the instruments adopted in context of human rights have been “soft law” instruments across a variety of issues ranging from democracy, social development, poverty alleviation and health, along with a legally binding convention on women and children. The annual summits often involve the leaders of the Member States discuss about human rights

⁷⁶ Mayrhofer and others (n 49) 44.

⁷⁷ Asian Forum for Human Rights and Development, ‘A South Asian Human Rights Mechanism: Towards Protection for All’ (2017) < [https://www.forum-asia.org/uploads/publications/2014/May/Print%20-%20Booklet%20SAHRM%2022052014%20%20\(ICP\)%20\(PDF\)%20\(1\).pdf](https://www.forum-asia.org/uploads/publications/2014/May/Print%20-%20Booklet%20SAHRM%2022052014%20%20(ICP)%20(PDF)%20(1).pdf) > accessed 26 February 2018 (FORUM-ASIA).

but there have hardly been any concrete discussions regarding situations of violence in any member states or towards the performance of the states on international human rights standards. India due to its size, military and economic power enjoys a dominant position and is constantly put focus on aspects such as poverty alleviation, economic integration and infrastructural development which prevents focus upon human rights. The major dispute between India and Pakistan have still not been resolved and smaller countries in some way fear Indian dominance. This overall situation leads to a discourse that depicts that in order to add a human rights dimension to show the rest of the world, the SAARC meetings superficially discuss the issues concerned with human rights but fail to recognize it as a platform for furthering the human rights agenda for the region in any shape or form. Moreover, SAARC still does not have any dedicated mechanism or body for the promotion and protection of human rights and there do not seem to be many future prospects as well.

3.2.3 Association of South East Asian Nations

The Association of Southeast Asian Nations, better known as ASEAN came into establishment with the signing of ASEAN Declaration (also called Bangkok Declaration) in August 1967 by five member states of Thailand, Indonesia, Malaysia, Philippines, and Singapore. Presently there are 10 member states, the founding members having been joined by states of Brunei Darussalam (in 1984), Vietnam (in 1995), Lao PDR and Myanmar (in 1997), and Cambodia (in 1999).⁷⁸ This membership is notable in its diversity on numerous aspects from culture, language, religion to political institutions and economic development.

Studying the Bangkok Declaration, a glimpse into the foundations of ASEAN is afforded, focused on “economic growth, social progress and cultural development” through collaboration and assistance but with an underlying emphasis on the state sovereignty, national identity, territorial integrity and non- interference.⁷⁹ While this founding document did talk about regional peace and respect for justice and rule of law, it did not contain any mention of human rights in any form. This aids in understanding the functioning of ASEAN in terms of a regional organisation, even in the present context.

While initially ASEAN started as an economic development organisation, by 1993, the issue of human rights were raised, and establishment of sub-regional human rights mechanism was proposed. This urge for a human rights mechanism hasn’t been attributed clearly to a single

⁷⁸ Association of Southeast Asian Nations, ‘About ASEAN’ <asean.org/asean/about-asean> accessed 14 May 2018.

⁷⁹ The ASEAN Declaration (adopted 8 August 1967) (Bangkok Declaration).

cause but a number of situations. Among these, main were, the Vienna World Conference of 1993, and lack of action by ASEAN in context of protests and violations in Burma (1988) and East Timor (1991).⁸⁰ During this time, in the background of an approaching financial crisis, an informal Working Group on ASEAN was set up in 1996. This led to slow acceptance of the group by the ASEAN and eventually in the year 2000, the Group put forward draft agreement for the establishment of the ASEAN Human Rights Commission. Forging ahead ASEAN adopted the Vientiane Action Programme in 2004, for the promotion of human rights (focusing on rights of children and women) supported by national human rights institutions. Following this, the Commission members in 2005 reached a decision to adopt the ASEAN Charter that was aimed towards bringing the members states closer and promoting the idea of establishment of a human rights body in ASEAN.⁸¹ The document called the ASEAN Charter was adopted on 20 November 2007, and contained provisions endorsing democracy, rule of law, protection of human rights and setting up of a human rights body.⁸²

Two other human rights mechanisms have been created under ASEAN, namely, the ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children and the ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers.

3.2.3.1 Bodies

- **ASEAN Intergovernmental Commission on Human Rights (AICHR)**

AICHR, created in 2009, is the body responsible for the enforcement of rights enshrined in Article 14 of the ASEAN Charter of 2005. This body has been considered the overarching human rights institution in ASEAN holding the obligation of undertaking activities in context of promotion and protection of human rights. Towards the fulfilment of this, the Commission conducts programmes aimed towards public awareness and thematic studies, promotes capacity building and also has been promoting ratification of the human rights instruments amongst its member states in the region. AICHR has also been working with the member states on information regarding their status on human rights and thus acting in capacity of an advisory body to these states.

AICHR has been criticised for its limited mandate and for its ineptitude in functioning as a legitimate human rights mechanism in its region. This criticism comes from the way the

⁸⁰ Grimheden (n 4) 946.

⁸¹ *ibid* 946-947.

⁸² Grimheden (n 4) 948.

AICHR has been functioning till now. Upon inspection, while the mandate of AICHR requires both promotion and protection of human rights, in its functioning AICHR is extremely restricted in protection and only displays engagement in promotional side of the mandate. The Commission is not provisioned to take up individual cases of violations and in that regard to even conduct on-site visits. The member states hold an inordinate amount of freedom as the States are not required by the Commission to submit State reports and the State representatives are part of the Commission⁸³ rather than independent experts.⁸⁴ Further the States have also rejected proposals for creating procedures on grounds of the UN Special Procedures, such as a Special Rapporteur or a peer review mechanism for the region⁸⁵ which has been the norm in all other regional mechanisms.

The AICHR in its latest round of Selection process of its representative did not include Civil Society Organisations while assessing the candidates and some of the Member States in their individual selection process lacked transparency and openness.⁸⁶

However the Commission despite these inherent gaps has been working towards enhancing their functioning. In 2015, AICHR adopted guidelines for creation of structural engagement with the Civil Society Organisations (CSOs) and also initiated mainstreaming of human rights agenda in ASEAN Vision 2025.⁸⁷ Moreover the provisions of the Terms of Reference that dictate the functioning of the Commission in their ambiguity provide space for effective use with States. For instance, while member states are not provisioned to submit report, the article in Declaration on obtaining information from member states could be utilised to garner information on situations of violations.

- **The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)**

ACWC was established on 7 April, 2010, in Viet Nam during the 16th ASEAN Summit and its first meeting was convened in February 2011. Its basic functions and mandates include, “the development of policies, programmes, and innovative strategies to promote and protect the

⁸³ This creates a difficult position for AICHR, as its functioning is again circumscribed by the non-interference principle while dealing with the States.

⁸⁴ Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights art 4-6 October 2009.

⁸⁵ S Petcharamesree, ‘The ASEAN Human Rights Regime: Between Asian Values and Cultural Relativism’ (‘Beyond cultural relativism: The evolving human rights mechanism of the Association of Southeast Asian Nations (ASEAN) in context’ Conference, Swansea, March 2014).

⁸⁶ FORUM-ASIA (n 73) 11.

⁸⁷ FORUM-ASIA (n 73) ix.

rights of women and children to complement the building of the ASEAN Community”⁸⁸. The Commission is comprised of 20 representatives from the member States of ASEAN⁸⁹, working for women and child rights. Each representative is appointed for serving a term of three years and has the possibility of being appointed for another term.

As it works on the mandate of promotion and protection of rights of women and children, ACWC engages with the provisions of Convention on the Elimination of Violence Against Women (CEDAW) and Convention on the Rights of the Child (CRC). Both the treaties have been ratified by all member states of ASEAN. In its functioning, ACWC has been involved in organising regional workshops, trainings, consultations, and seminars engaging a variety of stakeholders from government officials, experts to CSOs. However recent report from FORUM Asia, on performance of ACWC in 2015, reflected that the Commission failed to engage CSOs in appointment processes or in consultation meetings and even did not incorporate feedback provided by such actors.⁹⁰

3.2.3.2 Instruments

- **ASEAN Human Rights Declaration (AHRD)**

The Declaration was adopted on 18 November, 2012 during the 21st ASEAN Summit in Phnom Penh, Cambodia by the Member States of ASEAN.⁹¹ This declaration lays down the General Principles and the Principles of Civil and Political Rights and on Economic, Social and Cultural Rights. It also includes principles on Right to Peace, Right to Development and provisions for Cooperation in Promotion and Protection of Human Rights. Being the declaration on human rights, it also reaffirms the commitment of the ASEAN to the Universal Declaration.

The drafting process of the declaration was criticised for failing in being transparent and consultative. But more significantly the AHRD is placed as below par the international standards of human rights⁹². This placement is due to the fact that the declaration neglects some vital rights such as right to freedom of association and has failed to include some elements of many rights. It has also been cited for including a wide range of justifications for restrictions of human rights and exclusion of proportionality principle that eventually debilitates the

⁸⁸ ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, ‘About ACWC’ < acwc.asean.org/about/ > accessed 14 June 2018.

⁸⁹ Two representatives from each member states are appointed, whereby one working on women rights and one on child rights. These representative work on a part-time basis, voluntarily.

⁹⁰ FORUM-ASIA (n 73) 35-40.

⁹¹ Mayrhofer and others (n 49) 39.

⁹² The UN High Commissioner for Human Rights, Navi Pillay, had raised concerns regarding the language that was used in the Declaration being inconsistent with the international standards (OHCHR, 2012).

guarantees against abuse.⁹³ Due to the significance placed on national and regional aspects in rights implementation, the declaration is also cited to be trying to revive the cultural relativism or Asian values debate.⁹⁴

- **The ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers**

It was adopted on 13 January 2007, in Cebu in the Philippines. The Declaration laid down the “general principles, obligation of sending states, obligations of receiving states and commitments by ASEAN I regard to respecting the rights of migrant workers”⁹⁵.

While it is encouraging to see ASEAN move beyond its original mandate to embrace and adopt the human rights agenda through mechanisms and instruments such as AICHR, ACWC and ASEAN Declaration, certain concerns that were raised before still persist. The AICHR and ACWC have followed in the footsteps of ASEAN in following a culture of silence. What is more condemning is that this silence is in reacting to the human rights violations in the region. Despite complaints from civil society organisations on various issues, such as enforced disappearances or Rohingya migration crisis, AICHR and ACWC continue to ignore such documents.

3.3 Regional Civil Society – Example of FORUM ASIA

Conceptions about civil society have been divided from earlier times. The classical theorists had defined civil society, “as an antithesis to the dangerous state of nature”⁹⁶, the modern theorists looked at civil society as a parallel but distinct realm to the State. In more modern times, civil society has come to be understood as the third wave in a democratic space that acts as an intermediary for the citizens and the state. Involvement of civil society actors in the issues pertaining to human rights has been a long one, probably from Anti-Slavery Society in 1836, to International Committee of the Red Cross (1863).⁹⁷ Even at the UN level, NGOs that form a part of civil society have been granted a consultative status under Article 71 of the UN

⁹³ US Department of State Press Release, ‘ASEAN Declaration on Human Rights’ (20 November 2012) PRN: 2012/1286 <2009-2017.state.gov/r/pa/prs/ps/2012/11/200915.htm> accessed 15 June 2018.

⁹⁴ Ibid.

⁹⁵ Mayrhofer and others (n 49) 39.

⁹⁶ Krishan Kumar, ‘Civil Society: An Inquiry into the Usefulness of a Historical Term’ (1993) Vol 44.3 the British Journal of Sociology < www.jstor.org/stable/591808> pp. 375–395.

⁹⁷ Mayrhofer and others (n 49) 21.

Charter. With time the civil society has come to widen its scope of the functions it performs⁹⁸ and with it the influence it holds.

Asia with its varied member states that operate on different systems of democracy was a questionable realm for the functioning of civil society. But overtime it has been widely accepted that the civil society plays an important role in human rights in Asian region and have also been important for the development of the scarce existing human rights mechanisms in the region or sub-region. In Asia, the NGOs have been considered to be quite heterogeneous, wherein the organisations vary in being assertive or being low-key, functioning at the grass roots level or siding with the academic approach, and with an international presence or a local one.⁹⁹

The member states in the Asian region have experienced phases of growth and systems of governments and democracy¹⁰⁰. The CSOs due to the diverse nature of their functions from service delivery to election observations have inevitably provided important contributions to the development of the region, promoting the democratic structures and governance reforms, and technological advancements. But with shifts in the political structures and economies of States, the CSOs have been challenged in their functioning, including limitations in implementing their programs, legal regulations circumscribing their operations¹⁰¹, and budget constraints. Due to a lack of regional mechanisms, and with these challenges, the CSOs are unable to participate with other regional or global organisations that work on similar issues. International actors have been beneficial in providing support in such instances in joining local CSOs with each other. One such instance was the ‘Asia Regional Civil Society Experience Summit’ organised in Jakarta and involved around 150 representatives from Northeast, South and Southeast Asia.¹⁰²

⁹⁸ These could be providing information, mobilisation, policy making, advocacy and education.

⁹⁹ Vitit Muntarbhorn, ‘Development of the ASEAN Human Rights Mechanism’ (Briefing Paper requested by European Parliament’s Subcommittee on Human Rights, European Union, September 2012) <[www.europarl.europa.eu/RegData/etudes/note/join/2012/457120/EXPO-DROI_NT\(2012\)457120_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/457120/EXPO-DROI_NT(2012)457120_EN.pdf)>

¹⁰⁰ It is the complexity of the region and positive role of civil society in Asia that an activist like Aung San Suu Kyi from Myanmar could become the President of the Nation.

¹⁰¹ Foreign Contribution (Regulation) Act (FCRA) 2010, in India has been like a menace that was introduced basically to curb or regulate the functioning of NGOs that were critical of government policies. Under this licenses of many NGOs were either revoked or were delayed and the NGOs due to a lack of funding were facing troubles in functioning. It is believed more than 15,000 NGOs were suspended and one of the most famous ones include Greenpeace.

¹⁰² Barbara Smith and Kim McQuay, ‘Civil Society Organizations in Asia press for more open environment’ (24 September 2014) <asiafoundation.org/2014/09/24/civil-society-organizations-in-asia-press-for-more-open-environment/> accessed 16 June 2018.

3.3.1 FORUM – ASIA

The Asian Forum for Human Rights and Development (FORUM-ASIA) founded in 1991 in Manila, the Philippines is a network of 58 members in 19 countries from Asia. The organisation works towards creating a “peaceful, just, equitable, and ecologically sustainable community of peoples and societies in Asia¹⁰³”. Holding a consultative status with the UN Economic, and Social Council, this network mainly works towards promotion and protection of human rights, by providing collaborations and co-operation in between human rights organisations and human rights defenders in Asia and beyond. In this mandate, FORUM-ASIA engaged in activities that include human rights advocacy at national, regional and international level, protection of human rights defenders in Asia, capacity building and providing platform for collaboration of activists and stakeholders for human rights issues. Headquartered in Bangkok, it has its presence in Jakarta, Kathmandu and Geneva as well. Counted amongst one of the foremost networks on human rights in Asia, especially in South East Asia, FORUM-ASIA, has been working through its network in various countries on almost all rights and at various levels.

One of its sub-bodies, Asian NGO Network of National Human Rights Institutions (ANNI) is counted amongst one of the most influential bodies on NHRIs in Asia. This was also supplemented during interviews with experts. ANNI has been responsible for monitoring the performance of NHRIs and assisting the regional NHRIs to perform in compliance with the Paris Principles. Another regional initiative, the Regional Initiative for a South Asian Human Rights Mechanism (RISAHRM) has been advocating for establishing a regional mechanism for South Asia, since 2012 and has a task force for implementing its mandates.

Being engaged as a consultative organisation and through its UN Advocacy Programme, FORUM-ASIA has been focused on influencing the decisions of the States at the Human Rights Council and has even managed to increase the Asian CSOs perspectives’ visibility at the debates at the Human Rights Council. It was such efforts that independent inquiry in Myanmar was setup by the UNHRC to investigate into violations of human rights by the military in the country. It was successful to call for a joint statement on the situations in Maldives (on extrajudicial killings) and on Philippines.

¹⁰³ Asian Forum for Human Rights and Development, ‘About FORUM-ASIA’ < www.forum-asia.org/?page_id=21481 > accessed 12 May 2018.

3.4 Conclusion

This brief overview accentuates the regional human rights mechanisms and systems in Asia and some of the key issues in their functioning. The civil society in the Asian context has had a historic role in enhancing the human rights agenda in the States, even in the times of oppression and weakening of democracy. While these existing sub-regional frameworks have failings and gaps in their structure, in the absence of a regional mechanism their presence is a huge development. The civil society is an aid that works in tandem with governmental or official structures and cannot take the place of a sub-regional structure. In this scenario it then becomes important to garner an understanding of the way the States in the region perform in the human rights domain. The extent of acceptance and implementation of the international norms and instruments by the States can help towards enhancing these sub-regional structures. The missing elements in the sub-regional declarations such as the ASEAN Declaration that are providing the space for abuse and dominance of State structures can be compensated through inclusion of provisions of the international instruments in national legislature. The states in their acceptance of scrutiny from the international mechanisms could pave way for acceptance at a regional level as well.

Therein come the next chapters that provide a look at the performance of States in Asia at this international and national level through the examples of India and Thailand.

4 Analysing India and Thailand on United Nations Mechanisms

4.1 Introduction

The purpose of this chapter is to proffer a brief insight in the performance of the focus states in certain international human rights procedure or mechanisms. This is mainly a quantitative review of the concerned states on Special Procedures and Universal Periodic Review. The discussion is initiated with a review of the human rights treaties in terms of ratification by the States followed by observations on the processes of the Special Procedures in the context of the focus regions. Lastly India and Thailand are reviewed on their performance in the Universal Periodic Review during the second cycle along with a comparison on global trends.

4.2 International Human Rights Treaties and their Ratifications

Based on the details provided in the chapters before, the international human rights protection system can be understood to be the last and largest layer of protection mechanism that provides a platform for standard setting, grievance redressal, discussion, and negotiations. It falls mainly within the purview of international law. The human rights system in UN functions mainly on the mandate of protection and promotion and is found enshrined in some specific legal instruments. In this direction, the International Bill of Human Rights was created and it consisted of the Universal Declaration of Human Rights (UDHR) together with the two covenants¹⁰⁴; the International Covenant on Economic, Social and Cultural Rights (CESCR) and the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols.¹⁰⁵ Although the UDHR was not legally binding, it has been “recognised as a source of international customary law”¹⁰⁶ and has been widely utilised in creating norms dictating the functioning of some UN bodies. These Covenants provided the space for enhancing the provisions of UDHR to a legislative framework. To further pursue the implementation of these instruments the UN established two treaty bodies created from provision of ICCPR covenant

¹⁰⁴ The initial vision had been of creation of a single general human rights treaty but eventually two covenants were created and adopted in 1966. They entered into force in 1976.

¹⁰⁵ Manfred Nowak, ‘The International Covenant on Civil and Political Rights’ in Felipe Gomez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto 2009) p. 275.

¹⁰⁶ Baranowska and others (n 17) 28.

and the Economic and Social Council resolution; namely, the Human Rights Committee and the Committee of Economic, Social and Cultural Rights, respectively.¹⁰⁷

Thereafter the scope of international law grew through adoption of more human rights treaties which would confer legal obligations in certain specific areas in human rights. While there are numerous covenants and treaty bodies that have been created since, at the core there are 10 international human rights treaties. These core treaties are:

1. The International Covenant on Civil and Political Rights (ICCPR)
2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)
3. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
4. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
5. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
6. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)¹⁰⁸
7. The Convention on the Rights of the Child (CRC)
8. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)
9. The Convention on the Rights of Persons with Disabilities (CRPD)
10. The International Convention for the Protection of All Persons from Enforced Disappearance (CED)

In accordance with the provisions of each of these treaties, treaty bodies, also called monitoring bodies have been established. These treaty bodies consisting Committees of Independent Experts are for the purpose of monitoring the implementation of the provisions of the conventions, excepting one¹⁰⁹.¹¹⁰ In the process of monitoring, the treaty bodies review the States based on reports provided by the States and issue observations on this review and to

¹⁰⁷ United Nations, 'UN Documentation: Human Rights –Treaty-based bodies' <research.un.org/en/docs/humanrights/treaties> accessed 28 May 2018.

¹⁰⁸ Despite not being a convention, this optional protocol still serves as a distinct convention.

¹⁰⁹ The OPCAT being an Optional Protocol, instead has a Sub-Committee on Prevention of Torture that is to monitor in the States, the places of detention.

¹¹⁰ OHCHR, 'Human Rights Bodies' <www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> accessed 5 June 2018.

further facilitate the implementation publish recommendations called General Comments to interpret the scope of the treaty and guide in dealing with issues on mandates of the treaties. Some of the treaty bodies (eight) have also set up individual complaint procedures. Some bodies in instances of violations have provisions for enquiry procedures.

A striking aspect of these treaties is that despite covering global concerns and being endorsed in such a manner, the level of ratification lies on a broad spectrum whereby the highest ratification is for the CRC by 196 (all 193 member states but lacks USA ratification) and lowest is for the Convention on Migrant Workers by 51 members.¹¹¹ In theory the ratification of a treaty signifies that the State is assuming the legal obligation towards implementation of the treaty provisions through the means of measures at domestic level and enforcing local legislations in sync with these obligations. The state also has to submit report in a regular manner to the monitoring committees. A note of caution here would be that in practice it has been seen that the ratification possibly reflects prima facie acceptance by the State and has the bigger purpose of facilitation of the provisions of these treaties.

Within the present study considering the broad extent of Asian region, the focus has been on South and South East Asian region and further on the two States of India and Thailand. The table below provides a look at the ratification status of the core treaties by India and Thailand.

Instrument	Status – Signatory or Ratification	
	India	Thailand
ICCPR	Ratification – 1979	Ratification – 1996
ICESCR	Ratification – 1979	Ratification – 1999
CERD	Ratification – 1968	Ratification – 2003
CEDAW	Ratification – 1993	Ratification – 1985
CAT	Signatory – 1997	Ratification – 2007
CRC	Ratification – 1992	Ratification – 1992
OPCAT	No Action	No Action
CMW	No Action	No Action
CRPD	Ratification – 2007	Ratification – 2008
CED	Signatory – 2007	Signatory – 2012

Table 1: Treaty Ratification Status of India and Thailand

¹¹¹ The most recent data, updated on the website as of 25 June 2018 <indicators.ohchr.org/>.

As depicted above both India and Thailand have not taken any individual action on ratification of CMW focused on rights of migrant workers and also on the Optional Protocol to Convention against Torture. India still remains a signatory to the Convention against Torture, and both states are signatory to the CED on enforced disappearances. Literature and popular media sources provide a picture of use of torture in India and a number of cases of enforced disappearances in India and Thailand which can in some manner also pointed to the lack of ratification of these instruments.

In fact the two treaties of ICCPR and CESCPR enjoy a high ratification status in the Asian region with one notable absence being that of China. However when focussed on the South and South East Asian region, surprisingly 4 ASEAN states (Myanmar, Malaysia, Brunei and Singapore) and one SAARC state of Bhutan have taken no action on ICCPR. Looking at ratification status of CESCPR, almost similar patterns emerge, wherein 3 ASEAN states (Brunei, Malaysia and Singapore) and Bhutan have not taken any action. Convention focused on Rights of Persons with disabilities enjoys almost full ratification except the state of Timor-Leste.

In Asian countries, main human rights treaties have experienced a higher rate of ratification than the optional protocols (providing largely for complaint mechanisms)¹¹² which is also reflected later on in the analysis of their national institutions.

While looking at the treaties it is also important to get a larger picture including other instruments such as UDHR or resolutions of UNGA, HRC and others. This picture helps to comprehend that these other documents are significant in contributing to the human rights system, as States that are not parties to certain treaties and obligations associated with them are still bound by the provisions of these instruments and act accordingly. These mechanisms and instruments such as the resolutions (UNSC resolutions are legally binding) also influence the human rights policies and practices of the Asian states. The consequences of disregarding resolutions such as sanctions or military interventions are actions that states do not want in their regard.¹¹³

The treaty bodies have been seen to have an expanding influence on the human rights status of Asian states. The Treaty body members present their reports to the Committee who then provide concluding remarks and recommendations to the States. In case of Asian states, in

¹¹² FIDH (n 2) 22.

¹¹³ *ibid* 35.

recent years the observations and recommendations provided have been strong and effective in changing some situations.¹¹⁴ These have included amendments to legislations and adoption of new laws, training of civil servants, directions for measures to change societal attitudes and more.

4.3 Special Procedures – Working Groups of experts

Previously described in the functioning of Human Rights Council, the Special Procedures include special rapporteurs, independent experts or working groups of five members that work on two mandates: to either review the human rights situation in specific countries so as to provide observations and recommendations or conduct thematic studies across the world.¹¹⁵ As of June 2018, there were 44 thematic mandates and 11 country mandates.¹¹⁶

In Asian context, the influence of engagement of special procedures has been increasing and the states have started requesting for visits by the mandate holders. In recent years, Asian region has seen an increase in the visits by holders of Special Procedures. Considering the visits by UN Special Procedures ‘with protection mandates’¹¹⁷ holders it is evident that major number of Asian states, display hesitancy in accepting such visits while visits associated with the ESCRs or on subjects such as right to development have gained acceptance.¹¹⁸ The practices of Asian states in terms of country specific mandates has been divided. Only 43% of countries from the Asia Pacific regions have agreed to accept visits by mandate holders¹¹⁹. In the states with most visit request, in the concerned region, Cambodia has been requested 34 times while Indonesia has been requested 27 times and Cambodia has a higher rate of completed visits.¹²⁰ In context of thematic mandates, the trends suggest that Asian states vary in their responses. Some states may accept, but at times delay the process or some states may not accept at all. Afghanistan did not respond to request of Special Rapporteur on Torture or Nepal did not

¹¹⁴ *ibid* 36.

¹¹⁵ United Nations Human Rights Council, ‘Special Procedures’ <www.ohchr.org/EN/HRBodies/HRC/Pages/SpecialProcedures.aspx> accessed 3 June 2018.

¹¹⁶ OHCHR, ‘Special Procedures of the Human Rights Council’ <www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 1 July 2018.

¹¹⁷ Special Procedures with protection mandates may include Special Rapporteur on Torture, Special Rapporteur on contemporary forms of slavery or on extrajudicial killings, or the Working Group on enforced or involuntary disappearances or on arbitrary detention.

¹¹⁸ FIDH (n 2) 22.

¹¹⁹ Marc Limon and Ted Piccone, ‘Human Rights Special Procedures: Determinant of Influence’ (Policy Report, Universal Rights Group, March 2014) p. 24.

¹²⁰ *ibid* p. 25.

accept the request in spite of being sent five reminders.¹²¹ Thailand, in 2017 issued standing invitation to mandate holders in a very welcome move.

India has accepted and had visits by four special rapporteurs and one working group with the latest being in 2017 by Special Rapporteurs on human rights to safe drinking water and sanitation and on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material. While in 2018, two Special Rapporteurs on the elimination of discrimination against persons affected by leprosy and their family members and minority issues and a Working group visit on the issue of discrimination against women in law and in practice are proposed to be conducted. Special Rapporteurs and experts who are mandate holders have repeatedly urged India to repeal the Foreign Contribution Regulation Act (FCRA), 2010 which has been a hindrance in the functioning of civil society and yet the country has not taken action in that regard.¹²² Multiple NGOs faced issues in functioning or were suspended or their licenses were revoked in what was being seen as violation of freedom of expression and association.

The responses or rejections provided by the States to the recommendations and observations help to map out the constructive engagement levels for the mandate procedures.¹²³ The communications that are dispatched to the States under the Special Procedures are urgent in nature and in some manner creates pressure on the governments to provide responses on violations¹²⁴, which brings the processes of the States in scrutiny. The rates of response by the State across the Asian region has been varying with an overall low rate of response.¹²⁵

In a study, by the Global Public Policy Institute, the response rates on communications on Human Rights defenders combined with rejection rates were studied, and in the period of 2000-2016, the state of India was found to have provided replies to 70 cases from a total of 247 individual cases and furthermore 82% of replies provided were rejections.¹²⁶ Also the average period of response found for India was 7.6 months¹²⁷ making it in one of the lowest response

¹²¹ FIDH (n 2) 37.

¹²² OHCHR, 'UN rights experts urge India to repeal law restricting NGO's access to crucial foreign funding' (Geneva, 16 June 2016) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E> accessed 14 June 2018.

¹²³ Janika Spannagel, 'Chasing Shadows: A Quantitative Analysis of the Scope and Impact of UN Communications on Human Rights Defenders (2000-2016)' (Policy Paper, Global Public Policy Institute, 2018) p 16.

¹²⁴ FIDH (n 2) 37.

¹²⁵ *ibid*

¹²⁶ Spannagel (n 124) 17

¹²⁷ *Ibid*

rates. In this data Thailand stood in a better position than India with a response rate that indicated that response rates were similar to rejection rates.

As other stakeholders, networks of NGOs also participate in this process through submitting information on cases or situations. In Asia, at regional level, FORUM –Asia and FIDH have played an important role in providing information to the mandate holders enhancing the work of special procedures.¹²⁸

Asian states reflect a varied response spectrum and mainly lie on the lower side of the spectrum but an important observation to note is that the general global trends are echoed on the response spectrum whereby the engagement has been slow and inconsistent.

4.4 Universal Periodic Review

The Universal Periodic Review (UPR) was established as part of one of the mandates of the Human Rights Council in March 2006. The mandate of the Council involved it to “undertake a universal periodic review, based on the objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”¹²⁹. It should also be understood that this process of review is a form of interactive dialogue whereby the UPR takes on the role of assisting the States in realization of their obligations and commitments of human rights.

Acting in complementarity to the treaty bodies, the UPR uniquely encompasses all member states in a periodic manner that could ensue a follow-up as well. In each review cycle, 48 States will be considered, with all States being reviewed once in every four years, on all rights provided in the UDHR and the treaties.¹³⁰ The review also includes all stakeholders in terms of contribution, including observer states, national institutions (NHRIs) and non-governmental organisations.

The Working Group consisting of all members of the Council conduct the review based on three kinds of documents: the national report submitted by the State under review; a compilation of information provided from reports of Special Procedures (comments and observations), Treaty bodies and any other document by other UN entities; and a summarised

¹²⁸ FIDH (n 2) 37-38.

¹²⁹ UNGA (n 32).

¹³⁰ OHCHR, ‘Basic facts about the UPR’ <www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> accessed 15 June 2018.

compilation of information provided by any other relevant stakeholder.¹³¹ This documentation makes the basis for questions put to the states, who then answer in the sessions while presenting its national report. The outcome of the review is conveyed through a report by the Working Group containing the summary of the process of the session with conclusions and recommendations for the States which it may reject or follow.

The first review cycle of UPR started in March 2008 and ended in 2011 and the process experienced growth as more and more countries were reviewed. Thereafter, the process gained eventual acceptance, participation and recognition among the member states.

4.4.1 Engagement of India and Thailand with the UPR

Considering the scope of the present study and for ease of understanding for both states, the second UPR cycle has been considered to study the performance and engagement of the states. Although India has finished the third cycle as well, the second UPR cycle will be studied. This choice has been made keeping in mind that since most of the countries including Thailand have not been reviewed under the third cycle, providing comparisons among the focus states and against the global trends in the completed cycle will provide better comprehension.

4.4.1.1 India at UPR

In the case of Indian UPR review, in the second cycle a total of 170 recommendations were received by India from 71 states and of these 56 recommendations were ones that involved specific action on part of India.¹³² In the recommendations made, it could be seen that not all SAARC member states made recommendations and only the states of Nepal, Maldives and Sri Lanka recommended to India. As the recommendations made were not that high in number, the trends suggest that mainly each of the states made a small number of recommendations, and Ireland was the state with highest number of 6 recommendations.¹³³ Interestingly the Holy See which has an Observer Status in UN also made 6 recommendations.¹³⁴ In terms of recommendations made by the members in accordance of their regional groups it could be understood that member states belonging to the Western Europe and Other Group made 63 recommendations followed by 40 recommendations made by members of Asian group. Thus it would be understandable that members of the European Union provided the biggest

¹³¹ Carrasco and Sutton (n 22) 261.

¹³² UPR Info, 'Statistics of Recommendations: India' < www.upr-info.org/database/statistics/index_sur.php?fk_sur=77&cycle=2 > accessed 15 June 2018.

¹³³ UNHCR 'Report of the Working Group on the Universal Periodic Review: India' (9 July 2012) A/HRC/21/10.

¹³⁴ UPR Info (n 133).

proportion of 58 recommendations while the members of Commonwealth and ASEAN made 21 and 12 recommendations respectively.¹³⁵

In the response of the Indian government, it could be seen that a rather small number of recommendations received acceptance of India. Out of the total 170 recommendations made, only 56 recommendations were accepted which would mean that a majority 67% of the recommendations were marked as only supported and not accepted. Within the recommendations accepted, those made on rights of child and women, trafficking, development and poverty were accepted.¹³⁶

In the issues covered under these recommendations made to the State under review (India) broadly 41 issues could be counted.¹³⁷ As the data trends regarding the responses would corroborate, the rights of the child covered in 43 recommendations was a significant issue, followed by issues pertaining to international instruments in 42 recommendations and women's rights in 38 recommendations. Issues that were also highly recommended upon were torture and other Cruel, Inhumane and Degrading treatment (26 recommendations), right to health (15), minorities (12), right to education (12), and death penalty (11).¹³⁸

4.4.1.2 Thailand in the Second Cycle

In its second cycle of review under the UPR process in 2016, a total of 291 recommendations were made to Thailand by 97 states, wherein 135 recommendations that were made involved a specific action.¹³⁹ All ASEAN member states provided recommendations to Thailand but they were very few whereby the highest number of recommendations provided were 4 by the Philippines. The Government of Thailand was provided recommendations by 11 countries to work towards improving functioning of its National Human Rights Commission through ensuring its independence and compliance with the Paris Principles.¹⁴⁰ This was to upgrade back its accreditation status from "B" to "A". The highest proportion of recommendations of 32.3% were made by states from the Western Europe and Others Group followed by the states from the Asian group who made 68 recommendations constituting about 23.3% of the total recommendations. Looking at an aspect of organisational participation, it can be reported as

¹³⁵ Ibid.

¹³⁶ UNHCR (n 134).

¹³⁷ UPR Info (n 133).

¹³⁸ UNHCR (n 134).

¹³⁹ UPR Info, 'Statistics of Recommendations: Thailand' <www.upr-info.org/database/statistics/index_sur.php?fk_sur=173&cycle=2> accessed 16 June 2018.

¹⁴⁰ FORUM-ASIA, '2017 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia' (FORUM-ASIA 2017) p. 63.

the European Union (EU) led with the highest number of recommendations at 82 and ASEAN member states provided 20 recommendations.

In its overall response, the state of Thailand provided that it would accept 209 of the 291 recommendations that were made to it and the remaining 82 recommendations were considered as being noted.¹⁴¹ On recommendations on NHRC, the action plan provided by the Government did not indicate activities that would strengthen the functioning and achieve the desired results. There were efforts to undertake work on the recommendations by international mechanism but the compliance of NHRC with the Paris Principles seems to have been lost in translation by the Thai government. Furthermore the situation in the country in terms of human rights violations and their redressal seems to have regressed.

Following the numbers it is also important to look at the issues being addressed in the recommendations made to the state under review. The sheer scope of UPR covering the whole gamut of rights under UDHR and other treaties is one of the unique and enhancing feature. Thus in terms of studying the issues covered in recommendations, it can be inevitably assumed that it was a wide range. Broadly speaking 45 issues were understood to have been covered whereby 89 recommendations amounting to about 30% were in the context of international instruments¹⁴², generally recommending the ratification of these instruments or the optional protocols¹⁴³. In a positive note, the rights of child and women were covered under 56 and 23 recommendations respectively. Some of the other issues that were covered in high number of recommendations include Death penalty (32), detention (31), torture and other Cruel, Inhumane and Degrading treatment (30), labour (30), freedom of expression and opinion (27), justice (26).¹⁴⁴

4.4.2 Global trends in UPR

In the second UPR cycle a total of 36,331 recommendations were made and only 25 countries did not participate in making any kind of recommendations and the highest number of recommendations received were by the United States (388 recommendations).¹⁴⁵ While in terms of receiving recommendations, Thailand fell in top thirty states, at the eighth position as it received 291 recommendations, and India with 170 recommendations was at a higher

¹⁴¹ UPR Info (n 140) Thailand.

¹⁴² UPR Info, 'Statistics: Thailand' (n 140).

¹⁴³ UNHCR 'Report of the Working Group on the Universal Periodic Review: Thailand' (15 July 2016) A/HRC/33/16.

¹⁴⁴ *ibid*.

¹⁴⁵ UPR Info, 'Statistics of Recommendations: Global' <www.upr-info.org/database/statistics/index.php?cycle=2> accessed 17 June 2018.

position of 121. Other Asian states (considering South and South East Asia) in the top thirty included Myanmar (292), Singapore (278), Maldives (258), Vietnam (256) and Malaysia (252).¹⁴⁶ Neither India nor Thailand were in the higher recommending states position.

An interesting observation is that in context of regional grouping, members of region of Asia received the highest number of recommendations. A more engaging aspect of this observation is that when looking at the same data in organisational grouping, ASEAN member states fell much below, even lower than the European Union or Organization of American States.¹⁴⁷ In terms of recommending states, Asian region fell below the Western Europe and Other Group and ASEAN member states maintained a lower position in even providing recommendations to other states.

When compared with the global trends, the Asian states, in particular Thailand did not behave much different in their UPR outcomes. The global data for the second review cycle also suggested that the higher proportion of recommendations were supported while the lower proportion were categorized as having been noted¹⁴⁸.¹⁴⁹ The UPR being a process of interactive dialogue that covers universally a wide range of rights and also provides the space for different stakeholders such as the civil society to participate. The areas of concern or the issues raised to States from across the world could be important to form collaborative networks and grounds for enhancement. When looking at the issues raised in the UPR review, the global trends coincided with the trends of Asian states, India and Thailand in particular. The top 5 issues that were raised during reviews of states in the second cycle globally were International instruments (in 8,331 recommendations), women's rights (7,006), child rights (6,641), torture and other Cruel, Inhumane and degrading treatment (2,791) and justice (2,770).¹⁵⁰

An important fact to ponder upon is that upon assessment of the other first and the third cycles (till now) the same issues are being raised in most recommendations. While a broad generalization cannot be made without a deeper analysis, but from study of reports of India and Thailand and some other Asian States, the issues pertaining to women and child rights, torture, and international instruments (in terms of ratification mainly) were still matters raised by most states. Global trends of first cycle puts the exact same list of top five issues in even the same

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ Noted does not directly mean rejection, but involves that a state, 'does not enjoy its support' or 'not in a position to accept' or 'does not accept'.

¹⁴⁹ *ibid* (n 146).

¹⁵⁰ UPR Info, 'Statistics: Global' (n 146).

order. Even the regional mechanisms have a focussed approach when it comes to women and child rights. This leaves with doubts if these are the issues with biggest violations that despite recommendations and actions still persist or have these issues become the scapegoats that are safer and less controversial to raise in an international forum and can be done away with mere lip service.

4.5 Conclusion

The international mechanisms are both the highest and first stages of the UN protection system. These mechanisms provide a forum for the setting of norms for institutions and mechanisms, a space to address instances of violations when local level fails and lastly involve the processes of discussion, and negotiations for all these. While the treaties are the broad frameworks that facilitate for national systems to set up bodies and mechanisms for human rights, the special procedures and the universal periodic reviews are procedures for implementations of these instruments.

The Asian states like other regions have mainly a high status of ratification for all major treaties barring some exceptions. But when it comes to handling the implementation of the human rights mechanisms, they are still on the path of learning. There is scope for improvement in responding to the Special Procedures mandates and in implementing the recommendations of the UPR process. While progress has been made in great strides, certain ideas that exhibit precedence of State sovereignty and scepticism towards scrutiny hinder in improving their performances.

5 Assessment of National Human Rights Institutions and Local Civil society

“Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advance in a sustained manner” – Kofi Annan, UNGA, 2012

5.1 Introduction

The purpose of the present chapter is to provide an evaluative glimpse of the local human rights mechanisms in the focused states of India and Thailand. The concept of National Human Rights Institutions (NHRIs) is briefly defined through its history and introduction to the global framework. The NHRIs of India and Thailand are assessed along with the existing civil society in these countries in particular context of human rights.

5.2 Locating National Human Rights Institutions

The United Nations has been following the broad mandates of protection and promotion in the context of human rights and undertakes activities towards fulfilment of those mandates. While the UN provides active assistance to its member states in efforts towards the mandate, however with its global structure the UN is not and could not possibly be the go-to institution at a local level. There are not just limitations in terms of resources and its capacity but also the fact that the international mechanisms, be it globally or regionally (such as European or African level) have always stressed upon creating solutions at domestic levels before reaching interventions at larger levels. The regional systems like the ones in Africa, America or Europe fall below the UN but even lower, at the starting points are domestic institutions. The governments and non-governmental organisations play a key role in fulfilment of mandates of the UN.

The role of institutions, particularly governmental institutions in realization of mandates is significant and practical for individuals. Incorporating provisions of international instruments in domestic laws or fulfilling obligations through other ways are important steps that States take. But even more important than introduction of legislations or other ways is the implementation and monitoring of these actions. Therein come the national institutions for protection and promotion of human rights.

5.2.1 Brief History of NHRIs

Post-World War II, in the year 1946, the Economic and Social Council put into consideration the idea of national human rights institutions and subsequently the member states of UN were asked to consider establishment of groups (information) or human rights committees at the local level. Thereafter, the idea was mulled upon and in 1978, in a seminar organised by the Commission on Human Rights, draft guidelines were produced that looked into the functioning and structures of such institutions.¹⁵¹ Following these steps, in 1991, at the first international workshop on the National Institutions for the Promotion and Protection of Human Rights was held in Paris. The outcome; the Paris Principles, which could be considered as a set of criteria for normative standards and evaluation of the NHRIs. The UN General Assembly through resolution 48/130 of 20 December 1993 adopted the Paris Principles (as Principles relating to the Status of National Institutions). In this regard, the 1993 World Conference on Human Rights held in Vienna was a decisive point, whereby the NHRIs that were compliant with Paris Principles were given a formal recognition and also encouraged for further strengthening.¹⁵²

The Paris Principles have been widely accepted as the benchmarks for testing the credibility and legitimacy of the national institutions. The principles set the two broad mandates of protection and promotion of human rights for the NHRIs which could include in protection-receiving and investigating complaints, monitoring activities and mediation of conflicts and in promotion – outreach, education, dissemination, capacity building, training and advisory to the Governments.¹⁵³ The Principles provides six main criteria for the NHRIs to fulfil which include, mandate (includes competence), independence (by Constitution or Statute), autonomous standing from Government, pluralism (in sense of participation of non-state actors such as the civil society), sufficiency of resources, and adequacy of the powers to conduct investigation.¹⁵⁴ To better understand, for instance the Paris Principles state that the national institutions should be provided with a broad human rights mandate with clear provisions that provide for this mandate to be set in a text (legislative or constitutional), with specifications of its composition and sphere of competence.¹⁵⁵ Collaboration with non-government

¹⁵¹ Global Alliance of National Human Rights Institutions, 'A brief history of NHRIs' <nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx> accessed 16 June 2018 (GANHRI).

¹⁵² OHCHR, 'Paris Principles: 20 years guiding the work of National Human Rights Institutions' <www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx> accessed 13 June 2018.

¹⁵³ UNGA 'Principles relating to the Status of National Institutions' (the Paris Principles) A/RES/48/134.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

organisations and promotion of human rights have also been handled specifically within mandates for NHRIs.

NHRIs can be thus understood to be independent institutions embedded in the Constitutional framework and could be established within a legal framework for protection and promotion of human rights at the national capacity. They generally perform the core functions of handling complaints of violations, human rights educations, and advising and recommending legal reforms to the Governments. They could act as an essential element not only in linking the domestic civil society with the government in the mandate of protection of human rights but also reducing gap in the text and ground level implementation of international standards of human rights.

Other bodies of the UN such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women (CEDAW), and Committee on Economic, Social and Cultural Rights (ECOSOC – General Comment 10) have also recognised the importance and role of NHRIs.¹⁵⁶ NHRIs have been involved in interacting with these UN bodies through the medium of reporting on State situations, such as during the Special Procedures or UPR. The NHRIs are second bodies to take the floor during reporting in UPR after the State parties. Similarly during review sessions with treaty bodies, the NHRIs provide inputs regarding their States. The recommendations and concluding observations during these sessions require a follow-up provision and this role is fulfilled by the NHRIs. The NHRIs also help in implementation of provisions of international instrument in local framework. For instance in India, the NHRC was involved in monitoring situations of child and bonded labour, trafficking and mental health to supplement the judiciary. Further the NHRC in assisting treaty bodies also engaged in reviewing anti-terrorism legislation as these had been deemed problematic by the treaty bodies. NHRC was responsible for creating public awareness in this regard. NHRC was also instrumental in India signing the Convention Against Torture. It has worked extensively and at ground level in active collaboration with the civil society on issues of health, education, bonded labour and trafficking.

¹⁵⁶ GANHRI, ‘Governance and Operations’

<nhri.ohchr.org/EN/AboutUs/Governance/Pages/Governance.aspx> accessed 16 June 2018.

5.2.2 Assessment of NHRIs

In 1993, when the Paris Principles were adopted by the General Assembly, the International Coordinating Committee for National Human Rights Institutions (ICC) was also established as an association of NHRIs that would function to bring NHRIs across the world to function in accordance with the Paris Principles and to enhance co-operation and information sharing amongst the NHRIs and amongst the international systems and the NHRIs. The ICC is now known as the Global Alliance of National Human Rights Institutions (GANHRI). This body among its various functions associated with establishment, facilitation, promotion, capacity building, and support for NHRIs also includes the function of undertaking the process of accreditation of the NHRIs as per the norms set in the Paris Principles. As per the Global Alliance of National Human Rights Institutions (GANHRI), across the world there are six models of NHRIs. “These are namely, Human Rights Commissions, Human Rights Ombudsman Institutions, and Hybrid Institutions, Consultative and advisory bodies, Institutes and centres and multiple institutions”.¹⁵⁷

The accreditation process is conducted through the Sub-Committee on Accreditation (SCA) and includes the Office of the High Commissioner for Human Rights (OHCHR) as its permanent observer as well as the Secretariat.¹⁵⁸ The Sub-Committee basically undertakes a review of the NHRIs in terms of their legislative foundations and ground level functioning or operation in context of the Paris Principles. This process undertaken on the principles of independence, rigor and transparency confers to the accredited institutions a global recognition of their status. Thus it is no surprise that key UN bodies such as the UNGA and Human Rights Council, and UN Human Rights mechanisms such as the Special Procedures, the UPR and treaty bodies place emphasis on this process.¹⁵⁹ The accreditation process categorizes the NHRIs across three levels that include : A – these are Voting members¹⁶⁰ and those are fully in compliance with the Paris Principles, B – these are Observer Members¹⁶¹ that are in partial compliance with the Paris Principles and C – these are Non-Members which are the non-compliant NHRIs.¹⁶²

¹⁵⁷ GANHRI, ‘Roles and Types of NHRI’ <nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx> accessed 10 June 2018

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ Voting Members are able to fully participate in sessions of the Human Rights Council through taking floor, submitting documents during the process of UPR. These members could also participate in meetings of international, regional and national institutions.

¹⁶¹ Observer Members, as name suggests are observers during meetings of international, regional and national institutions. They are not able to vote or taking floor during UPR.

¹⁶² GANHRI (n 157).

Thus, when we talk about the National Human Rights Institutions (NHRIs), it is important to note that these institutions are varied in forms and categories. Broadly speaking these institutions vary on their mandates, or the composition, or the legal and political traditions of their functioning. There are multi-member NHRIs that handle complaints in Asia and Africa or single-member such as Ombudsman in Nordic (European) countries or advisory capacity institutions in some European countries.¹⁶³ These differences in structure and mandate along with the resource allocation and conditions of operation are factors that affect the performance and the impact of the NHRIs.

When talking about the NHRIs, an important body in the Asian context is the Asian NGO Network on National Human Rights Institutions (ANNI). The network as discussed in a previous chapter focusses on the issues of the NHRIs in the region.¹⁶⁴ ANNI works with 36 organisations (that are its members) from 21 countries or territories in Asia.¹⁶⁵ It is interesting to note that ANNI is almost a regional unit of the GANHRI as its work includes strengthening the functioning of the NHRIs in its scope and improving the functioning in compliance with the international norms such as the Paris Principles and observations and recommendations of the SCA of GANHRI.

In the international human rights discourse the promotion-protection dialectic is implicit in nature and requires a harder look to decipher. In the Asian countries, this dialectic is represented in the rhetoric and practice of putting emphasis on the promotion often on the expense of the protection. The lack of regional mechanism aided with weaker national frameworks could bring concern but positive changes can provide better future prospects.

5.3 National Human Rights Commission of India (NHRC) – a toothless tiger

5.3.1 About the Commission

In India, the National Human Rights Commission (NHRC) was established on 12 October, 1993 through a legislation called the Protection of Human Rights Act (PHRA), of 1993¹⁶⁶. Created in the response to the increased human rights awareness in international arena and with a Constitution in compliance with the Paris Principles, the NHRC was one of the founding

¹⁶³ The International Council on Human Rights Policy, 'Assessing the Effectiveness of National Human Rights Institutions' (OHCHR, 2005) pp. 5-6 (ICHRP).

¹⁶⁴ FORUM-ASIA, '2017 ANNI Report' (n 141).

¹⁶⁵ *ibid.*

¹⁶⁶ The Act was amended in 2006, where one of the most significant amendments focused on compensation for victims of violations.

members of the ICC. The Commission follows the mandates of protection and promotion of human rights as defined¹⁶⁷ in the PHRA, 1993.

The NHRC as created by the legislation of Parliament is an autonomous body that has a wide variety of functions and caters to a large population. In its work, the NHRC is assisted by State Human Rights Commissions (SHRC) in around 26 states in the country. The Commission performs numerous functions in its work including, complaint handling and conducting investigation or inquiries, conducting visits of places of detention, review legislations and Constitutional framework focused on safeguarding protection mandate, undertaking research project and promoting human rights education, collaborate with and encouraging civil society actors in field of human rights and more.¹⁶⁸

The NHRC in accordance with its statute comprises of a Chairperson and four members along with four ex-officio members¹⁶⁹. These members and the Chairperson are appointed by the President based on the recommendations provided by a Committee made up on high level political figures, including the Prime Minister and Speaker of the House.¹⁷⁰ Divided into various divisions in its functioning, NHRC also includes Special Rapporteurs and Core and Experts Groups¹⁷¹. Handling complaints (with its own investigating team) is one of the most major functions of the Commission and it also seeks suo-moto complaints dealing with complaints on entire range of political and civil rights and economic, social and cultural rights. Based on the sheer population it is inevitable that the Commission has a humongous caseload that is unlike any other national human rights institution in the world¹⁷².

Thus it becomes sensible if there is delegation of the work in some manner. The State Human Rights Commissions have been established as autonomous bodies in accordance with the Protection of Human Rights Act. The Commissions were created at the state level in order to facilitate accessibility of a human rights mechanism for the citizens at the state level. The

¹⁶⁷ Section 2(d) of PHRA, 1993 defines human rights being rights that are related to life, liberty, equality and dignity of individual citizen, guaranteed through the Constitution or enforced through the Courts or as in the international covenants. See also: The Protection of Human Rights Act, 1993, Ministry of External Affairs, Department of State, s 2(d).

¹⁶⁸ National Human Rights Commission, 'NHRC India' (National Human Rights Commission) p. 16 (NHRC).

¹⁶⁹ Ex-Officio members are chairpersons of National Commissions of Scheduled Tribes, Scheduled Castes, Women and Minorities.

¹⁷⁰ NHRC (n 169) 7-9.

¹⁷¹ The Core and Expert Groups include persons who are expert in their field serving in voluntary or honorary capacity. The groups include group on health, right to food, NGOs, disability, refugees etc.

¹⁷² The complaints received by the Commission saw an increase from 496 in the year 1993-1994 to 74,444 complaints in the year 2005-2006.

NHRC as per its necessity has the right to transfer the complaints to the concerned State Commission.

5.4 Assessment

5.4.1 Present Status of NHRC and situation in the country

The Indian NHRC was accredited with the “A” status by the Sub-Committee on Accreditation (SCA) of the GANHRI in 2011 and has since maintained the status, getting re-accredited in the latest review in November 2017. The Commission is an important body in what is the world’s largest democracy which has long displayed a respect for human rights through its legislative and constitutional framework.

When the current government in India took power in 2014, there were certain concerns raised by the civil society actors regarding the democratic space and control of government across the spectrum that could result in violations of rights of people, in particular the human rights defenders. As the time progressed by 2016, it could be seen that the human rights defenders and civil society actors were facing attacks, the democratic space was diminishing and there was a rise of populist politics. Within such a period it is important for the NHRC to be up to par and effectively function as an independent, autonomous body that is able to take on the complaints of human rights violations and resolve issues, even if those responsible are politically in power. While the re-accreditation of the NHRC would suggest that the Indian NHRC was able to stand up to the challenge and retained its status of functioning in compliance with the Paris Principles, many other sources would disagree. The SCA was satisfied with the steps taken by NHRC and pointed out areas regarding selection process and composition and reporting mechanism where there was room for improvement, but the local and regional networks point some important deficiencies regarding complaint handling, involvement of police in investigation, lack of diversity, political appointments, judicial overpowering in membership, lack of action towards oppressive acts that need redressal.

5.4.2 Composition of NHRC – Pluralism and Lack of Diversity

The Commission’s composition of the Chairperson and the members reflected a preponderance of judiciary which was limiting the selection of candidates.¹⁷³ Added to this was the fact that since 2003, the Commission had not had a single appointment of a women member. Even within the overall staff, women are represented in a much lower proportion, which has been neglected by the Commission. Excluding the judiciary only two members of the Commission

¹⁷³ FORUM-ASIA, ‘2017 ANNI report’ (n 141) 94.

could belong to a different background (but having human rights experience). In 2016, the Appointment Committee brought in the National Vice- President of the ruling party as a member of the Commission which faced a lot of criticism and protests and thus was eventually rescinded.¹⁷⁴ While in a progressive move, this candidate was replaced by a woman, however, she not only had close association to the ruling party but was also a lawyer.¹⁷⁵ Moreover, the civil society actors (based on the minutes of the meeting for appointment reported) that no other candidates had even been in consideration for this position. A member selected with lack of transparency and clear political affiliations displayed a disregard of Paris Principles and recommendation of the SCA. It was also noted and indicated that the religious and ethnic minorities had faced under-representation in the Commission¹⁷⁶ and no steps have been taken to improve upon that situation.

5.4.3 Appointment process

As mentioned above the appointment of members with clear political affiliations with the ruling party denote that the selection or appointment process was biased. The provisions of the Act (PHRA) do not provide the selection process to be transparent or even consultative which leads to appointments that are clearly harmful for the functioning of the Commission. The vacancies were not advertised, no clear criteria for eligibility was set and the process has no specifics about consultations regarding the selection.¹⁷⁷ The NHRC post recommendations from SCA took steps to address former two concerns but the consultations were still not included.¹⁷⁸ Furthermore the appointment of Director General of Investigations from the armed forces points towards issues in investigating complaints of violations by police forces and leads to perceptions of bias and questions the credibility.¹⁷⁹ Similar concerns have been raised on appointment of Secretary General from officials from government service.¹⁸⁰ Both these concerns did not lead to any change in the selection process.

¹⁷⁴ FORUM-ASIA, '2017 ANNI report' (n 141) 94-95.

¹⁷⁵ *ibid*

¹⁷⁶ Muslims, or people from tribal and Dalit communities despite forming largest minorities do not have any representative in the NHRC.

¹⁷⁷ *Ibid* (n 175).

¹⁷⁸ GANHRI, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) – November 2017' (OHCHR 2017) p. 19.

¹⁷⁹ FORUM-ASIA, '2017 ANNI report' (n 141) 96.

¹⁸⁰ GANHRI, 'SCA Report' (n 179) 20.

5.4.4 Civil Society Engagement

One of the facts on functioning of the NHRC is the minimised engagement and interaction of the civil society. While there is a core group on NGOs, its participation and engagement has been limited in recent times and certain significant and influential networks such All India Network of NGOs and Individuals (AiNNI) working with National and State Human Institutions have also been neglected in terms of interaction¹⁸¹. Recent reports and literature suggests that even the existing mechanism including civil society actors have not been functioning in an effective manner. Similar concerns had been noted by the SCA in re-accreditation report and recommendations to enhance engagement of stakeholders from civil society.

5.4.5 Complaints Handling

The NHRC as part of its Complaint Handling mechanism also consists of its own investigation unit which is not being used properly. In 2016, the Commission failed to address several cases of violations of certain fundamental rights and freedoms (of expression, assembly and association) leading to perception of biased and controlled functioning of NHRC. There have been reports of delay in handling cases and even use of police officials for investigating complaints against the police which could reflect over reliance and confidence in the system but could also be problematic in efficient dealing of cases. The NHRC has also been ineffective in their dealings with government authorities as there had been delays in communications and in following through with recommendations made by the Commission.¹⁸² There is also the provision of dealing with complaints of instances occurring only in the last one year which restricts the scope of the accessibility of the mechanism. In past few years the instances of human rights violations have been on rise and some incidents of murders of noted academicians and journalists have been highlighted but the actions taken by NHRC were delayed, ineffective, non-assertive and highly questionable¹⁸³. A lot of complaints are transferred to the State Commissions for handling and while it is good due to the huge case load aspect but the State Commissions are also suffering from lack of resources and structural issues. Moreover handling of cases of local police officials leads to easy harassment of the complainants.

¹⁸¹ FORUM-ASIA, '2017 ANNI report' (n 141) 99.

¹⁸² Ibid (n 182) 101

¹⁸³ Case of Professor Nandini Sundar from Chhattisgarh and Mr. Khurram Parvez from Kashmir. Introduction of Foreign Contribution Regulation Act led to huge problem for non-profit organisations and a lot of human rights organisations due to renewal of FCRA license for foreign funding faced issues in functioning, such as Greenpeace or Lawyers' Collective.

5.4.6 Annual Reports

The NHRC has also been delayed in presenting its reports. As per the SCA the backlog in this case is not at all beneficial as this delay undermines the work done and makes the report presented being useless as its been delayed. Till 2017 accreditation, the annual report that could be publicly availed was for 2013-2014 session as the reports for coming years had not been tabled before the parliament.¹⁸⁴ This leads the report to lose their effectiveness for judging and improving performance and utilization as an advocacy tool.

The Indian NHRC may have addressed concerns to re-accredit their status but the local and regional actors are not convinced of effective functioning of the body. In the past the NHRC has displayed efficient and effective functioning and led to some landmark achievements. The present government however, with its populist politics has been neglecting and stifling rights and fundamental freedoms of citizens, in particular human rights defenders has led to a rather biased and restrained Human Rights Commission which do not promise good future aspects.

5.5 National Human Rights Commission of Thailand (NHRCT) - Downgrade or transition

5.5.1 History of NHRC and present status

The National Human Rights Commission of Thailand (NHRCT) officially came into existence based on the provisions of the Constitution of the Kingdom of Thailand (1997) in 2001. The NHRCT had resulted from a public demand for a national level independent mechanism that would look towards protection of the rights of the people as guaranteed in their Constitution. Based on the Constitutional provisions, the National Human Rights Commission Act was enacted in 1999 and the official institution started functioning from July 2001.¹⁸⁵ The Committee that was to select the members was a diverse group (including civil society members in effective numbers) that was tasked to nominate the members to be voted in by Senate in a democratic process. ¹⁸⁶The first Committee of the Members of NHRC was appointed for a period of six years till the year 2007 by the monarch of the kingdom.¹⁸⁷

¹⁸⁴ FORUM-ASIA, '2017 ANNI report' (n 141) 105.

¹⁸⁵ OHCHR, 'Technical Note on the National Human Rights Commission of Thailand in the draft 2015 Constitution' (Bangkok, 31 March 2015) p. 5.

¹⁸⁶ *ibid* (n 186) 6.

¹⁸⁷ National Human Rights Commission of Thailand, 'About us: Background and History' <www.nhrc.or.th/AboutUs/The-Commission/Background-and-History.aspx> accessed 8 June 2018 (NHRCT).

In the year 2004, the NHRCT was accredited the “A” status by the ICC Sub-Committee during the first accreditation process based on its structural and operational functioning in compliance with the Paris Principles.¹⁸⁸

However during this first term itself, the country experienced a major coup d’état in the year 2006 by the Democratic Reform Council and subsequently the Constitution was abolished.¹⁸⁹ The new Constitution of 2007 changed the process for the selection of members wherein the Selection Committee was reduced to exclude all civil society actors. This lack of diversity and exclusion of non-State actors led to concerns by the ICC Sub-Committee¹⁹⁰ pointing towards diversification and consultation with a broader range of stakeholders including the civil society and vulnerable groups.

In the year 2009, the Selection Committee in its closed process ended up choosing commissioners that had no experience or expertise on human rights and were lacking diversity. Thailand experienced political violence in 2010 (due to clashed between protestors, Red Shirts and government) resulting in deaths during military actions which were clear human rights violations. Further in 2013 there was an uprising against the government. The NHRC failed to investigate or even address these situations of human rights violations in a timely fashion and displayed great delay in its functioning. Despite these situations, the NHRC did not experience any change and in the year 2013, the Sub-Committee on Accreditation (SCA) expressed concerns regarding lack of redressal of issues raised in its report of 2008. However the SCA still deferred and provided the NHRCT time to address the grave issues that were threatening the re-accreditation of the NHRC.

There was another military coup d’état in 2014 and as a result martial law was established in the country. Thailand came under a military rule of the National Council for Peace and Order and the constitution in place (of 2007) was officially ended.¹⁹¹ The coup saw human rights violations and the NHRC failed to address these grave violations, again leaving itself displayed in a non-functional and non-autonomous capacity. Also, during 2014, the SCA in addition to the selection issues pointed out the lack of independence and credibility of the NHRC. This had been reflected from the clear display of political affiliations during official duty occasions

¹⁸⁸ OHCHR, ‘Technical Note’ (n 186) 2.

¹⁸⁹ NHRCT (n 188).

¹⁹⁰ Report by the Sub-Committee recommended a need for diverse committee of members of NHRC based on consultation and inclusion of civil society members and vulnerable groups in the Selection Committee.

¹⁹¹ FORUM-ASIA, ‘2017 ANNI Report’ (n 141) 52.

by the members of the NHRC.¹⁹² In its earlier report in 2013, the NHRCT was given one year grace period to follow through on recommendations provided so as to prevent the institution from being downgraded in the accreditation status from “A” to “B”. However looking at the absence of actions taken by the NHRCT, the ICC recommended a downgrade in the status of the NHRCT. In October 2014, the GANHRI (formerly ICC) in its Accreditation report, followed through with its recommendation and the NHRCT was given the “B” status and became an observer member.

5.5.2 Downgraded status of NHRC – selection process, credibility and public perception

The NHRCT had then reached a downgraded status mainly due to certain reasons. The first was a non-exclusive, non-participatory selection Committee that was leading to the group of Commissioners that lacked experience, understanding and were not diversified at all.¹⁹³ Furthermore, the selected Commissioners lacked independence and credibility as reflected through their display of their political affiliations while acting in official capacity and failure to address serious situations of human rights violations. The public lacked confidence in approaching the NHRC and was also being handled ineffectively in dealing with their complaints. It has also been pointed out that the recommendations given by the NHRCT were not being implemented by concerned authorities and NHRCT failed to follow-up these cases.¹⁹⁴

5.5.3 The 2017 Constitution and a merged body?

This period was witnessing another transition whereby a draft constitution was being prepared and the NHRCT was again in a position of experiencing modifications or reconstructions. There were instances of members of the Commission resigning from their posts, expressing dissatisfaction with the Commission and the leadership was labelled as being ‘weak’.¹⁹⁵ The proposition regarding reconstruction proved to be true as the organic laws on the NHRCT were announced to be adopted. The Constitution Drafting Committee in January 2015, announced a merging of the National Human Rights Commission and the Office of the Ombudsman into a singular body proposed to be named Office of the Ombudsman and Human Rights

¹⁹² Human Rights Watch, ‘Thailand: Keep Independent Rights Commission’ (3 February 2015)

<www.hrw.org/news/2015/02/03/thailand-keep-independent-rights-commission> accessed 8 June 2018 (HRW).

¹⁹³ FORUM-ASIA, ‘ANNI – Performance of the NHRC Thailand: Withering of Human Rights Protection?’ (29 August 2016) <www.forum-asia.org/?p=21408> accessed 17 June 2018

¹⁹⁴ OHCHR, ‘Technical note’ (n 186)

¹⁹⁵ FORUM-ASIA, ‘ANNI – Thailand: Recent Developments Show the Urgent Need for Structural Changes of NHRCT’ (11 April 2017).

Protection.¹⁹⁶ The new Constitution entered into force on 6 April, 2017 and included the provision of Organic Act on National Human Rights Commission 2017 replacing the 1999 NHRC Act.¹⁹⁷ The new Constitution of 2017 had some major differences in comparison to the 2007 Constitution in context of the NHRCT. For instance while under 2007 framework, the NHRCT had the power to refer or to even bring to Court (lawsuit filing) instances of legislative documents (such as by-laws or any other acts) violating human rights, this was omitted from the new Constitution.¹⁹⁸ The 2017 Constitution included a new duty for the Commission that basically made it a state watchdog that had to report and clarify facts in cases reported by non-State actors such as civil society and even international bodies that included human rights violations by the State.¹⁹⁹

This has caused a lot of concerns not just from the GANHRI or the Office of High Commissioner (regional) but also from other international human rights mechanisms such as UPR and treaty bodies and important civil society actors such as the Asian NGO Network on National Human Rights Institutions (ANNI). UPR in its recommendations expressed concerns, inter alia, one of the concerns' reflects on the failing functioning of the NHRCT (largely the selection, roles and functioning of Commissioners) and that merging it with Ombudsman's Office that has a different scope, functioning and working methods, could create more problems.²⁰⁰ Another concern was focussed on the selection of members/Commissioners for this new body under a regime that is already facing issues concerning the Commissioners of NHRCT. In fact, some concerns raised reflect that the Organic Act may lead to further demotion of the NHRCT to "C" status.²⁰¹

5.5.4 Complaints handling

Another aspect of looking at the functioning of the NHRCT is to assess the complaint handling mechanism of the Commission, as it is one of the most important mandates of the work of NHRIs. Looking at the Thailand NHRC, it can be reported that during the period of third batch of Commissioners²⁰² the Commission received 897 complaints of which 574 complaints

¹⁹⁶ HRW (n 193).

¹⁹⁷ FORUM-ASIA, '2017 ANNI report' (n 141) 53.

¹⁹⁸ FORUM-ASIA, '2017 ANNI report' (n 141) 53-54.

¹⁹⁹ *ibid.*

²⁰⁰ OHCHR, 'Technical note' (n 186).

²⁰¹ *ibid* (n 199).

²⁰² As per the NHRCT website, the third batch of NHRC was appointed in 2014 and have the period for holding position from 20 November 2015 to 19 November 2021. The complaints looked at are for period between November 2015 to May 2017.

forming about 65% proportion were marked as resolved.²⁰³ Within these complaints, the highest number of 389 complaints were received by the Sub-Commission on Human Rights Protection Coordination, which would amount to about half of the total proportion (44%).²⁰⁴

Looking at the functioning through the Complaints Handling Mechanism, it is important to consider the quality of the complaint handling. To begin with there is backlog in the process of investigation as 35% of complaints received were not resolved. Delay in handling complaints was an issue raised and was tackled by the Commission members through allotment of time periods for stages of complaint handling. Literature and reports from previous members suggest that the accessibility for public was one of the issues as the people remained unaware of availability of complaint filing processes at regional offices of the Commission and those who accessed the mechanism had generally reached the point through recommendations of network of human rights organisations.²⁰⁵²⁰⁶ Further it was also suggested that the number of complaints received were disproportionate to the instances of violations across the country, and also that there were issues of under-reporting due to introduction of time allotment clause. Needless to say the delay in handling, inaccessibility and lack of information regarding its presence the mechanism faced a shoddy public perception of being ineffective and lacking trust which was exacerbated through unprofessional handling of confidential information²⁰⁷.²⁰⁸

The functioning of the NHRCT can also be judged in some manner from its documentation work. The website of the Commission showcases that the last annual report produced by the commission was in the year 2014 while the statistical information for complaints shows information till the year 2015. But it should be noted that through other sources the records could be obtained.

Thailand in this phase of transition awaits a new body among continued serious concerns on its structure, functioning, mandate in compliance with the international mechanisms, in particular the Paris Principles.

²⁰³ FORUM-ASIA, '2017 ANNI report' (n 141) 59.

²⁰⁴ *ibid.*

²⁰⁵ This statement has a dual impact as it not only reflects on the quality of the mechanism of handling complaints but also portrays how important the role of civil society in the functioning of the NHRCT.

²⁰⁶ FORUM-ASIA, '2017 ANNI report' (n 141) 61.

²⁰⁷ One instance was of a complaint against Internal Security Operations Command (ISOC) officials of torture and information about the complainant was found to have been divulged to ISOC officials resulting in harassment and intimidation of the complainant.

²⁰⁸ FORUM-ASIA, '2017 ANNI report' (n 141) 62.

5.6 Civil Society

Civil society as a term has been used by World Bank to denote an expansive group of organisations including non-profit, non-government, community groups, faith-based organisations, professionals associations, and labour unions, indigenous groups that displayed a certain presence in public life and expressed values and interests of these groups.²⁰⁹ It has been understood to be the third sector²¹⁰ that would affect the business and decision and policy makers of the society.

It is in this capacity of third sector that the role of civil society has emerged as being essential contributor to the running of global system and development of society. This wide range of the groups incorporated in the civil society going beyond the NGO groups has led to expand the functions of civil society to include promotion of transparency and accountability, enhancing engagement of public, raising awareness of issues of society, meeting needs of different sectors, expertise and shaping policies and strategies and much more. The civil society has been recognized as being significant in international human rights discourse for promotion and protection mandate²¹¹. The UN has also recognized civil society as playing a significant role in supporting its work and also advancing its ideals.²¹²

There have been resolutions in the HRC that have enabled the creation and maintenance of civil society.²¹³ There had been a discord in the HRC on civil society and the space and functions it needs to be accorded. The Asian states have been at the forefront for introducing amendments to these resolutions; amendments that have been restrictive and undermining the space and efforts of the civil society.²¹⁴ The trends in voting on the resolutions regarding civil society among the Asian states have been reflective of their stances on promotion of civil society being taken up as a human rights issue.²¹⁵ Moreover another important aspect in this trend was that Japan was in core group of States leading these resolutions and yet the other Asian states provided minimal support as co-sponsors, rather actively participating in

²⁰⁹ World Bank, 'Civil Society' <www.worldbank.org/en/about/partners/civil-society#2> accessed 15 June 2018.

²¹⁰ The other two sectors being the government and the commerce sector.

²¹¹ The Vienna Declaration and Programme of Action recognized pluralistic civil society, particularly NGOs to be "a vehicle for promotion and protection of human rights." It also recognised civil society actors as rights holders that should be strengthened and assisted in their functioning.

²¹² UN website – civil society section - <http://www.un.org/en/sections/resources-different-audiences/civil-society/index.html>

²¹³ Ahmed Adam, *Perspectives on a Decade of Asian Foreign Policy at the UN Human Rights Council* (FORUM-ASIA Working Paper Series Number 2 2017) p.49.

²¹⁴ Adam (n 214) 53.

²¹⁵ Adam (n 214) 51-56.

sponsoring or favouring amendments restricting the resolutions. This was also resonated by one of the interviewees, as he mentioned that looking at participation of Asian states in UN institutions there is no particular regional level human rights discourse in Asia (South Asia in particular) and thus states may not act in tandem as regional members but rather as individual members.

In context of SAARC countries, an important observation in context of civil society actors has been the call for a regional human rights mechanism for South Asia. The SAARC primarily being an economic body despite inclusion of a few human rights mechanisms failed to address the human rights challenges that the region was facing. Looking at this, in 2012, the Regional Initiative for a South Asian Human Rights Mechanism (RISAHM) was established. This was a platform for the collaboration of civil society organisations (CSOs) in the region along with individuals to work towards making the establishment of a regional mechanism (for human rights) in South Asia a reality.²¹⁶ This had been reiterated by three of the experts interviewed who talked about the civil society initiatives to call for a SAARC human rights body and the disinclination from the government of member states towards such an initiative.

Another effectiveness of the civil society has been reflected in the way the domestic human rights institutions and framework have responded to certain situations of violations. For instance in the Indian context, the role of media and civil society actors (such as Ms. Teesta Setalvad) as outspoken campaigners helped in conviction of perpetrators involved in the violence in Gujarat riots, even putting the erstwhile Chief Minister and present Prime Minister, Mr. Modi in scope of targets for his role.²¹⁷

In recent years, civil society and human rights defenders in Asian states, have been facing rising threats in the name of national security or protection of majority notions from State actors, and in some cases non-State actors as well. The last couple of years have seen proliferation of policies and legislations advancing restriction of basic rights in Asia.²¹⁸ Foreign policy decisions of Asian states have been fluctuating a lot and against the larger interests of the public which makes the role and scrutiny from civil society at this stage of these states an essential step.

²¹⁶ FORUM-ASIA, 'FORUM-ASIA Annual Report 2017' (29 June 2018). Available Online <www.forum-asia.org/?p=26672>

²¹⁷ Meenakshi Ganguly, 'Threat to India's vibrant civil society' (HRW 14 August 2015) <www.hrw.org/news/2015/08/14/threat-indias-vibrant-civil-society> accessed 25 May 2018.

²¹⁸ Adam (n 214) 81-82.

5.6.1 Case of Indian civil society – what once was a vibrant one?

The civil society in India often used to be described as vibrant and active one that along with the strong courts, and democratic space had made India a powerful force in the human rights space. India's influence was growing on global issues and its regional presence was being enhanced. The recent years however have reflected a change that has been alarming and keeps rising.

Since the Indian NHRC came into existence in 1993, the civil society had expressed concerns regarding a lack of representation in NHRC and the government has not made many efforts to rectify that but there was still some harmony in functioning. However later on, India was involved in sponsoring restrictive amendments to resolutions on civil society in HRC in 2013, 2014 and 2016, and these amendments were justifying the restrictions.²¹⁹ But this was still not the stifling atmosphere that the civil society has now come to face under the present government. The human rights violations have been increasing and the civil society actors have become the favourite targets.

Human Rights defender groups (especially journalists and academicians) who have spoken out or dissented from the governments have faced not just curtailment of their freedoms but also life threatening situations and even murders. Non-governmental Organisations were targeted through legal framework, wherein the access to foreign financial support was curtailed or altogether denied²²⁰, regulatory laws were put up as having been violated. The scrutiny on functioning of NGOs that displayed any actions against the government was enhanced to point of being controlling. Even students were targeted wherein the last couple of years, there have been numerous instances where students were targeted as being anti-nationals for even discussing ideas against the government²²¹. In fact critics of government be it from any groups were being described as anti-nationals.

²¹⁹ Adam (n 214) 49-51.

²²⁰ Foreign Contribution Regulation Act, 2010 was regulating foreign contribution to NGOs who were required to get licensing by government approving their foreign funding and as a result numerous NGOs were shut down or stopped functioning.

²²¹ Students in Jawaharlal Lal Nehru University in Delhi were arrested and charged with seditions as they participated in a student rally that was protesting execution of a separatist leader who had been alleged to be a terrorist. The student were arrested for raising slogans that were anti-India.

5.6.2 Thailand's civil society – Declining through military

In the context of Thailand, it is notable that grassroots organisations are cited as having engendered the human rights discourse in the public space and agenda.²²² The discourse started with focus on rights other than political and civil rights but these rights have also gained momentum in recent years. Civil society organisations were lauded as being instrumental in the progressive realisation of human rights in the country. The organisations raised awareness on human rights and appropriated the rights regime leading to the governmental institutions to match these efforts.

In recent times with the advent of the repressive military regime, the democratic system has faced serious challenge. The country is experiencing phases where the human rights are going on backslide and space for dissent is being further reduced.

One of the important things to note in the assessment of the Thailand NHRC (NHRCT) was the exclusion of non-State actors, in particular the civil society from the NHRC functioning. While the earlier selection Committee and process in its diverse and pluralist nature used to include representatives of civil society and non-State controlled actors in sizeable number, the new legislations have a minor proportion of such actors (University lecturers or representative of human rights CSOs). It becomes evident that the Government of Thailand is displaying mistrust and non-inclusive attitude towards the civil society.²²³

Despite having provisions in the new 2017 Constitution for consultation and participation of stakeholder in legislative processes, the media, public and civil society were either engaged as token participants (feedbacks given were not incorporated) or not engaged at all. Furthermore in the earlier framework, the Sub-Commissions of NHRCT²²⁴ used to be an important space for the civil society representatives but in accordance with the new legislations, the Sub-Commissions will be appointed only when inevitable and within that too recruiting only from staff of the Commission.²²⁵ This reduced participation and contribution of civil society has been leading to adverse effects in terms of public participation and representation, as civil society hold great public support and information.

²²² FIDH (n 2) 17.

²²³ FORUM-ASIA, 'ANNI report' (n 141) 54.

²²⁴ Sub-Commissions were mechanism introduced to assist the NHRCT to deal effectively and facilitate process of complaints and investigation and enhance engagement of the Commission with the people.

²²⁵ FORUM-ASIA, '2017 ANNI report' (n 141) 57.

5.7 Conclusion

The NHRIs in Asia put precedence on the promotion of human rights, as evident from the hesitant complaint handling mechanisms in above examples. In the Indian example, the strong legal framework in India acts as the beacon of hope for rights advancement in the existing situation and that democratic spaces can help to overcome the challenges being faced by the commission. In case of Thailand, following a promising initial phase, there has been a decline in the democratization and the Commission has been weakened.

Across the Asian region, the domestic mechanisms vary in their capacities and functioning and are not even present in certain countries. But it is important to consider that the role of NHRIs in enhancing the human rights record of any country is significant. And this institution cannot function in isolation or in dominance. It is the civil society actors that act in a variety of roles, of assistance, of motivation, of protest, and of promotion when it comes to any human rights issue in any country in the world. This applies to Asian region and in lack of a regional mechanism it has been seen to be particularly magnified. These institutions simply by their existence and their mandate of providing recognition to the human rights space in public life provide solid foundations for the discourse to flourish. Thus the presence of these institutions in lack of regional mechanism is a powerful tool for the human rights advancement even in face of weakening structures and controlling governments.

6 Conclusion

The purpose of this thesis was to cogitate on the prospects of India and Thailand, located within the human rights space in South and Southeast Asia, to create an impact on the regional human rights protection system. This research emanated from the dichotomy of the glaring absence of regional mechanism with the presence of sub-regional mechanisms in one of the most challenging and diverse regions in the world. Rather than establishing an exhaustive inventory of the situations in the focus States, the author approached them via global, national and civil society dimensions. This final chapter will present a conclusive analysis of the descriptions of the sub-regional mechanisms and country performance of India and Thailand on some global and domestic dimensions to surmise on the possibility of a regional mechanism in the present environment.

6.1 SAARC and ASEAN – Looking through human rights

The South Asian Association for Regional Cooperation (SAARC) and Association of South East Asian Nations (ASEAN) were created as sub-regional mechanisms within the premise of economic, social and cultural development but with time have forged space for involving human rights agenda. While SAARC took smaller and minute strides towards this course, still in the crawling phase, ASEAN went towards a better direction, creating a Human Rights Commission and adopting a declaration.

ASEAN with its dedicated body of ASEAN Intergovernmental Commission on Human Rights stands in a better position the SAARC in the context of human rights protection mandate. The review of ASEAN and AICHR can best be summed up by the acculturalist views that ASEAN adopted the Human Rights mechanism in a “desire of regional elites to mimic the institutional forms of other regional organisations in pursuit of legitimacy²²⁶”. This view is not just a theoretical postulate but was also reiterated by experts interviewed during the study. One of the experts suggested,

AICHR has a tootling role...it is there as a tool to legitimize the human rights regime in front of the international community. It has not been able to interfere or take steps

²²⁶ Hiro Katsumata, ‘ASEAN and human rights: resisting Western pressure or emulating the West?’ (2009) 22(5) *Pacific Review* (as cited in Mathew Davies, ‘Important but De-centred: ASEAN’s Role in the Southeast Asian Human Rights Space’ (2017) 5(1) *Trans-Regional and National Studies of Southeast Asia* p. 103.

*in situations of human rights violations, such as that in Philippines or Cambodia or Burma.*²²⁷

AICHR is still stuck in working on the promotion mandate of human rights. The activities undertaken by AICHR usually are training modules, workshops, debates and dialogues²²⁸. And even when AICHR moves beyond, it has been criticised to be cherry picking the issues which are uncontroversial or the lesser evil to pick on. For instance in 2015, AICHR chose to work on implementation of Convention of the Rights of Persons with Disabilities, when the treaty has already been acceded by all its member states. There were more pressing issues of migration crisis (in Myanmar), or death penalty or suppression of freedoms of expression and association which were not acted upon by AICHR. The complaints from civil society groups on these issues were acted upon either.

Following the ‘promotion bandwagon’, logic would dictate that AICHR should be involved in undertaking thematic studies, however, its annual report of 2015 revealed that the Commission completed only one thematic study in five years focusing on Corporate Social Responsibility and Human Rights.²²⁹ Moreover, even this report was criticised was lack of transparency, lack of consultation with CSOs, and poor execution of information from other literature.²³⁰ In fact there has been a certain habit of neglect of CSOs by AICHR, as evidenced many times as recently as 2015. The complaints from CSOs were not acted upon, the suggestions on utilising the terms of reference or to ratify international treaties to enhance their mandates and functioning have been ignored to maintain functioning in a confined manner.

SAARC has while still lacking a dedicated mechanism has adopted human rights instruments and the reports of summits involve discussions on human rights (particularly of some groups) in almost all summits. However what’s important to note is that these discussions remain superficial and fail to engage the Member States effectively. They don’t prescribe any specific situations of violations or institutions in any of the States. While there have been steps towards economic co-operation and trade agreements in SAARC countries, when it comes to human rights, they have been instead adopting the approach with soft law instruments that has not been translated to action. This construes to the absence of a discourse on human rights in the

²²⁷ As stated during one of the interviews. The interviewer did not wish to be quoted on this.

²²⁸ These promotional activities are often centred on public awareness and technical and capacity building.

²²⁹ ASEAN Intergovernmental Commission on Human Rights, ‘Annual Report of AICHR’ (June 2015) (AICHR).

²³⁰ James Tager, ‘ASEAN must stop brushing-off civil society’ *International Commission of Jurists* (23 April 2015) <www.icj.org/asean-must-stop-brushing-off-civil-society/> accessed 12 June 2018.

region. *‘There is no regional level discourse in South Asia, and no discussion amongst member states.’*²³¹

In fact, despite creation of Charters and bodies by SAARC and ASEAN, the states in region continue using the death penalty and some countries even increased the use.²³² Many countries also introduced and increased the use of security legislations that provide space for abuse of victims, putting as their way to responding to ‘war on terror’. Another form of control came through increased use of laws and arbitrary measures restricting freedom of expression and association, in countries such as India and Thailand.

The study of AICHR mechanism, or the SAARC mechanism, reveals that these institutions are still focusing on the rights for children and women, for instance in 2015, AICHR in its Work plan introduced some more focussed interventions for women and children. In 2004, SAARC adopted the Social Charter and has bodies that work towards the rights for children and women and ASEAN has a dedicated distinct Commission intended for working for these rights. While these rights deserve a focused attention, it does not make sense for these bodies to continue such focused approach as this just replicates the mandate in a new mechanism requiring resources input which are already being stretched. Even more important aspect in this scenario is that the present work of bodies like the AICHR or ACWC has been somewhat circumscribed. Following the promotional way of ASEAN, the work on rights of children and women have focused more on issues such as enhancing education system or social impact of climate change on women and children or promoting rights of women and children or providing recommendations rather than working effectively on deeper issues such as child marriage or children’s right to freedom. This translates into straying away from any issues that could be controversial and thus could face resistance from the member states. This safer approach hints towards an “attitude of paying lip service to the larger causes such as gender equality”²³³.

Even at the international level these institutions do not seem to have created a sense of belonging (to regional entity) among its member states. Looking at Asian states in terms of HRC resolutions it could be somewhat deduced that the Asian states generally “oppose scrutiny of other Asian states without the consent of the State concerned”²³⁴. The sovereignty principle

²³¹ As stated during one of the interviews with Mr. Ahmed Adam, UN Advocacy Programme Officer.

²³² Examples of such countries- Bangladesh, Singapore, Brunei, Sri Lanka. SEE: Amnesty International, ‘The Death Penalty in 2017: Facts and figures’ (12 April 2018) <www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/> accessed 2 June 2018.

²³³ Interviews with one of the experts for the study.

²³⁴ Adam (n 214) 70.

has been time and again advocated by the Asian states in international platforms. This view was also put forward by two of experts interviewed in the study for ASEAN states, mentioning that observing the interactions and debates of ASEAN states in space like HRC, especially when talking about human rights situations in other ASEAN members, it is evident that they refrain from criticism and rather in some way have to tendency to protect each other at international level²³⁵.

*'While talking about ASEAN or AICHR or even SAARC, (one) should be careful as Member States do not talk as members of the regions but rather as individual countries.'*²³⁶

However within all this it needs reiteration that ASEAN has still emerged to a certain degree as actively engaging international mechanism that is working towards strengthening ties with other regional systems. Establishing the AICHR in the scenario existing in Southeast Asia should not be discounted. It has displayed the impetus towards certain areas and issues. More than that, one should not miss that while SAARC has failed to generate a regional human rights discourse, even as paying lip service, AICHR provides a platform for the member states to discussion human rights, and it opens the space for discussion. Even when it's rhetorical engagement, there is norm diffusion that is taking place. This needs translation to the SAARC framework to encourage purposeful engagement.

This dance of one step forward and two steps backward for both the sub-regional mechanisms can best be summarised by a quote from Dr. Matthew Mullen on AICHR that reflects on both these mechanism:

*'AICHR seems to be a mix of ceremony, self-protection and occasional substance.'*²³⁷

6.2 India and Thailand –

India and Thailand are currently operating in somewhat similar yet distinct democratic structures. The regimes in both countries are synonymous with a somewhat autocratic rule that are even stifling fundamental rights and freedom of its citizens. The previous chapter provided review of the performance of the States in United Nations mechanisms and of their local

²³⁵ Interview with Ahmed Adam, UN Advocacy Programme Officer, FORUM-ASIA (Video Call, 21 June 2018).

²³⁶ Ibid. This was the response in context of AICHR and SAARC holding some important positions as human rights systems in the region.

²³⁷ Interview with Dr Matthew Mullen, Professor, IHRP, Mahidol, Thailand (Email, 16 June 2018).

domestic institutions and this section will provide a brief supplementary commentary on the same dimensions for both the States.

6.2.1 At global human rights level

Looking at the human rights resolutions, it could be noted that since 2011 India had sponsored a total of 4 resolutions in HRC, all falling under the type of thematic resolutions of Economic, Social and Cultural Rights.²³⁸ It is interesting to note that Thailand has been the main sponsor for 41 Human Rights resolutions in the United Nations, wherein 34 resolutions were those passed by the Human Rights Council.²³⁹ These HRC resolutions were largely thematic and mainly covered Economic, Social and Cultural Rights or covered cross-cutting issues (such as regional arrangements, Human Rights Council or co-operation). Together, India and Thailand had sponsored two resolutions that dealt with health and medicines.²⁴⁰ Thailand has also been more engaged in sponsoring item 10 resolutions (technical and capacity building) at Human Rights Council than many other Asian states, such as India, Indonesia or China.

India has displayed consistency in its voting on resolutions on religious intolerance wherein it has never abstained on resolutions targeting discrimination on religious grounds.²⁴¹ A report from the Commonwealth Human Rights Initiative provides that in period of 2006-2016, at the Human Rights Council, India has abstained from voting on sixteen resolutions²⁴² and voted against four resolutions and single decision^{243, 244}

6.2.2 At the Domestic Level

In many Asian states, including and particularly India and Thailand, the greatest problem in realization of rights has been the impunity provided to the elites. Be it members of political or financial group or even certain government institutions (such as armed forces) the justice system falls short in dispensing justice to these groups. This prevailing elitist culture of impunity is so powerful in Thailand, it even has a name for this phenomenon called “phu yai”.²⁴⁵ In states such as India, the victims of abuses by the business or financial elites find it

²³⁸ Universal Rights Group, ‘UN Human Rights Resolutions Portal’ <www.universal-rights.org/human-rights/human-rights-resolutions-portal/> accessed on 17 June 2018.

²³⁹ Ibid

²⁴⁰ Ibid (n 239).

²⁴¹ Yashasvi Nain and Nolberto Zubia, *The Commonwealth At The Human Rights Council: A Decade of Voting 2006-2016* (Commonwealth Human Rights Initiative 2017) p. 71.

²⁴² These include resolutions on right to peace, transitional justice, sexual orientation and gender identity, torture, UN human rights mechanisms etc.

²⁴³ These were on peaceful death penalty, peaceful protests, and protection of human rights in counter-terrorism situations.

²⁴⁴ Nain and Zubia (n 242) 77.

²⁴⁵ FIDH (n 22) 25.

hard to reach justice and recently political impunity has been on a rise. Looking at government institutions, there are certain regions in some countries that are forced to be under special legislations creating the stronghold of mainly the armed forces institution, documented for widespread human rights abuses. Southern Thailand or States of Jammu and Kashmir or Manipur in India are few examples wherein army as the State institution not only enjoys unprecedented power but also remains untouched for their abuses.

In the present day when Thailand is under a military regime, it can be understood that the democratic space and the human rights sphere do not enjoy their previous status and are facing a receding position. So, while there were no particular mechanisms for safeguarding the interests and working of human rights defenders, in the existing situations this has led to increased instances of detentions and prosecutions of the defenders.²⁴⁶ There have been more situations of violations of rights of ethnic minorities in the nation. During the review of Thailand by the Human Rights Committee under the ICCPR, concerns regarding fundamental rights and freedoms of the people were raised.²⁴⁷

‘Thailand has been devolving into increasingly predatory governance. The scariest part is that the increasing oppression is quite effectively sold to the masses as necessary and just.’²⁴⁸

Furthermore, the implementation of recommendations from the Universal Periodic Review reports has been discontinued by the regime. At the local level, reports of the Asian NGO Network on National Human Rights Institutions and the recommendations provided by the NHRCT have also been discontinued.

But in some aspects, both the states displayed that they could take on positive stances as well. India, in 2017, intervened in Nepal (SAARC member), to urge the government for adoption of inclusive policies involving minorities from southern Nepal.²⁴⁹ Locally new progressive legislations focusing on mental health and transgender rights were also introduced.

Thailand is one of the countries that has issued standing invitation to the Special Procedures mandate holders. The representative from Thailand at AICHR introduced the initiative to release the Commission’s annual reports of 2015, which would enhance the transparency of the Commission and was the only one to take feedback and inputs on issues from the CSOs for

²⁴⁶ FORUM-ASIA, ‘2017 ANNI report’ (n 141) 58.

²⁴⁷ HRW, *World Report: 2018* (Seven Stories Press 2017) p. 546-548.

²⁴⁸ Interview with Dr Matthew Mullen, Professor, IHRP, Mahidol, Thailand (Email, 16 June 2018).

²⁴⁹ HRW (n 248) 265-269.

inclusion in the new Work plan of the Commission.²⁵⁰ This was organised as part on an annual consultative process with the civil society. Thailand's representative was one among the only three representatives of AICHR who attended a meeting by civil society actors on human rights in ASEAN in Kuala Lumpur in 2015. Thai representatives have been regular in facilitating participation of CSOs and in taking some initiatives to enhance consultative and transparency in functioning of bodies.

6.3 The Way Forward

The attempt to understand functioning of India and Thailand in context of the human rights systems renders the depiction of a divergent and protean landscape that is complex in comprehension. There is interpenetration of multitude of institutions, mechanisms and instruments along the domestic, regional, and global dimensions. Thus it's necessary to simplify the complexities to let the words form a clearer picture to answer the questions that were raised in the first chapter. The thesis was trying to find if patterns of synchronicity in performances of India and Thailand and to explore the possibility of a regional system possibility or continue functioning with sub-regional systems.

To begin, it became clear that in the present state neither the sub-regional bodies nor the states are taking any steps towards a regional mechanism of human rights. Moreover, the literature or even the civil society while recognizing important of regional mechanisms for human rights do not see it in the future prospects for Asia²⁵¹. For now the consensus remains on sub-regional bodies.

Then in the present thesis, the understanding further emerges, that while the existing sub-regional human rights mechanisms in South and Southeast Asia have introduced the human rights agenda at the regional level they are still stuck in a rut of promotional mandate or superficial engagement. The ideas like state sovereignty and territorial integrity are overriding the charters of these bodies and political processes are penetrating their autonomous functioning. However looking at examples of other regional systems, it can be deduced that the regional human rights system were standing on the foundation of regional political structures like ASEAN or SAARC.

²⁵⁰ FORUM-ASIA (n 73) 15-16.

²⁵¹ The present thesis is also limited in its scope and extent to the South and Southeast Asian region and can only talk about the rhetoric for this region.

From history we have seen that regional human rights mechanism are being created and developed, under the umbrella of regional intergovernmental political organisations, like the Inter-American Commission for Human Rights which was created under OAS or the African Commission which was created under AU or role of CoE and OSCE ...So in the Asia-Pacific region we have a few of such organisations already and only one has tried to create a regional mechanism, which is ASEAN. My prognosis is that perhaps if there are more regional HR mechanisms in the future in the Asia-Pacific region, then these mechanisms are going to be mechanisms created within the political organisations so Pacific Islands Forum or perhaps SAARC might do that. I don't expect any mechanism created out of any empty space.²⁵²

Thus the sub-regional systems cannot and should not be easily discounted. Now moving on to the States, it is a fact that both India and Thailand, enjoy a rather similarly influential position in their particular sub-regions. They are both powerful and large economies that are rising on the global scene as well. In a similar manner, on a lot of aspects their human rights records is impairing, but their participation on certain levels has seen improvement.

It (Thailand) is one of the biggest economies in Southeast Asia so they hold a certain sway in the region. The Thai NHRI even within its limitation has led to some progress in discussing extraterritorial obligations, in Business and Human Rights.²⁵³

So looking at both these scenarios, it is evident that in both cases, be it sub-regional mechanisms or India and Thailand, the systems exist but are being impeded and face challenges in implementation. Also it should be noted that in both cases, the civil society has played a historically significant role and still does.

ANNI has been able to influence NHRIs in some countries and creates a sort of pressure, makes NHRIs a bit more self-conscious and even led to formation of NHRI in Taiwan.²⁵⁴

²⁵² Interview with the UN Official from National Institutions and Regional Mechanisms Section, OHCHR, Geneva (Video Call, 30 April 2018).

²⁵³ Interview with Ahmed Adam, UN Advocacy Programme Officer, FORUM-ASIA (Video Call, 21 June 2018)

²⁵⁴ *ibid.*

*Civil society and its movement is very crucial and important for pluralistic democracy in India, in particular, and in Asian region too.*²⁵⁵

The logical solution thus dictates that both need to work in tandem towards improvement. Working simultaneously to improve institutions, processes and instruments of human rights will help in creating a circular approach. The States with improved human rights record will aid in enhancing the functioning of sub-regional bodies and the enhanced sub-regional bodies would assist the States in improving their performance in the human rights domain, not just locally, and regionally but also globally. This could also result in a dedicated human rights body for the SAARC member states. Thus the future in this space sees and requires focus on sub-regional mechanisms that could only be built on the foundations of strong national human rights records.

²⁵⁵ Interview with Dr Lenin Raghuvanshi, Founder and CEO, People's Vigilance Committee on Human Rights, Varanasi, India (Email 13 June 2018).

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