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# Pushing Boundaries and Expanding Space in Institutionalising and Setting Standards for Human Rights in Southeast Asia: The AICHR 2016 – 2018 Experience

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## Connecting the dots

Concerns about the efficacy, effectiveness and relevance of the ASEAN Intergovernmental Commission on Human Rights (AICHR) have often been repeated. This essay looks at the work of the AICHR over the past three years between 2016 and 2018. Some progress has been made. Weaknesses still exist but the nuances are often overlooked.

I will attempt to 'connect the dots' of the AICHR's work in the past ten years by utilising the last three years as a longitudinal case study. In doing so, observations are made as to the progress made, and challenges faced, by the Commission, coupled with insights on the factors that contributed to either of these. I outline my observations in the form of lessons learned during my tenure as the Representative of Malaysia to the AICHR. I hope to provide an insight and a deeper understanding into the workings of the AICHR as well as to make suggestions that would hopefully enhance the Commission's role to better institutionalise human rights practices in the region.

### There are six lessons.

**Lesson 1: The AICHR's programming and implementation thereof reveal a lack of congruence between that which is ideal and the reality on the ground.**

The strengths of the AICHR are in two areas.

First, its convening power. It has the ability when hosting programmes to invite and gather senior officials from the governments of ten countries to talk about human rights. It is part of Track 1 diplomacy. We should not lose sight of this fact.

Second, its consensus power. Once a decision is made, it would be one taken by the ten Representatives. The representation to the world at large and other governmental agencies in the implementation of such a decision is readily accepted, and cannot be easily undermined.

Between 2010 and 2018, the AICHR recorded about 121 completed activities. This figure does not include the AICHR's meetings or ad hoc activities. Using a highly conservative back-of-the-envelope calculation, more than USD6 million was spent to run the said activities.

From 2016 to 2018, the AICHR conducted 53 activities and 33 reports were produced and noted. This indicated that more than 40% of the total activities were completed between 2016 and 2018. It can safely be said that there was a sense of heightened interest among the Representatives in contributing to the work of the AICHR. The 33 reports generated within only three years is a feat and they contain a wealth of information including progressive recommendations. In these activities, the attendees would generally be composed of government officials representing the relevant national agencies, and several independent experts (including former diplomats, academics and representatives of civil society organisations [CSOs]) as resource persons.

## I would express some concerns.

First, these activities are usually high-level activities. They are insufficiently participatory. Until 2016, there was no consistent practice of inviting or allowing representatives of marginalised communities or vulnerable groups to attend the events or to speak at the same. Objections would be taken to their participation in fear that some governments would be subjected to critique or admonishment for their actions.

In 2016, there were eight new Representatives. There seemed to be some degree of openness allowing for more opportunities to have human rights survivors and defenders attending the activities to share their stories. This improvement enriched the discussions as the voices of those who worked at the grassroots level and who were often directly affected by human rights violations could be heard.

Second, in spite of the number of good reports containing recommendations that stemmed from the AICHR's activities, there was no real indication of the AICHR's proactive approach towards implementing them in a more programmatic manner. The feeling I had – and I may be wrong on this – was that most of the activities were 'tick-the-box' exercises to show that something was done with the funds the AICHR had at hand.

Third, there was no mechanism to check if the recommendations were implemented domestically by each Member State or if there were any follow up actions taken. CSOs could also not independently verify the progress because the majority of the AICHR's reports, particularly those before 2016, were not made available for public consumption. Even the AICHR's Annual Reports were not made public until 2016. The argument was that the AICHR's reports are considered internal and the recommendations therein could only be published if they were adopted by consensus. The reports would only be noted for the record.

When I came on board the AICHR, I reviewed all of the reports since its establishment and found that only one recommendation was adopted. It was a recommendation to establish an 'ASEAN Inter-Sectoral (Bodies) Technical Working Group on Women and Girls' Human Rights' adopted at the AICHR's Special Meeting from 2 to 5 August 2015 in Kuala Lumpur, Malaysia. But to date, there has yet been any movement on this recommendation. I presented a proposal by way of a Concept Note on this to be implemented in 2019 and I hope it will be adopted.

While some of the Representatives supported a more open sharing of information of the AICHR's work to increase our connectivity with the public, there was still much resistance. We persisted and after much debate, the AICHR agreed on a middle position. Annual Reports could be published on a case-by-case basis, and after they were approved by the ASEAN Foreign Ministers' Meeting (AMM). As a result, we managed to publish the Annual Reports for 2016, 2017 and 2018 after much editing and sanitising of their contents. For activity reports to be published, they had to be summarised to five pages and no recommendations could be included. As such, some of us chose not to publish the reports as we would have had to compromise on some of the information while being unable to present a full picture of the discussions.

Overall, we managed to change the situation for the better to a noticeable degree although further work needs to be done for the AICHR to be more in touch with the lives of the people on the ground.

**Lesson 2: The AICHR's modalities of programming require a stocktaking exercise that culminates in a strategic framework to enhance the Commission's work in the region.**

It is often said that the AICHR is more concerned with the 'promotion' than in the 'protection' of human rights. Some Representatives have argued that in promoting human rights, the AICHR would also be protecting human rights because we would be raising the level of awareness among government officials on the rights. Some, of course, have argued that the AICHR's Terms of Reference (TOR) – in practical terms – does not provide for a protection mandate.

Here is the nub of the matter. While the AICHR's TOR is broad, each Representative seems to have a different understanding of what the AICHR ought to do given the limited amount of available resources. This may be due to the different levels of acceptance of human rights in each country regarding a particular human rights issue. For example, some governments may be more disturbed by the 'right to a fair trial' while some may be more emotive about the 'right to freedom of religion'.

Moving away from this quagmire, I venture to suggest grouping the AICHR's activities into three clusters: (a) socialisation, (b) institutionalisation, and (c) legitimisation. Not all of the activities may fit neatly into each cluster, and therefore the 'why' question regarding the design of the activities should be asked:

*Socialisation cluster:* Is the programme designed to increase awareness or understanding of a particular human right issue?

*Institutionalisation cluster:* Is the programme designed to achieve a particular consensus on an issue by way of a negotiated and agreed outcome document, for example, a policy brief, a position paper, a general comment, a plan of action, a thematic study report, a model law, a set of guidelines, a declaration or a convention?

*Legitimation cluster:* Is the programme designed to validate or further the use of the AICHR's outcome document or adopted human rights position?

A majority of the AICHR's activities fall under the socialisation cluster. Programmes regarding vulnerable groups (such as on the rights of children, women, persons with disabilities and trafficked persons) and thematic issues (such as on right to education, business and human rights, the Sustainable Development Goals, and the judicial implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1981, the Convention on the Rights of Child 1990 and the Convention on the Rights of Persons with Disabilities 2008) were held in the form of dialogues, consultations and workshops to exchange information and share good practices. The AICHR's consensus to host socialisation programmes is often straightforward.

These programmes continue to play an important function to ramp up greater support and acceptance of the normative principles of the relevant subject matter while maintaining the space for human rights discussions in the region.

In the institutionalisation cluster, the AICHR's proposed programme would usually seek to achieve an outcome document that may be adopted and touted as containing the official human rights position of the AICHR. Several activities were conducted towards this end including those culminating in what is now known as the 'ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities' (Disabilities EM2025) adopted by the Association of Southeast Asian Nations (ASEAN) Leaders at the 33rd ASEAN Summit in 2018.

Others included developing an ASEAN legal human rights instrument (led by the Philippines); a set of regional guidelines on a rights-based approach for environmental impact assessments (led by Myanmar) and on corporate social responsibility (CSR) and human rights (led by Singapore); adopting a general comment-like position paper on Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD) regarding the right to safe drinking water and sanitation (led by Malaysia) and on Article 23 of the AHRD on the right to freedom of opinion and expression (jointly led by Indonesia and Malaysia); and formulating a model law on the rights of accused persons in criminal trials based on Articles 5, 11 and 12 of the AHRD (led by Malaysia). The AICHR's thematic studies on CSR and human rights, women in natural disasters, legal aid, juvenile justice, the death penalty, the right to education and the right to peace also fall within this cluster. Guided by the AHRD, the activities under this cluster seek to find a baseline agreement towards adopting a common standard or approach for the region.

The final cluster – legitimisation – is the one where the AICHR has its least presence. What would be envisaged under this cluster is to see programmes that evaluate and monitor, and further support the utilisation of the AICHR's outcome documents, recommendations or adopted human rights positions. For example, Members States should be able to report on how they have implemented, for example, the Disabilities EM2025 and to share cases, success stories, failures, challenges, gaps and possible improvements. Here, the Commission would then be able to validate its views and make further recommendations for improvement. For example, documenting the AICHR's views and observations in a case digest or report is one possible initiative that would increase the AICHR's relevance among the peoples.

Programmes under the legitimisation cluster can also act as a self-regulating mechanism working as a feedback loop. In the case of the AICHR, this would be ideal as there is currently an absence of an effective monitoring and evaluation system. The matrix which is used by the AICHR is one that is provided by the ASEAN Secretariat for implementing agencies under the ASEAN Political-Security Community (APSC) pillar. It focuses primarily on monitoring and there is a lack of an evaluation component. The matrix functions simply as a recording device and does not provide any means to track the implementation of the AICHR's work by national agencies, and whether the desired impact and outcomes have been met by the particular activity.

In light of the above, the AICHR should internally undertake a stocktaking exercise to categorise the relevant human rights enunciated in the AHRD according to the level of acceptance by each Member State or Representative. It then decides if its future activities should still remain at the socialisation stage, or should be designed for the institutionalisation or legitimisation phases. It would assist the Commission to be more strategic and focused on how it functions. For the AICHR to strengthen its role as a regional human rights body, it needs to move out of the socialisation cycle. When its work is seen through these three clusters, the AICHR would avoid having to wade in what seems to be the now protracted 'promotion versus protection' debate.

### **Lesson 3: The AICHR needs to decide what it is meant to do and focus on what it should do.**

It is my view that the AICHR should use its resources to draft authoritative written explications to interpret and elaborate on the provisions of the AHRD. I had previously articulated this point repeatedly at the AICHR's meetings. The jurisprudential documents generated will give life to the words declared in the AHRD and fill abstract concepts with meaning. They will list a set of criteria to orientate Member States in their implementation of human rights and at the same time provide a platform to monitor the progress of such measures. Although some may perceive the AHRD as flawed, it was the AICHR which drafted it and hence to the AICHR that people will look to for guidance.

It was in this vein that as the Representative of Malaysia, I drafted my view on the AHRD and on 23 September 2016 issued Malaysia's 'General Observation No. 1/2016: Interpretation of Articles 6, 7 & 8 of the ASEAN Human Rights Declaration 2012'.<sup>147</sup> While it may not be a perfect document, it formed a liftoff for our work around the AHRD. An academic opined that my interpretation of the AHRD 'is an example of argumentative discourse to reinforce AICHR's commitment to international standards of human rights and ward against backtracking'.<sup>148</sup>

After Malaysia hosted the AICHR's 'Regional Consultation on the Right to Safe Drinking Water and Sanitation (with an emphasis on rural communities)' held from 25 to 27 October 2017 in Kota Kinabalu, Sabah, Malaysia,<sup>149</sup> a team of experts<sup>150</sup> worked with me to draft a general comment-like document which became known as a 'Consultation Position Paper Regarding Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD)'<sup>151</sup> [CPPA28(e)]. It was to elaborate on the meaning of the right as well as to show how far ASEAN had progressed in terms of securing the right to safe drinking water and sanitation for the peoples of the region.

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<sup>147</sup> See: <https://www.facebook.com/aichr-malaysia/posts/2014433755460940> and <https://www.forum-asia.org/uploads/wp/2017/12/Performance-Report-AICHR-2016-FORUM-ASIA.pdf>. Accessed August 20, 2019.

<sup>148</sup> Collins, Alan. 'From commitment to compliance: ASEAN's human rights regression?' (2019) *The Pacific Review*, Volume 32, Issue 3, pages 365-394. Accessed August 20, 2019. <https://www.tandfonline.com/doi/full/10.1080/09512748.2018.1476402>.

<sup>149</sup> See the AICHR's press release titled 'ASEAN Meets to Develop a Common Approach and Position on the Right to Safe Drinking Water & Sanitation Under Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD)', November 7, 2017: <https://aichr.org/news/press-release-asean-meets-to-develop-a-common-approach-and-position-on-the-right-to-safe-drinking-water-sanitation-under-article-28e-of-the-asean-human-rights-declaration-2012-ahrd/>. Accessed August 20, 2019.

<sup>150</sup> The team consisted of Virginia Dandan, Apichai Sunchindah, Amanda Loeffen, Helena Olsson, Matthew Scott, Solene Le Doze, Marie Joyce Godio and Ding Jo-Ann.

<sup>151</sup> See: <https://m.facebook.com/notes/aichr-malaysia/consultation-position-paper-regarding-article-28e-of-the-asean-human-rights-decl/2293214520916194/>. Accessed August 20, 2019.

I wanted it to be adopted by the AICHR as an expression of our position on a particular human rights issue given that the AICHR had never articulated itself on the AHRD. I then presented the CPPA28(e) for a discussion.<sup>152</sup> One Representative said that it is only for governments to decide on how the AHRD is to be interpreted, not for the AICHR to do so; and another Representative said that the AICHR was not ready to adopt such a document. We had a lively exchange of views.

It was telling that no one objected to the language, tone or human rights interpretation of Article 28(e) contained in the CPPA28(e). I said that if there were any objections to the content of the document, amendments to the text should be proposed and I would be happy to consider the proposed revisions. Time was given but no comments were ever received. I suppose it would have been rather difficult for any Representative to state in writing that safe drinking water and sanitation should not be available, adequate, accessible, acceptable and be of a certain quality.

There are two more examples.

In respect of the regional refugee and human rights crises resulting from the situation in the Rakhine State, I had, with the Representative of Indonesia, Associate Professor Dinna Wisnu, issued a joint media statement on 23 April 2018.<sup>153</sup> We used language from the AHRD and the ASEAN instruments to recommend developing a 'whole-of-ASEAN' approach in cooperation with Myanmar to meet its challenges. We released the carefully worded statement after consulting with some of the Representatives and inviting them to sign on to the same. It would have come as no surprise to others on the AICHR that we issued the statement. Both of us were regularly raising the issues at the plenary sessions and sidelines of our AICHR meetings. No agreement could be reached. It came to a point that we had exhausted the avenues available within the AICHR. We had to say something. Subsequently, in one of the meetings, I was taken aback when one Representative said that we should not have made such a public statement because it interfered with the affairs of a Member State. Another Representative said that all members of the Commission had the right to express themselves and the matter rested there.

In the area of disaster management, Dinna and I once sought for a briefing on the work of the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre) in the region. It was good to learn about the commendable work of the AHA Centre and at the end of the briefing on 31 July 2018, the AICHR expressed an interest to assist the ASEAN Committee on Disaster Management (ACDM) to refine its proposal to define the term 'human induced disasters'. We were informed that the ACDM was attempting to agree on such a definition.

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<sup>152</sup> At the AICHR's 26th Meeting held from 24 to 26 January 2018 in Singapore.

<sup>153</sup> See: <https://www.facebook.com/aichrmalaysia/posts/2116189738618674>. Accessed August 20, 2019.

After consulting several CSOs and on behalf of Malaysia, I responded by providing a proposed definition.<sup>154</sup> The AICHR could not agree on making the definition its official own. The AICHR then transmitted my proposal written in my capacity as the Representative of Malaysia. This was probably the first advisory service and technical assistance provided to a Sectoral Body pursuant to the AICHR's mandate under paragraph 4.7 of the TOR.

I am sharing these episodes because some of us feel that as a standard-setting body, the AICHR should be more mindful of the design and purpose of its activities. These examples highlight the different ways the AICHR can effectively function if it wishes to do so. We must accept that the AICHR is not an implementing body because it does not have a governmental agency to specifically implement human rights domestically under the supervision of the Representatives. Rather, as a consultative body, the AICHR's strength is in providing opinions, guidance, technical know-how and recommendations regarding the AHRD and other related human rights instruments. There is a great divergence of views on the AHRD, but no one has taken a step back to consider what the provisions really mean for the realisation of human rights in the region.

To me, the AHRD serves as a human rights guidebook and the AICHR is best placed to expound on its meaning to give it life to the peoples of Southeast Asia. Providing technical human rights advice on the aspects of the AHRD should be the AICHR's forte and this function makes the AICHR unique as the overarching human rights standard-setting body in ASEAN.

#### **Lesson 4: Some of the AICHR's Representatives fear the unknown or know the fear causing the AICHR to practice self-censorship.**

It is an open secret that the AICHR functions more in a way of 'human rights diplomacy'. But there is a paradox. One would have thought that if it was only about diplomacy, then there should be no hesitation for the Representatives to make progressive statements on human rights or to inculcate global human rights protection standards. Unfortunately, there is some hesitation. Throughout the process of negotiating issues and documents, I noticed that there was a high degree of cautiousness among some of the Representatives. Such restraint is to be expected as some of them perceive themselves as acting on behalf of their governments. The example on the CPPA28(e) process illustrates the challenge and how it plays out in practice. The AICHR had to

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<sup>154</sup> 'A human induced disaster is a disaster:

- resulting – whether partially or fully – from a human made hazard / risk as opposed to a natural hazard / risk;
- caused – predominantly or otherwise – by State and/or non-State actors whether deliberately, intentionally, negligently, by omission, by accident, or otherwise;
- seriously or significantly impacting or affecting a segment or whole of a population of one or more ASEAN Member States directly or indirectly; and,
- manifesting in any form of human suffering, or disruption of the functioning of a community or a society at any scale, or a breach of the peace.

Elaboration (a) Examples of human induced disasters include environmental pollution, industrial accidents, acts of terrorism, inter-communal violence and armed or non-armed conflict. (b) The impact or manifestation of human induced disasters may be seen through human, material, economic and environmental loss, damage or degradation such as death, injury to persons, loss of property, disruption to basic services or to the means of livelihood, disease, and other negative health – physical, mental, emotional and social – occurrences.'

cancel itself even though it appeared that there were no objections to the text or content of the document.

Setting that aside, it became apparent that there were only four of us who would regularly speak as the 'more independent-minded' Representatives without needing to reflect the views of our governments. Three of us were from outside of our respective governmental institutions. One Representative among the four of us was a sitting government official, and it was refreshing that the said Representative could align with us on a human rights position even though it may not necessarily have been the Representative's government position. At some of the meetings, we were able to have open discussions on the situation in the Rakhine State, the rights of the indigenous peoples and the rights of the lesbian, gay, bisexual, transgender, transsexual, intersex and queer communities. There were also times at the sidelines of meetings when I was told that the Representative had to take a certain position even though he or she did not personally agree with it.

When I was first appointed, I clearly said that I do not represent the Malaysian Government. I represent my country: Malaysia.<sup>155</sup> Some say that governments can hire and fire the Representatives, and therefore we lack independence but I see no contradiction in this. One may be appointed, terminated or replaced by the government but it does not mean that one cannot still act independently. Paragraph 5.7 of the TOR demands that each Representative acts 'impartially' in the discharge of his or her duties.

I was free to lead and take a certain human rights position even when the Malaysian Government had not adopted it. I could share how we were trying to improve the human rights situation in Malaysia while acknowledging our weaknesses. The Ministry of Foreign Affairs of Malaysia understood my position and we worked well together in close consultation on all matters pertaining to the AICHR. I was even asked by observers, friends, colleagues and some of the AICHR's Representatives how I could operate under the then Barisan Nasional (National Front) administration in Government which was not known to be particularly enthused about human rights. They expressed some surprise that I could adopt the positions I took or say the things I said at the AICHR. To their credit, the then Minister of Foreign Affairs of Malaysia, Dato' Sri Anifah Aman, the current Minister, Dato' Saifuddin Abdullah, and the Ministry all understood that I had to act impartially. That was how I viewed my role and it could not be in any other way for otherwise I would not have wanted to continue serving the Commission. And therein lies the difference. I did not have to censor myself.

But given the current mindset within ASEAN, we had to work with what was before us. While self-censorship was evident in the internal workings of the AICHR even in the way Representatives

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<sup>155</sup> Koshy, Shaila. 'Improving Malaysia's profile'. The Star, July 10, 2016. Accessed August 20, 2019. <https://www.thestar.com.my/news/nation/2016/07/10/improving-malysias-profile>.

drafted documents to be presented to the Commission, there was another fear: rejection. Do not ask for something you perceive you may face rejection on. One example I remember was the commendable idea to come up with a set of regional guidelines on a certain matured human rights issue. Work on the guidelines led by the AICHR supported by an Entity Associated With ASEAN (under Annex 2 of the ASEAN Charter 2007) was in full swing. Numerous programmes were held. A set of guidelines was then adopted and was due to be presented to the AICHR for adoption. It never came. It was later understood that there would have been an objection by a Representative under the pretext that the AICHR was not ready to adopt such guidelines. In the end, the document was not presented even for discussion although there already had been a significant amount of work, time and resources invested on it.

Over the three years, we had long discussions and embarked on an arduous journey to reach a consensus every year to publish our Annual Reports in 2016, 2017 and 2018. Not only had we to hold our corner to make the AICHR's work more accessible to the public, but the version that was published had our recommendations and some robust statements removed due to the sensitivities expressed by some of the Representatives. There was a sense of apprehension that the AICHR would be bound by our own recommendations once they were made public and it would have been strange if we did not implement them. This fear resulted in a conscious act of self-censorship.

**Lesson 5: The AICHR's correspondence procedure needs to be expedited to regularise and institutionalise the way the AICHR handles complaints and cases of human rights violations.**

The AICHR has been consistently plagued by the critique that it is unable or unwilling to respond to human rights violations. I requested the ASEAN Secretariat to provide me with a list of all the letters of complaints and cases received by the AICHR. As of 28 July 2017, the AICHR received no less than 34 letters. The complaints and cases highlighted a wide range of violations that alleged breaches of the AHRD. It was quite surprising to know that the AICHR had not dealt with the letters in a way befitting a regional human rights commission.

There was an absence of consistency in the way the letters were being treated. The position of the Chairperson of the AICHR is actually quite powerful. While the Chairperson is only supposed to regulate the affairs and meetings of the AICHR and to stay neutral during the discussions, he or she wields a great deal of unseen power. During our time, each Chairperson adopted different practices including the degree of flexibility in managing and responding to issues. Because the conduct of the AICHR as a group differed from year to year depending on who chaired the AICHR, some complaints and cases would be shared with all the Representatives while some would not be. If they were not shared, we would not know about them. Some letters would receive a response while others would not. From the outside, CSOs continued to complain that the AICHR was unresponsive.

What then did I have to do? It was to put in place certain procedures to ensure the more effective functioning of the AICHR.

First, I encouraged the Malaysian CSOs to continue sending their letters on complaints and cases of human rights violations to the AICHR. When they send the same, they should copy all of the individual Representatives as well. It would then come to our attention.

As a second step, I drafted a set of guidelines to institutionalise the AICHR's practice of handling the letters it received. After consultations with the Ministry of Foreign Affairs and CSOs, and on behalf of Malaysia, I had in 2017 presented the AICHR with a set of draft 'Guidelines on Correspondence' (GOC). The draft went through some seven revisions. I admit that the GOC was not sufficiently robust and what CSOs would deem as ideal. But I decided that I would have to compromise on certain modalities to 'float a trial balloon', so to speak.

I proposed that the GOC handle three types of letters: (a) requests to meet, (b) proposals to cooperate or collaborate on joint activities, and (c) complaints and cases of human rights violations. On the modality regarding letters of complaints and cases, the GOC provided that individual Representatives may at his or her discretion follow up on the matters at home. Should there be any action taken, he or she may report it to the AICHR for a response to be sent to the complainant to inform of the progress regarding the complaint or case. This procedure, while not the best for a human rights commission, was to be a starting point for the practice to gradually evolve.

The GOC was then discussed at our retreats and in several meetings. It was encouraging that some of the Representatives supported the GOC while some expressed caution. One Representative was of the view that letters that pertained to the situation of a country should be sent only to the country's Representative and to no one else for otherwise it would be an interference in the domestic affairs of the Member State. Another Representative said that the AICHR had no power to receive complaints and cases of human rights violations. The argument was that only once the Secretary-General of ASEAN raises with the AICHR such complaints and cases can the AICHR then consider them.<sup>156</sup>

One Representative attempted to water down the GOC further to gain consensus. The draft was revised again and discussions ensued for almost a year. Still, the AICHR could not find a consensus. This failure was partly due to several other factors such as the attempt to place a budgetary cap on the AICHR's sources of funding and to limit the number of our activities. Because some of us did not want to budge, the AICHR failed to agree on the said cap and limit, and also on the GOC.

I left the latest version of the GOC with the AICHR and I hope that the new group of Representatives would have the guidelines adopted as it is a sorely needed mechanism. The AICHR should be more flexible to effectively manage and respond to complaints and cases particularly on pressing or difficult human rights issues. In the future, the AICHR should host a website containing a database accessible to the public documenting all of the complaints and

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<sup>156</sup> The Representative made this argument by reading paragraph 7.1 of the TOR with Article 11.2(a) and (b) of the ASEAN Charter 2007.

cases it has handled and its responses thereto. Having such a database would be a move that marches in lockstep towards making the AICHR more credible as the premier standard-setting institution of the region.

**Lesson 6: The AICHR is only one part of the ASEAN human rights architecture and it faces the dilemma of multiple decision-makers.**

In the context of the AICHR and its decision-making processes, it is not 'one size fits all'. ASEAN is not one, but ten. There are many different considerations for a particular Representative to lead an activity as its proponent. Some of the activities are implemented because the particular country needs to do it, some because it is a 'soft topic', some because it is evidence that 'something is being done', and some because the individual Representative is interested in the issue acting as its 'champion'.

There are several reasons attributable to why some of the AICHR's Representatives may not wish to act on certain matters:

Their governments do not agree with the human rights standards or recommendations that may be propounded as a result of the proposed activities.

Their governments agree with the standards and recommendations but do not want to be bound to implement them; failing which, they will be embarrassed.

Their governments do not have the capacity to take on the activities or to implement the standards or recommendations.

Their governments fear that the proposed activities would expose their failures or violations to the public.

It would be too simplistic to dismiss the actions of the AICHR without taking into account how governments operate. Governments may be pushed to take certain positions because of their internal political and security constraints, development status and to some extent, the need to ensure the continuation of their rule in office.

Having said that, the AICHR heavily relies on the relevant national line agencies to support its work. If the agencies say no, there is nothing much that the AICHR can do. For example, since the adoption of the Disabilities EM2025, the national agencies in charge of persons with disabilities bear the responsibility to implement the Disabilities EM2025 domestically. These agencies form ASEAN's Senior Officials Meeting on Social Welfare and Development (SOMSWD).

Further, without the buy-in from the relevant Sectoral Bodies, the AICHR would be paralysed. Cooperation with the Sectoral Bodies is not only seen as ideal but as necessary. Many of the cross-cutting initiatives often require the approval of the said Bodies.

When Thailand first conceived the idea to work on the rights of persons with disabilities, the proposal was to have a 'Regional Plan of Action' (RPA). The SOMSWD had a strong sense of ownership over matters in relation to persons with disabilities. It did not sit well with them that the AICHR intended to spearhead the initiative. The problem was resolved through a sideline meeting that allowed for candid exchanges. Finally, the initiative was to be jointly led by the AICHR and the SOMSWD. A 'Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community' was established comprising members of the AICHR, the SOMSWD and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The Task Force led the drafting of the Disabilities EM2025.

If the AICHR failed to secure the SOMSWD's cooperation and decided to go it alone, the initiative would have stalled. There were other details which were factored into the eventual adoption of Disabilities EM2025 including a name change (from the original 'Plan of Action' to 'Enabling Masterplan') proposed by the SOMSWD for it to be more palatable to the ASEAN Leaders.

Similarly, in respect of the drafting of the CPPA28(e) and the preceding consultation in Kota Kinabalu, I had to ensure that my AICHR office worked in close cooperation and collaboration with the ASEAN Senior Officials on the Environment (ASOEN), the ASEAN Working Group on Water Resources Management (AWGWRM), ASEAN's Senior Officials Meeting on Rural Development and Poverty Eradication (SOMRDPE) and ASEAN's Senior Officials Meeting on Health Development (SOMHD).

Given the ASEAN human rights ecosystem, one notable progress in the past few years was the increasing number of partnerships and engagement the AICHR had with the Sectoral Bodies. It was a remarkable effort by the AICHR to widen its scope of engagement with internal and external stakeholders with the aim of moving away from working in silos. During this process, the AICHR stood out as one of the more proactive ASEAN bodies that were advocating for cross-pillar activities. This process was without its challenges, however. There were difficulties with some Sectoral Bodies that were still wary of the AICHR. It means that after some ten years, the AICHR's role is still hazy to some within ASEAN.

What is the point I am making here? While the AICHR was meant to have a pervasive influence across the ASEAN architecture, its implementing power has been diffused. It will not be able to advance human rights without the support of the Sectoral Bodies. Not only are there ten Representatives who must work in concert, but there are also other bodies of ten officials who need to work together. At the domestic level, the AICHR's work will not progress further if the local implementers refuse to act. The consequence of this situation is that multiple decision-makers need to be consulted and even then, there are occasions when no decision can be made. It is very easy to hamper the work of the AICHR.

Nevertheless, this weakness of the AICHR is also its strength. The AICHR is still able to involve government officials to discuss human rights issues on the same table while CSOs are rarely able to do so. The contrast between how the AICHR engages governments and how CSOs engage the same governments is good evidence. On this note, CSOs may wish to leverage on the AICHR's power to convene to influence officials from the various governments.

**With regard to the AICHR's engagement with CSOs during my time, we made sure some key matters were enhanced.**

First, by encouraging more applications for CSOs to be in a consultative relationship with the AICHR. I was a member of the AICHR's Screening Panel together with the Representatives of Singapore and Indonesia. We saw a good number of applications and based on our recommendations, the AICHR granted more than 30 CSOs the consultative status as at the end of 2018. This was a commendable increase from only six CSOs in 2016.

Second, some of us pushed for an institutionalised annual interface and dialogue with the accredited CSOs. There was really no other benefit for CSOs to be in a consultative relationship with the AICHR and some of us proposed new ideas. Finally, on 28 November 2017, the AICHR held a 'Roundtable Discussion on the ASEAN Human Rights Declaration' in Bohol, the Philippines with all of the accredited CSOs. It was an activity jointly led by the Philippines, Indonesia and Malaysia. The second occasion where the interface and dialogue occurred was at Thailand's 'AICHR CSO Symposium' held from 13 to 15 October 2018 in Chiang Rai, Thailand.

Both programmes were useful in that they allowed CSOs to put across their concerns, but more importantly, it behaved as a face-to-face modality to raise cases of human rights violations. I hope that this annualised practice which has enhanced the AICHR's relationship with CSOs will continue in the years to come.

## **A 'fit-for-purpose' AICHR**

How has the AICHR impacted or changed the lives of the peoples of Southeast Asia for the better? Who have we assisted? How many lives have we touched?

How is the AHRD being used in the region or across the world? Who uses it to fight for their rights?

How many times have the AICHR's reports or documents been cited to deal with cases of human rights violations?

Is there evidence that the AICHR's meetings, discourses and conversations have advanced the protection of human rights?

With the many internal challenges to the AICHR, it is easy to fathom why some do not see the value of the AICHR or its relevance. This needs to be said as a reminder to the AICHR that it needs to be bolder.

I hope that the current batch of Representatives would lead the Commission to remove many of the self-imposed inhibitions. They need to work within the current parameters but at the same time test the boundaries.

I genuinely want to see the AICHR improve. And in a way, I hope that having been part of a group that moved the needle a little more evidently in the past three years,<sup>157</sup> we have set the Commission on the right path to greater things.

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<sup>157</sup> See my media statement titled 'AICHR Malaysia must continue to be the beacon of hope for human rights and democracy in Southeast Asia', January 14, 2019: <https://www.malaysiakini.com/news/460194>. Accessed August 20, 2019.