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National Human Rights Institutions and the Courts in the Asia-Pacific Region

By Andrew Wolman¹

Abstract

In many countries across the Asia-Pacific region, national human rights institutions (NHRIs) have in recent years joined the courts as principal institutional loci for the implementation of international human rights norms at the domestic level. This article investigates how the two institutions interact in the Asia-Pacific, and concludes that NHRIs exhibit several distinct types of interactions with the courts, namely collaboration; judicial training; participation in litigation; NHRI advocacy of better human rights practices and rulings by the courts; NHRI defense of judicial independence, and interactions related to NHRI adjudication of human rights petitions. This article argues that given the wide range of different interactions displayed, relatively simplistic characterisations of the optimal relationship between NHRIs and the courts as 'cooperative' or 'supportive' are misguided, and that different types of interactions would benefit from different types of institutional relationships.

Introduction

In recent years, National Human Rights Institutions ('NHRIs') have assumed a role of increasing prominence in promoting and protecting human rights in the Asia-Pacific. There are currently twenty NHRIs in the region, most of which are less than a decade old.² Several other countries are actively considering establishing NHRIs. Yet, there has been relatively little study of how these NHRIs interact with other institutions involved in implementing human rights protections in the region, such as the courts. This article will address this issue by investigating the ways in which NHRIs and courts are currently interacting in the Asia-Pacific, attempting to categorise those interactions, and discussing the implications for developing appropriate relationships between NHRIs and the courts.

Background

NHRIs have been defined as 'independent entities which have been established by a government under constitution or by law and entrusted specific responsibilities in terms of the

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² As of 16 Sep 2011, there are NHRIs in: Afghanistan, Australia, Fiji, Hong Kong, India, Iran, Indonesia, Jordan, Malaysia, the Maldives, Mongolia, Nepal, New Zealand, Palestine, the Philippines, Qatar, Republic of Korea, Sri Lanka, Thailand, and Timor Leste.

promotion and protection of human rights.’³ NHRIs in the Asia-Pacific tend to share a few significant characteristics: most notably, they are usually organised as national human rights commissions, instead of ombudsman, institutes, or advisory committees, which may have different traditions of interacting with the courts. They also are generally mandated to investigate individual complaints and issue non-binding recommendations, which leads to more intensive contacts with the judiciary. It should be stressed, however, that even within the Asia-Pacific region the mandates, independence, size and power of NHRIs can vary considerably.

Clearly, NHRIs share some of the same objectives as do the court systems, such as protecting human rights. They also share some of the same methods (ie, handling complaints; encouraging conciliation and mediation; building norms). The two institutions in many cases also share the same personnel - NHRI Commissioners are often picked from the judiciary, and in some cases are nominated or confirmed by the judiciary.

There are also important distinctions, however. NHRIs have a narrower substantive mandate - whether it includes all human rights or just certain ones such as non-discrimination - compared to the court system's general jurisdiction. NHRIs have an explicit promotional mandate while courts have traditionally been far less involved with the promotion of human rights. Courts have the ability to make binding decisions and order the enforcement of those decisions by State police power, while NHRIs can usually only make non-binding recommendations.

Interactions between NHRIs and the Courts

This section will explore the ways that NHRIs and the judiciary currently interact with each other in the Asia-Pacific region. Specifically, this section will propose that we can now distinguish six conceptually distinct types of interaction in the region: collaboration; education; participation; challenge; defense, and the interactions (jurisprudential and case-specific) that arise in the course of an NHRI's adjudication of individual complaints.

A. NHRI collaboration with the courts

Given the overlapping mandates of NHRIs and the courts, it is unsurprising that the two institutions have found a number of different ways to collaborate in their work. Collaboration has occurred in two main contexts.

First, NHRIs and judges have worked together to promote human rights to the general public. Human rights promotion is an important task for both NHRIs and the judiciary. The Paris Principles state that NHRIs shall ‘publicise human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs’.⁴ Meanwhile, according to the Beijing Statement of Principles of the Independence of the Judiciary, one of the objects and functions of the judiciary is to ‘promote, within the proper limits of the judicial

3 Anne Gallagher, ‘Making Human Rights Obligations a Reality: Working with New Actors and Partners’, in Philip Alston & James R Crawford eds, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), p 202.

4 Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted 20 Dec 1993, GA Res 48/134, UN GAOR, 48th Sess, UN Doc A/RES/ 48/141 (1993), para 3(g).

function, the observance and attainment of human rights.’⁵ Evidently, judges will differ in their view of the proper limits of the judicial function, depending on their jurisdiction and ideology. However, there are many judges in the Asia-Pacific who have engaged in collaborative activities, for example by participating in conferences or symposia held by the NHRI; appearing in public with NHRI Commissioners, and contributing to NHRI publications.

Second, NHRIs have collaborated with judges to help research human rights issues, implement court decisions and monitor the implementation of court decisions. This type of collaboration is specifically mandated for some, but not all, NHRIs. In India, there have been a number of interesting examples of the National Human Rights Commission of India collaborating with the Supreme Court in the implementation of human rights judgments at the Court's request. For example, in 1996, the Commission had just begun to study the right to food in the context of starvation deaths in Orissa when the Indian Supreme Court received a writ petition on the same issue.⁶ The Court responded by looking to the Indian NHRC for assistance, stating that ‘[i]n view of the fact that the NHRC is seized of the matter and is expected to give its report after an enquiry made at the spot, it would be appropriate to await the report.’⁷ Currently, the Indian NHRC is engaged in three activities on remit from the Indian Supreme Court, namely monitoring the implementation of the Bonded Labour System (Abolition) Act; overseeing the functioning of the mental hospitals at Ranchi, Agra, and Gwalior; and supervising the functioning of the Government Protective Home in Agra.

B. Judicial Training and Education

Human rights education is included in the mandate of almost all NHRIs. Judicial training and education is properly seen as one aspect of an NHRI's broader human rights education mandate, both because judges may not be well equipped to identify human rights problems, and because they may be unaware of developments in international human rights jurisprudence. According to the Nairobi Principles, the appropriate tasks of an NHRI include ‘[i]ncreasing awareness and knowledge by the judiciary of international human rights norms, standards and practices and related jurisprudence, including through training, seminars, study tours, or articles in professional legal publications[; e]ngaging with judicial educational bodies and professional legal training bodies[, and a]ssisting in the education of judges, lawyers, prosecutors and other judicial authorities (eg ensuring curricula reflect international human rights law)’.⁸

Judicial training programs established by NHRIs (often in conjunction with other institutions) have been conducted in many countries in the Asia-Pacific region. In Thailand, the National Human Rights Commission has been involved in educating judges on CEDAW and gender issues. The National Human Rights Commission of India co-hosted a judicial training program on child sexual abuse and provides financial support and free publications to judicial training institutes. The Australian Human Rights Commission has been involved in providing human rights training for Chinese judges under the aegis of the Australia Human Rights Technical Cooperation Program.

C. Participation in the court system

5 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995), para 10(b).

6 Writ Petition (Civil) No 42/97 of 1996 (Starvation in KBK Districts).

7 National Human Rights Commission of India, ‘Right to Food’, available at <http://nhrc.nic.in/hrissues.htm#no4>.

8 Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, ‘Nairobi Declaration’ (Nairobi, 2008), para 33(d).

In addition to collaborating with the courts and educating judges, NHRIs have the potential to further their mandate by actively participating in litigation. In fact, while such participation is not ubiquitous, a growing number of Asia-Pacific NHRIs are able to participate in litigation in one way or another.⁹ Often, the NHRI's mandate will provide broad leeway to participate in trials: one example of this is New Zealand, where the Human Rights Act specifically permits the Human Rights Commission to be appointed as an intervener; act as counsel assisting the court; or take part in court proceedings in another way permitted by its rules or regulations.¹⁰ For an NHRI, participation in trials brings with it the opportunity to access a coercive power that the NHRI lacks, but regular litigation can sometimes be unrealistic due to the expense and time commitment involved.

Generally speaking there are four roles that NHRIs have adopted in court cases: 1) initiating court cases on their own behalf; 2) intervening in court cases in support of a private plaintiff; 3) submitting *amicus* briefs in cases without joining as a party and 4) providing assistance (legal or otherwise) to a party without joining as a party to the case.

1. Initiating Cases

Many Asia-Pacific NHRIs are able to themselves bring lawsuits in the courts. According to Amnesty International, 'NHRIs should have the legal power to bring legal cases to protect the rights of individuals or to promote changes in law and practice.'¹¹ There are three distinct categories of cases that Asia-Pacific NHRIs have initiated so far: challenges to human rights abuses; petitions to enforce orders or recommendations, and claims for institutional protection.

The most high-profile and controversial type of case is that which is brought by an NHRI with the objective of bringing a human rights violator to justice or ending some type of human rights violation. One controversial example of an NHRI approaching the court on its own behalf is the Best Bakery massacre case.¹² In this case, a state court acquitted several alleged perpetrators of a massacre during the 2002 sectarian violence in Gujarat despite strong evidence against them. The National Human Rights Commission of India successfully challenged the acquittals in the Indian Supreme Court, leading to a retrial and convictions.

Not all NHRIs have been given the power to file a case on behalf of a victim of human rights abuse. For example, one recent attempt by the Human Rights Commission of the Maldives to file suit regarding a human rights violation was rejected by the Maldives High Court, which ruled that the Commission was not entitled to file civil cases in its own name unless it is directly aggrieved.¹³ On the other hand, in Thailand, the 2007 constitution for the first time explicitly

9 NHRIs have the power to intervene or assist in court proceedings in Australia, Fiji, India, Indonesia, Mongolia, Nepal, New Zealand, the Republic of Korea, and Sri Lanka. Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (BRILL, 2006), p 76.

10 New Zealand Human Rights Act, s 5(2)(j) (1993).

11 Amnesty International, 'Amnesty International's Recommendations on Effective Protection and Promotion of Human Rights', AI Index IOR 40/007/2001, at s 3.6, (Oct 1, 2001).

12 National Human Rights Commission v State of Gujarat and Ors, Crl MP No 6797/2003 for permissions to file SLP with TP (Crl) Nos 194-202 (2003).

13 Asian NGOs Network on National Institutions, *2010 Report on the Performance and Establishment of National Human Rights Institutions in Asia* (FORUM-ASIA, 2010), p 140.

gave the National Human Rights Commission of Thailand the ability to file lawsuits on behalf of victims of human rights abuses.¹⁴

The second category of NHRI-initiated cases involve lawsuits that are filed with the objective of obtaining court-ordered enforcement or sanctions when the NHRI has issued an order (ie, to produce documents, attend a hearing, or submit testimony) or made a recommendation (often in response to an individual complaint) that was ignored or rejected by the party to whom the order or recommendation is made. The Commonwealth Best Practice Guidelines promote the authorisation of this type of case, stating that '[t]here should be an expressly established mechanism for the enforcement of appropriate NHRI decisions by the courts.'¹⁵ One example of this type of lawsuit in India was the case of Shri Ram Singh, who was allegedly manhandled by police officers in Tamil Nadu.¹⁶ The National Human Rights Commission of India had recommended that the State of Tamil Nadu pay Singh 5,000 Rupees, but the State refused to pay. The Commission then petitioned the High Court of Madras to give appropriate directions to the State government. The Court responded by ordering the payment of the original amount plus interest by the State government, along with an exemplary payment to the Commission itself.

Finally, there are cases brought by an NHRI to preserve its own independence or effectiveness. In Korea, the National Human Rights Commission recently turned to the constitutional court to challenge a proposal by the Ministry of Public Administration to downsize its bureaus from five to three and cut its staff from 208 to 164.¹⁷ Whether courts can effectively act as a protector for the independence of NHRIs depends on how the NHRI has been established (whether by constitution, statute, decree or other means), and the protections given to the NHRI, if any, in its founding document.

2. Interventions

Most Asia-Pacific NHRIs are also permitted to intervene on behalf of litigants in court proceedings. For example, in Sri Lanka, the Human Rights Commission Act states that the Human Rights Commission may 'intervene in any proceedings relating to the infringement or imminent infringement of the fundamental rights, pending before any court, with the permission of such court.'¹⁸ In Australia, the Human Rights and Equal Opportunity Commission ('HREOC') has been particularly active in its court interventions, intervening in 59 cases between 1988 and 2009.¹⁹ The list of interventions has included some high profile cases, most

¹⁴ *Ibid*, p 237.

¹⁵ Commonwealth Secretariat, 'National Human Rights Institutions: Best Practice' (2001), p 29.

¹⁶ See, National Human Rights Commission of India, 'Compliance with the Commission's recommendations in the case of torture of Shri A Ram Singh, a member of the Cuddalore Bar Association: Tamil Nadu', available at <http://nhrc.nic.in/policecases.htm>.

¹⁷ Asia Pacific Forum for National Human Rights Institutions, Press Release, 'South Korea: NHRCK Staff cut by 21%, Bureaus Reduced', available at <http://www.asiapacificforum.net/news/south-korea-nhrck-staff-cut-by-21-percent-bureaus-reduced.html>.

¹⁸ 1996 Human Rights Commission of Sri Lanka Act, s 11(c).

¹⁹ Australian Human Rights Commission, 'Summary of Interventions by the Australian Human Rights Commission', available at http://www.hreoc.gov.au/legal/submissions_court/guidelines/table_interventions.html.

notable the Teoh case, which established that Australian administrative decision-makers were required to give effect to rights embodied in international human rights treaties.²⁰

One of the barriers to interventions is the difficulty in becoming aware of pending cases. This issue has been a challenge in Korea, where the National Human Rights Commission initially lacked access to a list of human rights cases pending in the court system, leading to its failure to intervene in at least three important human rights cases during the first year of its existence.²¹ The National Human Rights Commission of India has in some cases become aware of pending cases from local media reports or by relying on information from a special rapporteur assigned to investigate a particulate an issue area.

3. Amicus Curiae Brief Submissions

Another way that many NHRIs are able to affect the outcome of a pending lawsuit without actually becoming party to the suit is through the submission of an *amicus curiae*, or ‘friend of the court’ brief. Most but not all NHRIs have the power to submit *amicus* briefs. The Australian HREOC has stated that it will file an *amicus* brief when ‘1) the Commissioner thinks the orders may affect to a significant extent the human rights of persons who are not parties to the proceedings; or 2) the proceedings, in the opinion of the Commissioner, have significant implications for the administration of the relevant Act/s; or 3) the proceedings involve special circumstances such that the Commissioner is satisfied that it would be in the public interest for the Commissioner to assist the Court as *amicus*.’²²

While NHRIs most often approach the court to ask permission to submit an *amicus* brief, in some circumstances the dynamic is reversed, and the court will ask the NHRI to submit an *amicus* brief on a particular issue. For example, in *Naushad Ali v the State*, the Fijian High Court requested that the NHRI file an *amicus* brief on whether corporal punishment in prison was consistent with the Fijian Constitution’s prohibition of torture and other cruel or degrading treatment or punishment.²³

4. Provision of Advice and Assistance to Litigants

NHRIs routinely provide victims of human rights violations that wish to access the courts with simple advice such as how or where to file a suit. However, in some circumstances a higher level of assistance can be offered, including the provision of legal advice, the granting of money to hire a lawyer, or the provision of a referral of a lawyer willing to provide pro bono services. Sometimes this assistance mandate is explicitly provided for in the NHRI’s establishing legislation; for example, the Indonesian Human Rights Commission can ‘give recommendations to the parties for resolving conflict through the courts.’²⁴

D. Challenging human rights-unfriendly practices by the courts

20 Minister of State for Immigration and Ethnic Affairs v Teoh, (1995) 183 CLR 273 (Aust’l).

21 Kwak Nohyun, ‘National Human Rights Commission at Work: A Critical Reflection’ (2002) 42(3) *Korea Journal* p 211.

22 Australian Human Rights Commission, ‘Submissions to court as Intervenor and Amicus Curiae’, available at http://www.hreoc.gov.au/legal/submissions_court/index.html#2.

23 Criminal Appeal No HAA 0083 of 2001 L (Fiji).

24 Act No 39 of 1999 on Human Rights, Art 89(4)(c) (Indonesia).

One of the most fundamental tasks of NHRIs is to challenge the State when it engages in practices that violate human rights. Thus, NHRIs generally have the task of challenging actions by the judiciary that are human rights violations or human rights-unfriendly. Specifically, there are three aspects of judicial activity where NHRIs have advocated for human rights improvements. First, NHRIs have challenged the courts' procedural conduct of its judicial operations, including issues such as access to justice. Second, NHRIs have challenged the courts' rights jurisprudence, by advocating for more human rights-protective rulings. And third, NHRIs have advocated better adherence to human rights by the courts in their non-judicial operations. The means used by NHRIs to challenge court practices are similar to those used to influence other branches of government, and include writing reports; making public condemnations and issuing recommendations in response to individual complaints.

1. Courtroom Procedure

According to the Nairobi Declaration, NHRIs should promote 'equal access to justice and assisting victims seeking redress with information on the law and the legal system particularly in relation to marginalised or vulnerable groups as well as migrants'.²⁵ Asia-Pacific NHRIs have advocated for access to justice and human rights protection for victims on a number of occasions in Korea, India, Mongolia, and New Zealand. In Southeast Asia, the four NHRIs from ASEAN states recently signed a Memorandum of Understanding pledging to work towards ensuring access to justice for trafficked women and children.²⁶

While access to justice issues have traditionally received the most attention, other elements of courtroom procedure have come in for increased scrutiny too in recent years. In the Maldives, for example, the National Human Rights Commission condemned a court policy that required women to take off their veils when appearing in court as discriminatory against observant Muslim women.²⁷ In Korea, the National Human Rights Commission has asserted the right to privacy for participants in judicial proceedings.²⁸

2. Jurisprudence

NHRIs have influenced human rights jurisprudence through participation in litigation, as discussed earlier. However, there are also ways to influence the outcome of court rulings absent direct participation. For example, NHRIs have shown the ability to influence jurisprudence through issuing reports and guidelines that are later relied upon by the courts. In India, the National Human Rights Commission issued a set of guidelines on the treatment of cases of those who are mentally ill in jail which was quoted extensively by the Division Bench of the Indian High Court in one of its rulings.²⁹ More recently, the Indian Supreme Court relied in part on a set of

25 Nairobi Declaration (note 8 above), para 33(a).

26 Southeast Asian National Human Rights Institution Forum, 'Memorandum of Understanding Against Trafficking of Women and Children', Art 2,1 (30 Mar 2010).

27 'Banning Veils from Courts an Act against Human Rights: HRC' (Nov 12, 2007) *Haveeru Online*, available at <http://www.haveeru.com.mv/english/?page=details&id=19407>.

28 See National Human Rights Commission of Korea, Press Release, 'Acceptance of New Policy on Protection of Individual Information' (15 Dec 2003).

29 Case of Mr. Charanjeet Singh, Writ No 1278/04, Division Bench of the Delhi High Court.

National Human Rights Commission guidelines on the administration of lie detector tests for an important ruling.³⁰

One difficult question is whether NHRIs should be able to criticise or challenge a specific judicial ruling. Generally, such criticism has been rejected as inappropriate. In Korea, for example, the NHRCK has chosen not to criticise Constitutional Court decisions on the grounds that state agencies are legally bound by the decisions of the Constitutional Court.³¹ However, some human rights NGOs have characterised this reluctance as dereliction of duty, stating that because the Commission has the power to submit opinions to the Court, it is natural to criticise the Court when those opinions are ignored, and noting that the Commission is expected to speak for international human rights law as well as domestic law, so it may have a duty to criticise the Court in relation to human (rather than constitutional) rights.

One recent example of the difficulties that can arise from challenging a court decision was the case of *Bani Kanta Das and Anr v State of Assam*, where the National Human Rights Commission of India was reprimanded by the Supreme Court for asking the governor of Assam to grant clemency to an individual who had been sentenced to death for murdering four individuals.³² The Commission had advised the governor that capital punishment constituted a human rights violation. The Indian Supreme Court strongly criticised the Commission's intervention, stating that it had gone beyond its jurisdiction and was not permitted to hold that a court had violated human rights.

3. Non-Judicial Activities

The judiciary is not thought of as a branch of government that is particularly likely to violate human rights in its non-judicial activities. However, there are a number of ways in which court systems can in fact affect human rights through their roles as employers, contractors, purchasers of goods, etc. When abuses occur, they have been challenged by NHRIs. For example, the National Human Rights Commission of Korea recently recommended that the Supreme Court improve human rights conditions of cleaning service employees in the Supreme Court building and address the issue of the employees' low wages.³³

E. Defending the judiciary from challenges to its independence or effectiveness

Another important role for NHRIs is to defend the judiciary from challenges to its independence or its ability to effectively protect rights. According to the Nairobi Declaration, NHRIs should '[take] action where officials in the judiciary are faced by intimidation, threats or violence'.³⁴ Asia-Pacific NHRIs have advocated for judicial independence on a number of occasions. For example in response to criticisms of 'judicial activism' from some quarters, Commissioner Verma of India's National Human Rights Commission vocally defended the practice, stating that '[j]udicial activism is a delicate exercise involving creativity. [...] Judicial creativity is needed to fill the void occasioned by any gap in the law or inaction of any other

30 *Selvi & Ors v State of Karnataka & Anr* [2010] INSC 340 (5 May 2010), para 164.

31 Kwak (note 21 above), p 211.

32 *Bani Kanta Das and Anr v State of Assam and Ors* (08/05/2009 – SC)

33 National Human Rights Commission of Korea, '2008 Annual Report' (2009), p 43.

34 Nairobi Declaration (note 8 above), para 33(e).

functionary, and, thereby, to implement the Rule of Law.’³⁵ In 2004, members of a colloquium involving the human rights NGO Interrights, the Fiji Human Rights Commission and representative from the Fiji Judiciary issued the Suva Statement on the Principles of Judicial Independence and Access to Justice. In Malaysia, SUHAKAM (the Malaysian NHRI) held a symposium in October 2009, promoting judicial independence.

F. Adjudicatory Interactions

In the Asia-Pacific region, the ability to investigate individual complaints is the norm for NHRIs: according to a recent study of twelve NHRIs in the region, all were mandated to investigate individual complaints.³⁶ When it comes to the adjudication of human rights complaints, the relationship between courts and NHRIs is often characterised as parallel: each institution is involved in independently hearing complaints of human rights abuses in its separate sphere.³⁷ However, the parallelism is not always complete: as discussed below, there are a number of potential intersections between the two systems.

One example of an NHRI and judicial system coming into contact would be the handling of the same matter simultaneously by both an NHRI and a court. This is generally seen as inappropriate. According to the Commonwealth Best Practice Guide, ‘NHRIs should not commence investigations into matters already pending before the courts unless required as part of the duty of NHRIs to investigate systemic issues relating to equal protection under the law and access to justice.’³⁸ It is perhaps less obvious whether a NHRI investigation should continue its investigation if a criminal or civil case on the same subject is commenced after the NHRI has already begun to hear a complaint. In Korea, the National Human Rights Commission will transfer a case to the criminal investigation agency upon commencement of a criminal investigation. However, it will retain investigatory rights over the case when the complainant brings a civil action or makes a petition to the Constitutional Court on the matter under investigation.

Another possible intersection between the two systems occurs after the NHRI has completed its investigation and made its recommendation. According to the Commonwealth Best Practice Guide, the ‘decisions of NHRIs should be subject to judicial review.’³⁹ As a practical matter, when NHRIs only have the power to issue non-binding recommendations, there may be relatively little incentive for a party deemed guilty of a human rights violation to appeal an adverse recommendation (instead of simply ignoring it). On the other hand, if a complainant is not satisfied with the recommendation of an NHRI then the question remains of whether the NHRI’s recommendation can be appealed in the courts (and if so, whether the factual elements of the NHRI investigation will be accepted by the court) or whether the underlying subject of the complaint can alternatively be tried *de novo*. In some circumstances, the NHRI itself may recommend that the public prosecutor file a criminal case against an individual if its investigation has revealed abuses that are best dealt with by the criminal law. However, the final

35 Justice J S Verma, ‘Protecting Human Rights through the Judicial Process’, Second Justice M Hidayatullah Memorial Lecture (Raipur, 21 Dec 2002), available at <http://nhrc.nic.in/Documents/JHidyaMemo-II.pdf>.

36 Burdekin (note 9 above), p 8.

37 See Amnesty International (note 11 above), s 4.D.2.

38 Commonwealth Secretariat, (note 15 above), p 29.

39 *Ibid*.

decision on whether to prosecute will normally rest with the prosecutor's office (although there may be considerable public pressure to follow the NHRI's recommendation).

Finally, the adjudicatory regimes of courts and NHRIs can intersect through their jurisprudence. The National Human Rights Commission of India, for example, uses existing court jurisprudence to interpret constitutional (or human) rights in its own rulings.⁴⁰ Conversely, courts can cite prior NHRI holdings in their own rulings, although the appropriateness of this will vary by jurisdiction. There has been little research into NHRI jurisprudence and the degree to which it reflects or diverges from judicial rights jurisprudence, but theoretically, different rulings on a particular matter could lead to a confusing emergence of conflicting norms.

Discussion

Clearly, at least in the Asia-Pacific context, it would be inaccurate to view the court system and NHRIs as existing in isolation from each other. On the contrary, the interactions between the two bodies are significant, complex, and multi-faceted. Conceptually, the NHRI-judiciary relationship can be broken down and viewed as composing a range of different types of interactions, which this article characterises as collaboration, education, participation, challenge, defense, and adjudicatory interactions.

The wide range of interactions between courts and the judiciary in the Asia-Pacific region brings into question some of the conventional wisdom regarding the nature of the relationship between the two bodies. Observers have tended to promote close cooperation between the courts and NHRIs. Thus, the Nairobi Declaration states that 'the role of NHRIs with regard to courts is one of support and cooperation.'⁴¹ The Commonwealth Best Practice Guide for National Human Rights Institutions states that NHRIs should play a role complementary to that of courts, and NHRIs and courts should establish a cooperative working relationship.⁴² Another commentator states that 'engagements by NHRIs with the judiciary should be pursued at every opportunity ... I offer the following suggestions: periodic meetings between groups of senior members of both institutions, even if the meetings are initially only for tea and pleasant conversation.'⁴³ This article suggests that such advice may not always be appropriate, and that the type of relationship that an NHRI should cultivate with the judiciary will depend on the nature of the interaction that is occurring.

In the collaborative situations described above, cooperation and regular contact would presumably be beneficial. Similarly, to the extent that NHRIs and the judiciary desire to create a uniform rights jurisprudence, frequent communication and cooperation would seem useful. On the other hand, where the NHRI is a party to litigation before a court, close cooperation would be inappropriate. In these circumstances, the NHRI should be treated on an equal basis as other

40 See, eg, Procedure with respect to complaints against Armed Forces: Disappearance of Mohammed Tayab Ali, who was last seen in the company of paramilitary forces (Case No 32/14/1999-2000) at <http://nhrc.nic.in/armedforcescases.htm#no8> (citing Supreme Court in *Union of India v Luithukla (Smt.) and Others*, (1999) 9 SCC 273).

41 Nairobi Declaration (note 8 above), para 21.

42 Commonwealth Secretariat, (note 15 above), p 28.

43 John von Doussa, 'Introductory Address at National Human Rights Institutions and the Administration of Justice Round Table Conference' (Copenhagen, 2003), available at http://www.hreoc.gov.au/about/media/speeches/speeches_president/2003/copenhagen.html.

litigants. This means, for example, that *ex parte* communications should be prohibited if that is the general rule in the relevant jurisdiction.

The situation where the NHRI is challenging some aspect of judicial human rights performance presents another case where ‘support and cooperation’ does not adequately characterise the nature of the NHRI-judiciary relationship. Here, the NHRI must maintain enough of a distance from the courts to be able to vigorously criticise and condemn poor human rights practices, even if the NHRI is supporting a particular court in other aspects of its work or sitting before it as a party to pending litigation. Evidently, a particular judge may not take kindly to such criticism, but that should not prevent the NHRI from exercising its mandated duties.

Conclusion

Increasingly NHRIs and the courts are emerging as two prominent pillars for the implementation of human rights protections in the Asia-Pacific. Thus, the ways in which these two institutions interact has taken on greater importance. While further study of this topic is needed, this article makes clear that the interactions between NHRIs and the judiciary are multi-faceted and complex. NHRIs do not exist in an entirely separate and parallel sphere than the courts. At times – and perhaps at the same time – their interactions involves collaboration and challenge; protection and petition. Thus, the relationship between the two bodies should be carefully managed in order to further the mutual goal of human rights protection while ensuring the independence of each institution.