

Can ASEAN take Human Rights Seriously?

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Through the adoption of the ASEAN Charter in 2007, ASEAN undertook for the first time to be an international person with formal legal personality that upholds democracy and human rights in the form of binding legal obligations. By incorporating human rights and democracy in its constituent instrument and emphasising the idea of a ‘people-oriented ASEAN in which all sectors of society’ would benefit from ASEAN integration and community building, ASEAN sent the signal that it viewed human rights as essential to the community-building process.¹

There is a plethora of institutions and instruments at the international, regional and national level that could and should be used by ASEAN and its Member States to promote and protect human rights. ASEAN states possess constitutional protections as well as domestic laws and institutions which protect human rights; they have ratified to varying degrees the core UN human rights treaties; and most notably, ASEAN has instituted its Intergovernmental Commission on Human Rights (AICHR) in 2009 as part of its post-Charter transformation. Despite these commitments and advancements in human rights laws, institutions and tools, the human rights record in the ASEAN region oscillates between improvement in certain areas and stagnation (or even deterioration) in others. Moreover, as a collective regional entity, the legal and institutional development of human rights is arguably limited, seldom matching up to international thresholds, even if we leave aside sensitive inter-regional comparisons of laws, implementation and enforcement.²

Although the establishment of AICHR and adoption of the ASEAN Human Rights Declaration (AHRD) in 2012 were steps forward a number of concerns remain regarding ASEAN’s commitment to human rights. Such concerns include the fact that AICHR is composed mainly of state officials without relevant human rights experience, that it has lacked transparency and accountability in its operations, and that there is an apparent absence of political will to

¹ ASEAN Charter, Art 1(13).

² The UN High Commissioner on Human Rights Navi Pillay issued a statement exhorting ASEAN to adhere to international human rights standards in both the AHRD and AICHR. See ‘Pillay encourages ASEAN to ensure Human Rights Declaration is implemented in accordance with international obligations’, OHCHR News, 19 November 2012 at www.ohchr.org. Such external critique is not lost on ASEAN. Richard Magnus, the former Singapore AICHR representative, described the AHRD as ‘a realistic document’ that ‘should be seen as a work in progress and not an end-state’ thereby implicitly acknowledging room for further improvement. See ‘Leaders at ASEAN summit sign human rights declaration’, 18 November 2012, Channelnewsasia.com.

strengthen regional mechanisms. Such criticisms all have a serious consequence: it calls into question whether ASEAN can take human rights seriously.

It is too simplistic to dismiss ASEAN's commitment to human rights as window-dressing as ASEAN's relationship with human rights is complex. The situation in ASEAN is part of a wider Asian phenomenon demonstrating an aversion to closer international scrutiny of human rights, notwithstanding ASEAN states participation in both the Universal Periodic Review (UPR) by the UN Human Rights Council and the reporting system administered by the UN treaty bodies.³ The reasons are intertwined with Asian states' involvement (or lack thereof) in the formation and evolution of international human rights norms. The most infamous Asian 'pushback' was manifested in the 1990s Asian values debate where the precedence of cultural particularism over universalism, and responsibility and economic development over human rights were promulgated. While the Asian values debate has abated, vestiges persist. ASEAN states resolutely maintain that human rights are strictly within the purview of domestic affairs and are not subject to interference by external parties (a principle also manifested in the ASEAN Way).⁴

Given the inherent tension in the ASEAN human rights discourse – ASEAN states have undertaken a legal obligation to promote and protect human rights and democracy and yet are unwilling to take substantive measures for their development – the purpose of this study is to examine whether ASEAN can take human rights seriously and the substantive action that may be taken to achieve its articulated aims. In other words, do human rights have an authentic role to play in the ASEAN integration enterprise, and if so, how?

The study is organised in four parts. Chapter 1 provides context by examining the wide diversity of regional rights concerns. By focusing on the issues highlighted in the UPR reports, it is possible to gain insight into the issues that government and non-governmental organisations deem as areas of concern. The authors are not suggesting that the record of ASEAN states is any worse (or better) than states located in other regions, but rather that there are crucial issues to be addressed by ASEAN. These include democracy and rights to political participation,

³ This is apparent from the reservations made on human rights treaties as well as the dearth of human rights bodies and instruments (legally binding or not) in Asia. The numerous and persistent attempts by the UN and non-state actors to encourage the establishment of a regional human rights institution in Asia have been unsuccessful to date.

⁴ Although ASEAN's purposes as stated in the 2007 Charter include the strengthening of democracy and good governance as well as the promotion and protection of human rights and fundamental freedoms, these are to be carried out 'with due regard to the rights and responsibilities of the Member States'. See ASEAN Charter Art 1(7). Moreover, the AHRD includes a range of arguable restrictions on human rights based on 'national security', 'public safety' and 'public morality': ASEAN Human Rights Declaration, Art 8.

freedom of speech and expression, freedom of religion, extrajudicial abuses, economic and developmental rights and access to justice.

Chapter 2 addresses the incoherence in the ASEAN understanding of human rights through an analysis of human rights in the political and legal development of ASEAN. First, it will explore the national experience of human rights in ASEAN, beginning from the time of nation-building and the realisation of the right of self-determination to the inclusion of rights protections in many ASEAN states' constitutions and the establishment of national human rights institutions. Second, the impact of the Asian values debate on ASEAN states' attitude to human rights will be examined, especially the reason why certain tenets remain so important (for example, the balancing of rights and responsibilities, the interplay between development and democracy, and the veracity of the cultural imperialism argument). Third, this chapter will analyse the relationship between the 'ASEAN Way' and human rights. Does the ASEAN Way with its focus on absolute sovereignty, non-interference, consensus decision-making and informal institutions provide a legitimate defence to the potentially intrusive nature of formal human rights institutions in the region? Can and should human rights be prioritised over the ASEAN Way? Finally, we examine the developments surrounding the incorporation of human rights in the ASEAN Charter as well as other instruments which document the relevance of rights to regional integration. These instruments include the Blueprints for the ASEAN Political-Security, Economic and Socio-Cultural Communities.

Chapters 3 and 4 examine the utility of existing human rights tools in the ASEAN region and consider alternative ways in which to operationalise the Charter's vision of human rights in ASEAN. There are numerous international, regional and national laws and institutions designed to protect human rights in the ASEAN region. Yet, the lack of coherent vision, steady commitment to and understanding of human rights undermines their efficacy. At the regional level, ASEAN has established AICHR (dealing with human rights generally) and two thematic institutions – the ASEAN Commission for the Promotion and Protection of Women and Children's Rights (ACWC) and ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). Questions remain about the effectiveness of these institutions given limits on their powers. It is also important to consider if human rights are incorporated as part of the work of the ASEAN Secretariat or if these issues are delegated to AICHR, ACWC and ACMW.

At the national level, constitutional rights provisions exist across all ASEAN states and Indonesia, Malaysia, Myanmar, Philippines and Thailand have established national human rights

institutions (NHRIs)⁵. The domestic courts of some member states have discussed these constitutional rights (as well as international human rights law). Yet, the domestic rule of law can be weak and there is little recourse to national institutions in such circumstances. At the global level, ASEAN states have ratified a number of the core international human rights conventions, with all ASEAN members being parties to the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although in many cases with significant reservations. ASEAN members have also actively participated in the UPR process at the UN Human Rights Council. However, it is very rare for ASEAN states to subject themselves to individual complaints procedures pursuant to the UN human rights treaties or to any form of international judicial processes with respect to rights protections. There is a danger that the implementation and enforcement of these international obligations will be overlooked by ASEAN states. The aim of Chapter 3 is to analyse each level of protection in terms of their competence and degree of use and efficacy in promoting and protecting human rights in ASEAN member states.

Chapter 4 examines the ways⁶ in which ASEAN could operationalise its vision of human rights. This involves analysing the methods by which human rights could be enunciated in the ASEAN region – for example, are soft law or hard law approaches more appropriate? ASEAN appears to be moving away from its roots as a soft law organisation by promulgating a binding treaty in the form of the ASEAN Charter, but this does not mean that this movement to formalisation should or could be replicated in the field of human rights. It is important to determine the desirable features of an ASEAN human rights system. This involves a number of sub-themes: should ASEAN be concerned with both the promotion *and* protection of rights; should it pursue an adjudicative mechanism for dealing with violations of human rights (in light of existing international and national mechanisms); should it institute other forms of sanctions, for example, suspension of membership for violations of human rights and democracy (as have been pursued in a number of other regional organisations); or should it consider strengthening existing institutions, for example, the network of NHRIs?

In considering the potential institutions which ASEAN may establish, examples will be drawn from existing international and regional organisations to determine the appropriate model or models in the Southeast Asian region. ASEAN countries are using language reminiscent of the European Union (for example, ‘three pillars’, ‘community-building’, ‘shared destiny’). There

⁵ Cambodia has also been considering whether to establish an NHRI.

⁶ The use of the plural ‘ways’ is important in this respect as there may be a number of different methods by which ASEAN could implement the Charter’s vision of the promotion and protection of rights in the region.

may also be similarities with the Organization of American States – as with the countries of Latin America, ASEAN countries were initially bound by a strong distaste for the possibility of communist influence in the region and were (and still are) attached to the principle of non-intervention. When discussing rights specifically, the African model may provide inspiration, given that it departs in some respects from the European and Inter-American systems on the basis that there is a different conception of rights in Africa. These regional examples (as well as others) may provide possible models for an ASEAN system of rights protection.

In conclusion, the question whether ASEAN can take human rights seriously is integral for the future of ASEAN community-building for a number of reasons. First, ASEAN has given a legal commitment to uphold human rights and democracy. If ASEAN's commitment to this goal is lacklustre, it will be out of step with its own instruments and the international community at large. The principles of the rule of law, human rights and democracy have attained paramount importance in the global order. An international person – state or organisation – has to abide by such norms to demonstrate its integrity and be taken seriously as a global actor. To not take such obligations seriously would be to undermine ASEAN's standing in the international community. Second, it is important that ASEAN's vision of rights accords with international law. In this respect it is imperative that the development of a regional model genuinely upholds human rights and does not undermine existing international standards. Finally, and most importantly, it is fundamental to the people of ASEAN that the primary international organisation in the region, now self-described as 'people-oriented', takes the commitment to promote and protect rights seriously.