

Introduction

It was with great fanfare that the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. Three years later, in November 2012, the ten leaders¹ adopted the highly anticipated ASEAN Human Rights Declaration (AHRD) at the ASEAN Summit in Cambodia. Hailed by the Foreign Secretary of the Philippines, Albert del Rosario, as ‘a legacy for our children’, it was described more cautiously by Singapore’s representative to AICHR, Chan Heng Chee, as ‘a realistic document’ that ‘should be seen as a work in progress and not an end-state’.² This more circumspect assessment would appear to be justified given the range of critiques of the Declaration that have been offered by human rights organisations and advocates. The United Nations High Commissioner for Human Rights, Navi Pillay, congratulated the regional institution following the adoption of the AHRD, but also made an express request that ASEAN adhere to international human rights standards in both the AHRD

¹ The ten ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic (Lao PDR), Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

² ‘Leaders at ASEAN Summit Sign Human Rights Declaration’, *The Malaysian Times* (Online), 19 November 2012.

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and AICHR.³ Pillay's comments epitomise the international community's underlying concerns regarding the ASEAN human rights mechanism. On the one hand, the establishment of AICHR is a positive development for the region; on the other hand, the substantive parameters of rights protections may fall short of global standards, thus raising the question: can ASEAN take human rights seriously?

Many human rights scholars and practitioners have long doubted the commitment of Asian states, whether in Southeast Asia or the wider region, to any form of regional human rights instrument or human rights institution. This scepticism largely stems from the lack of regional human rights bodies and instruments (legally binding or not). In the case of Southeast Asia this is a result of ASEAN members' strong adherence to the principle of non-interference in their domestic affairs. In addition, the organisation's *modus operandi*, the ASEAN Way, demonstrates a preference for informal structures and consensus decision-making over formal institutions with substantive powers. Such doubts about ASEAN's credibility are keenly felt within the region. Senior officials from ASEAN states often remind critics that the inclusion of a commitment to human rights in the organisation's principles is a significant and positive development that

³ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Pillay Encourages ASEAN to Ensure Human Rights Declaration is Implemented in Accordance with International Obligations', 19 November 2012, <http://newsarchive.ohchr.org>; UN News, 'UN Rights Chief to Southeast Asian Leaders: Make Your Landmark Human Rights Declaration More Inclusive', 8 November 2012, <http://news.un.org>.

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would have been impossible prior to the adoption of the Charter of the Association of Southeast Asian Nations (ASEAN Charter) in 2007 – therefore, patience is needed.⁴

It is within this context that this study aims to examine the question of whether ASEAN can take human rights seriously. From ASEAN's establishment in 1967 with the signing of the Bangkok Declaration, through to the adoption of the ASEAN Charter in 2007, member states operated as a loosely bound, informal organisation with a preference for diplomacy and non-binding modes of cooperation. The possibility of any deeper form of political and legal integration in the ASEAN region – apart from economic cooperation – appeared to be an aspiration for the distant future rather than an undertaking for the present. However, with the adoption of the ASEAN Charter the organisation declared its ambition to transform into an integrated and coherent ASEAN Community based on the rule of law, human rights and democracy.⁵ The Charter, as the constituent treaty of ASEAN, not only placed regional integration on a firmer legal footing; it also included a legal obligation to support human rights and democracy in regional endeavours.

With little mention of human rights in ASEAN instruments until the beginning of this century, human rights principles came from seemingly nowhere in ASEAN's official

⁴ See comments by Chan Heng Chee in 'Leaders at ASEAN Summit Sign Human Rights Declaration'.

⁵ The members' commitment to 'a stronger, more united and cohesive ASEAN' is located in the 'Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015', Cebu, Philippines (13 January 2007).

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documentation to occupy a key place in the Charter's purposes and principles. The Charter mandated that in pursuing the purposes of the organisation ASEAN and its members should respect 'fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'.⁶ Members should also adhere to the 'principles of democracy and constitutional government' and uphold 'international law, including international humanitarian law'.⁷ The Charter gave added weight to these statements by stipulating that the organisation would establish a regional human rights body.⁸ These specific purposes and principles were accompanied by broader statements emphasising the idea of a 'people-oriented ASEAN in which all sectors of society' would benefit from 'ASEAN integration and community building'.⁹ Thus, post-2007 ASEAN was redesigned not only to be an organisation of member states, but a community of peoples.

Despite these statements affirming the place of human rights in ASEAN, the Charter contained a rider – the purpose of the promotion and protection of human rights was to be achieved 'with due regard to the rights and responsibilities of the Member States'.¹⁰ The differences between the statements of ASEAN and its leaders and their subsequent substantive actions – including the use of soft legal instruments to promote human rights and the members' relative

⁶ Charter of the Association of Southeast Asian Nations, opened for signature 20 November 2007, 2624 UNTS 223 (entered into force 15 December 2008), Art. 2(2)(i).

⁷ *Ibid.*, Art. 2(2)(h), (j). ⁸ *Ibid.*, Art. 14. ⁹ *Ibid.*, Art. 1(13).

¹⁰ *Ibid.*, Art. 1(7).

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silence in the face of violations – have led to questions about the priority and role ASEAN accords to human rights in the community-building process. While other studies in this series have examined the way in which law will enhance ASEAN integration – whether it be through trade, investment treaties, services or dispute resolution mechanisms – this study will determine whether human rights have an authentic role to play in the ASEAN integration enterprise and, if so, the ways in which that role may be achieved.

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Our approach to the question whether ASEAN can take human rights seriously comprises a number of elements, but is principally directed at two interrelated issues. First, do ASEAN members demonstrate the necessary political will to address human rights concerns in the region? Second, does ASEAN have the capacity through its existing instruments and mechanisms to assist in the improvement of human rights in Southeast Asia? The first question requires an understanding of the different national experiences of human rights among the ten ASEAN members, as well as developments in their approach to ASEAN's fundamental principles, including consensus decision-making and non-interference. ASEAN members' attitude towards the international human rights project, from nation-building to constitution-making, provides the context for their current approach to integrating human rights standards into ASEAN's work. The organisation's willingness to regard human rights as important can be determined through a diverse array of sources, not least its

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method of incorporating human rights into the community-building project. Such materials provide evidence to answer the question whether ASEAN members, and ASEAN as an organisation, view human rights as a serious part of the ASEAN Community.

The second issue, directed to the current capacity of ASEAN, leads to an analysis of the mechanisms that have been established to promote and protect human rights in the region. What laws and institutions exist at the national, regional and international levels in Southeast Asia? Are these laws and institutions able to address the range of problems in ASEAN members? The results of this analysis will indicate whether ASEAN has the procedures in place to promote and protect human rights, or whether more needs to be done before it can be said that ASEAN can take human rights seriously. When examining whether ASEAN needs more robust mechanisms, this book will consider arrangements in other regional and international organisations to determine whether there are further options that may be appropriate and desirable in ASEAN. When analysing these mechanisms – either in ASEAN or elsewhere – this book does not enter debates on whether the ratification of international human rights treaties leads to better outcomes (and the correct method of measuring such outcomes)¹¹ in any detail. While there is a burgeoning literature, either challenging or

¹¹ For example, OHCHR has published an extensive guide on indicators for measuring the implementation of human rights: OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation', UN Doc. HR/PUB/12/5 (2012).

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supporting the ability of the international human rights system to achieve positive results,¹² we take the approach that ASEAN's capacity to take human rights seriously depends on whether it has the mechanisms in place to deal with human rights issues in the region. These mechanisms include standard-setting in the form of human rights instruments to provide a common benchmark for members, the establishment of institutions to disseminate information, monitor compliance and assess violations, and the involvement of civil society in these processes. The adoption of such measures serves to highlight whether ASEAN can take the promotion and protection of human rights seriously.

In exploring these questions, this work is organised in four parts. Chapter 1 will provide a context for this study by examining the wide diversity of human rights problems in the region through an analysis of the documentation provided by governments, international organisations and civil society organisations (CSOs) before the Universal Periodic Review (UPR) at the United Nations Human Rights Council.

¹² See Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal*, 111(8) (2002), 1935–2042; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most', *Journal of Peace Research*, 44(4) (2007), 407–25; Daniel W. Hill Jr, 'Estimating the Effects of Human Rights Treaties on State Behavior', *The Journal of Politics*, 72(4) (2010), 1161–74; Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties', *European Journal of International Law*, 14(1) (2003), 171–83; Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009); Gráinne de Búrca, 'Human Rights Experimentalism', *American Journal of International Law*, 111(2) (2017), 277–316.

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By focusing on the UPR it is possible to highlight the human rights issues that are perceived as most relevant by both governments and non-governmental organisations (NGOs) in the region as well as the United Nations' human rights bodies. The aim of this chapter is not to suggest that the record of ASEAN states is any better or worse than states located in other regions, but rather to highlight the diversity and gravity of the issues which will need to be addressed in any regional discussion of human rights and the development of regional human rights mechanisms. The difficult question of why, despite improvements in some areas, there are still significant human rights problems in the region must also be considered.

Chapter 2 addresses ASEAN's understanding of rights by focusing on the way in which human rights have featured in the political and legal development of ASEAN. For this purpose, Chapter 2 will analyse the four tensions contributing to the lack of a coherent vision of human rights in ASEAN. First, it will explore the legal experience of human rights in ASEAN members, 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. Second, the way in which the Asian values debate of the 1990s has influenced the approach of ASEAN states to human rights principles will be examined. The aim is not to discuss in detail the Asian values debate, as this task has been undertaken elsewhere, but rather to examine the arguments based on Asian values which could still be relevant in shaping the contemporary attitudes of ASEAN states to human rights. Third, the attributes of ASEAN that have been

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collectively described by both leaders and commentators as the ‘ASEAN Way’ will be analysed. Does the ASEAN Way provide a legitimate defence to the potentially intrusive nature of formal human rights institutions in the region? Finally, the developments surrounding the adoption of the ASEAN Charter, with particular reference to the inclusion of legally binding obligations to uphold human rights and democracy, will be examined. While the Charter is the most significant instrument in this respect, it is also important to determine whether human rights are considered relevant to ASEAN integration in other regional documents. The Blueprints for the three pillars of the ASEAN Community – the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community – are central for determining the way in which rights are viewed in the integration project.

Having explored the tensions in the ASEAN vision of human rights, Chapters 3 and 4 will examine the utility of existing human rights mechanisms in the ASEAN region and consider alternative ways in which to operationalise the Charter’s vision of human rights. Currently, there are many international, regional and national legal instruments 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, leaving aside AICHR as the overarching regional institution for human rights, ASEAN has established institutions specifically focused on women, children and migrant workers: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children

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(ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). But questions remain as to the ability of these institutions to improve the practical realisation of rights in member states given the limits on their powers.

At the national level there are many rights provisions in the constitutions of ASEAN states and five members have established national human rights institutions (NHRIs). Domestic courts in member states have discussed these constitutional rights as well as international human rights law in relevant judgments. Yet, the rule of law is weak in some ASEAN states and recourse to domestic courts to enforce rights provisions in such circumstances is difficult. In terms of protections provided by international instruments, ASEAN states have ratified several major international human rights conventions, with all ASEAN members being parties to the Convention on the Rights of the Child,¹³ the Convention on the Elimination of All Forms of Discrimination Against Women¹⁴ and the Convention on the Rights of Persons with Disabilities,¹⁵ although in some cases with significant

¹³ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC).

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW).

¹⁵ Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).