



Understanding and working with human rights ritualism in Southeast Asian regionalism

Policy Briefing – SEARBO2



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Dr Mathew Davies' current research examines the intersection of regional order building, human rights and governance in Southeast Asia, paying particular regard to the Association of Southeast Asian Nations (ASEAN). To study this issue he examines the region through the lens of socialisation, investigating how ASEAN is both a driver of, and arena for, those efforts to diffuse standards. He is interested in the stories of rights socialisation efforts that have emerged, the success and failure of those efforts and how we can use those stories to better understand what ASEAN is.

More generally Dr Davies' interested in International Relations Theory, human rights and regions and has published across these three areas.

Dr Davies has convened award-winning courses at the graduate and undergraduate level including in the areas of academic skill-building, World Politics, International Relations Theory, and Southeast Asian Security. I currently supervise honours, masters, and PhD students working in the field of International Relations theory, foreign policy, humanitarian aid, the environment, and democratic transitions.

DISCLAIMER

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This briefing is based on the forthcoming article “How Regional Organizations Respond to Human Rights: ASEAN’s Ritualism in Comparative Perspective”, Journal of Human Rights, 2021.

The governance of human rights in Southeast Asia is simultaneously at an all-time high and facing sustained challenge. Today, contrary no doubt to the founders of the regional organisation, the Association of Southeast Asian Nations (ASEAN) possesses seemingly robust commitments to human rights. At the heart of this rights governance system sits the ASEAN Human Rights Commission (AICHR 2010) which oversees the ASEAN Human Rights Declaration (AHRD 2012). Yet, at the same time as this system has developed, Southeast Asian states have seen considerable backsliding: repeated coups in Thailand, the policies of Duterte in the Philippines, and the continuing violation of rights in mainland Southeast Asia, most recently the violent military coup in Myanmar. This policy brief asks how we can understand the reasons behind ASEAN’s engagement with human rights, as well as its current nature and significance . Answering these questions requires comparing ASEAN’s approach with other regional organisations.

Background – why do regional organisations create human rights commitments? What do those commitments look like?

Our traditional understanding of why regional organisations create human rights commitments is tightly bound to the historical experiences of Europe, both because of the unprecedented nature of European integration and a more parochial concern of scholars largely based in Europe studying their ‘home’ experience. Here it was unambiguously the case that regional commitments both mirrored alignment between member states and were intended to serve as a ‘lock-in’ for those national-level commitments, ensuring no backsliding. The result of this alignment and intention was the creation of strong regional governance, court systems, detailed and specific treaty commitments, robust oversight and, where necessary, formal policing mechanisms. Today we see this system embedded in multiple institutions, most notably the European Union and the Council of Europe.

For a long time this model of regional commitment to rights has dominated our understanding of how other regional organisations around the world develop and engage with human rights values. We have assumed that regional commitments represent agreement amongst member states and that regional commitments, when created, are intended to be strong. The result has been the assumption that regional commitments, and so regional organisations, are always ‘good things’ when it comes to promoting and protecting rights.

Yet scholarship in the field of comparative regionalism – the study of the origins and development of regional organisations within and beyond Europe – has identified important criticisms of these Eurocentric assumptions. First, regional organisations elsewhere rarely represent areas of such deep alignment of values as those in European.

Regional organisations often include members with various domestic political systems. Second, regional commitments to human rights emerge without much, if any, alignment of values between member states. Today almost all regional organisations include some sort of commitment to human rights and democracy that, if taken at face value, would suggest a world of unified commitment to these values – something we know is not the case.

Regional organisations' commitment to human rights come about, then, for reasons other than pre-existing commitment to liberal democratic values. Three key reasons separate to the European experience suggest themselves:

- Pressure from external actors (whether that is states, organisations outside the region, or civil society within/beyond the region) to 'do something' about human rights
- A desire from within member states to 'look legitimate' and so emulate the form of European institutions even if they cannot meaningfully do the same job
- A compromise between divergent member states, some of which may be more committed to liberal democracy, others of which may be more committed to authoritarian forms of government

These reasons in turn suggest that regional organisations can play a wide range of roles in the human rights governance of the region, because different motivations for adopting rights and commitments result in different regional institutional designs.

	Antagonism	Ritualism	Embracing
Example	Various Central Asian regional organizations	ASEAN	EU
Response to human rights norms	Rebellion	Ritualised	Conformity
Normative agreement between states on human rights	No	No	Yes
Legitimate Institutions as part of the regional organisation's design	No	Yes	Yes
Form of human rights institutionalization	Anti-human rights	Vague declaratory with weak institutions	Treaty with supranational institutions
Tolerance of deviant behavior	NA	High	Low
Domestic governance preference	Authoritarian	None/weak preference for defective democracy	Embedded democracy
Position on member state sovereignty	Absolute commitment	Absolute commitment	Conditional

Table 1. Comparing Regional Organisation Response to Human Rights Values

Table 1 offers a way to think about different responses to human rights. The two ‘end points’ — antagonism and embracing — are already well known. The former refers to situations where a regional organisation entirely rejects rights and promotes fundamentally contrary values, usually some flavour of authoritarianism. The latter represents the ‘traditional’ understanding generated out of the European experience: a regional organisation that strongly promotes and polices violations of those rights in genuine ways. What is new is the middle position, here labelled ritualism? Ritualism represents a situation where, for any of the reasons given above, a regional organisation comes to adopt human rights values but has not developed wide and deep agreement on the moral worth of those rights. Such regional organisations can craft regional agreement to create declarations, commissions, and commitments to rights, but those commitments are weak, violation of them widespread, legitimate and unpunished. This weakness does not undermine the legitimacy of either the presence of these commitments within the regional organisation or the ‘rights talk’ that emerges within and around them. However, it does suggest very real limits to what these commitments can achieve in terms of rights governance and, as discussed below, poses considerable challenges and obstacles to rights and democracy promotion.

Organisations with a ritualised engagement with human rights demonstrate what at first glance can appear as inchoate or illogical institutional design choices. This can include the following features:

- General and declaratory commitments to human right and democracy that are weakly specified, if at all
- The regional system is largely sequestered from other systems. There is little to no linkage between UN human rights Charter and Treaty systems and regional mechanisms beyond the separate and pre-existing links between ASEAN members and the UN. Similarly, limited engagement between regional systems and national human rights institutions
- Rules, norms and principles that point in different directions — most often rhetorical commitment to rights and democracy on the one hand, and stronger commitments to sovereignty, non-intervention and domestic freedom on the other
- Where specific institutions on human rights exist, they are tied to Terms of Reference and other practices that limit their scope, oversight potential and activities
- Engagement with civil society is limited and highly curtailed, and works primarily in a top-down way

These features, however, are only illogical/inchoate if we assume wide, deep, genuine and sustained commitment to rights drove the decision to institutionalise (if it was, then it makes no sense to retain and/or design impediments to the realisation of rights). If, instead, we think about pressure, emulation and/or compromise as driving forces

behind any turn to rights, then the sort of institutional design hinted at above makes far more sense. Ritualism can be a confusing but ultimately understandable response to competing pressures and diverging interests. It is not a sign of inherent dysfunction or sub-par decision making, as to assume these things is to prioritise a particular account of what institutions are, look like and how they are designed.

Understanding ASEAN's Engagement with Human Rights: Ritualism in action

AASEAN's ritualism has emerged as the consequence of the competing logics described to this point. Change within member states such as Indonesia, most notably its transition to a reasonably robust democracy, has created stronger 'pro-rights' pressure from within ASEAN. ASEAN has also been pressured by civil society and external actors, especially the Europeans, over members such as Myanmar – either in terms of 'doing something' about one of its members or even going as far as ending Myanmar's membership of the organisation entirely. ASEAN elites have sought to reform the organisation, and all of these pressures have had to be articulated through a pre-existing governance structure that gives every member of ASEAN, who are diverse in background and values system, an effective veto on institutional reform. This is the central reality of the human rights system of Southeast Asia – it has been crafted, and continues to be dominated, by states whose domestic political systems often engage in widespread and sustained human rights violations, in apparent violation of the regional standards those same states have created. Any reform of ASEAN's system requires these states' agreement. Many of the readings I list at the end of this document go into detail about how these pressures came about. Here I outline the consequences of these pressures – ASEAN's ritualised human rights system in 2021 – in two ways: institutions and characteristics.

Institutions

ASEAN in 2021 has a developed set of human rights commitments and institutions. The 2007 ASEAN Charter calls for the following:

Preamble – Adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms

Article 1.7 – To strengthen democracy, enhance good governance and the rule of law and to promote and protect human rights and fundamental freedoms

Article 2.2(h) – Adherence to the rule of law, good governance, principles of democracy and constitutional governance

Article 2.2(j) – Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice

The ASEAN Intergovernmental Commission on Human Rights (AICHR), inaugurated in 2009, is the lead human rights institution in ASEAN. AICHR is governed by a Terms of Reference, and its activities are enumerated in the now three five-year work plans it has formulated (2010-2015, 2016-2020 and 2020-2025). AICHR took the lead in the drafting of 2012's ASEAN Human Rights Declaration that, over 40 articles, provides broad enumeration of which rights and duties ASEAN thinks are important (note the Declaration is not legally binding on members).

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) is a sectoral body focusing on those two specific groups. Again it has its own Terms of Reference and workplans. The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) rounds out the trio of institutions.

Characteristics

Undermining

Perhaps the most remarkable feature of ASEAN's human rights system is the extent to which it is undermined by ASEAN's wider approach to regional governance. ASEAN (in)famously has developed an approach to managing its own affairs through non-intervention, the defence of sovereignty, constant restatements of domestic freedom from interference and a commitment to unanimity and consensus in decision making. These commitments long predate ASEAN's engagement with human rights, dating back to the very foundation of ASEAN in 1967 and its development through to the 1990s and then onwards to today. ASEAN's commitment to human rights has grown within, not around or over, these deeper purposes. For example, the ASEAN Charter includes strong commitments to these values prior to mentioning human rights or democracy. The Terms of Reference of AICHR and the ACWC explicitly require those bodies to work within these commitments. Perhaps most notably, Article 40 of the AHRD is a 'self-denying' clause which notes that none of the foregoing 39 articles that list what human rights commitments may look like, albeit broadly, can be used to contravene the purposes and principles of ASEAN as laid down in the Charter.

Promotion not protection

The result of these self-denying characteristics is institutions that are far more focused on thinking about best practice in the future rather than investigating, let alone addressing, issues from the past. None of the ASEAN institutions have the capacity to address individual petitions, and they have never investigated past issues. There is no judicial or 'truth and reconciliation' function to them. Instead they focus primarily on considering best practice, information sharing, standard setting and public promotion – see AICHR's Work Plan (link to PDF below) for an example of this. This is not meaningless or irrelevant, but it does remove the potential for remedial action from the ASEAN framework. The system, put most optimistically, focuses on limiting harms in the future rather than correcting harms from the past or preventing them in the present.

Sectoral engagement

ASEAN's commitment to human rights being 'universal, indivisible, interdependent and interrelated' (AHRD Art. 7) does not mean that the ASEAN human rights system centred in AICHR works on all rights simultaneously. Particular issues are prioritised, and the issue selection illustrates the selectivity of approach that characterises ASEAN engagement with rights. AICHR has released thematic studies on only four areas of human rights, despite now being in existence for over a decade (Legal Aid, Women in Natural Disasters, Corporate Social Responsibility and Promoting Access to Tertiary Education). AICHR has also prioritised the following areas for particular focus: right to health, human rights and environment, children's rights, youth debate, freedom of opinion and expression, right to development, human rights and Sustainable Development Goals (SDGs), and human rights based approach to humanitarian action. All of the above are important issues, and the improvement of access to them is an undoubted positive. It is worth noting that the priority rights tend not to focus on more contentious civil and political rights (a notable exception is freedom of opinion and expression).

ASEAN and civil society actors

ASEAN's engagement with civil society actors from within and beyond the region is highly limited. This is at first glance surprising given ASEAN has reframed itself as a 'people-centred' community over the last decade. As with human rights, however, this is less than it appears. For ASEAN, people-centred is very different from people-controlled—the regional body remains the domain of states alone, and many of those states are highly sceptical of civil society rather than being comfortable with it. An elitist, top-down and often patriarchal account of state power is in play here—these elites will identify issues and activities and then these will be carried out 'for the people'. There is no room for contestation by, or co-creation with, civil society actors in this vision. CSOs may wish to participate in following ASEAN's agenda and communicating that to the people, but they play no role in setting the content of ASEAN's agenda.

This is especially the case with human rights where states have been particularly mindful of retaining control of the processes they have created. Despite widespread criticism, civil society was entirely excluded from the process of drafting the AHRD. Today, civil society actors can enter into a 'consultative' relationship with AICHR but to date only 30 have applied and been accepted. AICHR representatives are, except for Indonesia and Malaysia, picked by national governments from existing public officials, curtailing their autonomy and resulting in an 'arbitrary' approach to accepting CSO consultative status (Rüland 2020).

Gaining consultative status requires an organisation agree with the principles and purposes of the 2007 ASEAN Charter. The Charter includes very strong commitments to sovereignty and domestic freedoms of member states, often thought of as anathemas to developing the regional rights governance framework, which by its very

nature is intrusive into domestic freedom. CSOs agree further to support the AHRD, refrain from conduct that would undermine AICHR, respect national law in ASEAN member states and support the work of AICHR. Again, these are often thought to undermine the freedom of CSOs to criticise ASEAN and member states about rules that infringe on rights.

Consultative status affords little in the way of sustained input to ASEAN human rights processes. Instead, it creates a pool of civil society actors that AICHR can turn to on specific issues—literally who they may wish to consult with prior to making a decision. Meetings between AICHR and CSOs are limited, and the agenda of those meetings is largely controlled by AICHR and so, member states.

Given these strong limitations the response from civil society organisations has been far more focused on activities outside of ASEAN rather than within it, both because of the limited headway that can be made within ASEAN, and a concern with being perceived as ‘captured’ by a system that ultimately limits their ability to advance rights as they see necessary. CSOs have engaged in creative ways to ‘make their voices heard’ (see Gerard, 2015 in suggested readings). Often in meetings they run separate agendas to the ASEAN agenda, but being heard and being listened to remain very different.

ASEAN and Democracy – weak commitments and little lock-in

Regional organisations are widely assumed to be good for the status of democracy in the member states that comprise them. However, the disaggregation of different forms of regional commitment to human rights also suggests that different organisations can play different roles in relation to democracy as well. Important is the work of scholars such as Wolfgang Merkel who have identified multiple different political forms that are varying forms of democracy. The biggest distinction is between ‘embedded democracy’ and ‘defective democracy’, the latter of which covers a range of political structures that include some, but not all, features of pluralist multi-party democratic systems such as Australia’s. Defective democracies may have elections, but do not possess the social and political practices that make those elections meaningful and robust. For example, there may only be one party to vote for, or ballots may not be secret, or only a fraction of seats in a parliament may be based on election results.

The issues described above around human rights commitments are particularly prominent when it comes to the cluster of rights around democracy. ASEAN itself contains commitments to democracy in the ASEAN Charter. Commitments to democracy and the nature of ASEAN’s approach to rights institutionalisation. Two features stand out when considering the interaction of these ASEAN

A minimum plausible threshold

ASEAN's commitments to the rights that comprise democracy are weak. They do not require key requirements to embedded democracy such as all seats in parliament being open to election, or even that there be multiple political parties for which to vote. The result is that whilst ASEAN commitments promote democracy, the range of actual political forms that can be held to be compatible with these commitments is broad. This breadth was intentional, and required in order that countries as diverse as Indonesia, Malaysia, Vietnam and Cambodia would all agree to them.

Little response to backsliding

As illustrated by the 2021 military coup in Myanmar that removed the NLD government, ASEAN's weak commitments to democracy provide little platform from which to criticise democratic backsliding. Even in a case as egregious as recent events in Myanmar the response of ASEAN, as an institution, has been near-silence. ASEAN members have been far more vocal but at the time of writing the more engaged states (Indonesia especially) have not been able to lead all other ASEAN members in joining this pressure. The ongoing violence in Myanmar as the military continue to crack-down has attracted far more criticism from ASEAN members than the interruption of democratic rule itself. The Special ASEAN Summit on April 24th 2021 did little to alter this position—the five points of consensus calling in part for dialogue between all parties, placing the democratic government and those who overthrew it on an equal footing.

Working with a ritualised system of human rights: Opportunities and dangers

Ritualism is not synonymous with irrelevance or impotence, but it does suggest very real limitations to what can and cannot happen within a ritualised encounter with human rights.

Outlining aims to improve rights governance in ASEAN

In the absence of any plausible path to transform ASEAN's human rights system, suggestions have to focus on a balance, often uncomfortable, between advancing human rights performance and accepting the prevailing political realities of the ASEAN system. Suggesting the creation of a human rights courts, for example, may look like it addresses the 'compliance gap' in ASEAN's rights system, but under what circumstances would the ten members of ASEAN agree to a court robust enough to actually correct rights violations? We have to accept that the improvements that are pursuable are also limited in nature. Addressing rights governance in a way that is palatable to ASEAN members is evolutionary, not revolutionary, and builds on the rights system of ASEAN, rather than fundamentally overturning them. This does not guarantee perfect compliance, and the costs of this need to be recognised. Instead it does

outline concrete but ultimately only partial steps towards improving rights enjoyment in Southeast Asia. Three suggestions stand out for those who wish to improve rights governance in Southeast Asia.

- Facilitating rights specification. As noted above ASEAN's rights system is declaratory. Whilst it now mentions a range of rights, there is little detail to what those rights mean. This vagueness permits wide ranging behaviour, including substantive violations, to fit within 'meeting a rights requirement'. The best corrective to this is driving forward ASEAN's specification of rights. Ultimately the nature and results of this specification are a job for ASEAN—we cannot come and define those values for them—but we can help resource and assist this process. The thematic studies that AICHR has undertaken to date are a first step towards this, and should be encouraged more broadly, including in contentious areas.
- Southeast Asia, ASEAN, the UN. ASEAN is not the only driver of rights performance in Southeast Asia. ASEAN is one part of a multidimensional human rights space that includes domestic, national, civil society, regional and global levels. All ASEAN members interact with the global human rights regime through the reporting requirements of the UN Treaty system and then the overview function of the Universal Periodic Review of the UN Human Rights Council. In both of these, ASEAN states (and all UN members) are only reviewed against the obligations they themselves have ratified, sidestepping the issue of illegitimate criticism. A key challenge for this system is the time and resources it takes for states under review to prepare and submit reports and then meaningfully engage with the review and recommendations that emerge. ASEAN institutions can help address these issues by providing support to national governments in the preparation and follow up of their reports. Expanding especially the AICHR into this role supports its existing mandate to promote the ratification and realisation of UN instruments. The ACWC already engages in this where it helps ASEAN members engage with the CEDAW Review process.
- ASEAN institutional reform. Instead of suggesting an ASEAN Human Rights Court, looking to ASEAN's institutional past offers new ways forward. At key moments in ASEAN's history regional leaders have turned to 'eminent persons' to gather and provide suggestions. These retired and highly-respected political figures from ASEAN members (whether it was for ASEAN Vision 2020 in 1997 or the ASEAN Charter finalised in 2007) have provided surprisingly progressive suggestions for the shape, activities and purposes of ASEAN. Given the centrality human rights governance plays (ASEAN itself has suggested it is a pre-requisite for regional security) an ambitious goal would be to facilitate the creation of a 'Permanent Eminent Persons Group' in ASEAN to advise on human rights and, instead of chastising poor performance, recognising and awarding good performance

Suggestions for policy makers in Australia

Australia enjoys a close and productive relationship with ASEAN across a range of functional areas, and the promotion of rights governance is part of this broader set of economic, political, social and security relations.

- Bilateral. Change is always going to be ultimately from within ASEAN, led by its member states, not external dialogue partners (to follow external recommendations would be to violate ASEAN commitments to autonomy). Bilateral relations, especially with Indonesia, may offer a way to develop more rights-based ideas within ASEAN. However, Indonesia's willingness to 'drive rights' into ASEAN is neither total nor assured. Whilst Indonesia has been an active and constructive participant in the ASEAN rights system despite rumblings, it has yet to explicitly demand a strengthened system over the top of reluctance of other members. ASEAN is a broad foreign policy goal of Indonesia, and rights are but a small part of that.
- With ASEAN. Promoting the working of existing ASEAN systems is the most effective way to promote realistic change. Given political sensitivity direct resourcing is always going to be contentious, but facilitating the working of AICHR, ACWC and ACMW through knowledge-exchange, research visits or some other activity suggest ways to advance the functional ability of these institutions.
- With global processes. Advancing the engagement of ASEAN countries with human rights at the UN will facilitate rights governance in Southeast Asia indirectly. Whether that is on promoting engagement with UN Charter and Treaty review systems, in resourcing information gathering activities in ASEAN countries to facilitate more meaningful reviews, or training/provision of technical expertise about engaging with a review process, the UN offers an alternate path to improving rights in Southeast Asia

Suggestions for Civil Society actors

ASEAN's institutional hostility to Civil Society actors is difficult to overturn, and as noted above engaging with AICHR can lead to frustration rather than influence. Given the restrictive nature of the AICHR-CSO relationship there is a perennial risk of 'capture', where CSOs are co-opted by a system which does not work to their advantage whilst providing legitimacy to that system through their nominal participation. As such CSOs are best positioned to pressure ASEAN governments outside of the ASEAN system itself (given that rights governance in Southeast Asia, as noted, depends on more than processes within the region). Particularly notable here is the UPR at the UN, and the various treaty review mechanisms where ASEAN states are party to the treaty, which include opportunities for CSO information to be submitted and shared with states participating in the review, and where states often rely on information from CSOs to aide in their review.

Embracing complexity amidst an imperfect system

The above analysis and suggestions have demonstrated the complex and imperfect nature of the rights system in Southeast Asia. The system is confused and confusing, with multiple actors and processes, across domestic, national, regional and global levels. In ideal circumstances simplicity and clarity, not complexity and confusion, would shape institutional design, institutional performance and external engagement. However, Southeast Asia's rights governance system is not ideal. In the real world of conflicting political engagement with rights from ASEAN's 10 members, and a system that often legitimates the violation of the very goals it appears to set, it is complexity and overlap that offers the most realistic ways forwards. Enhancing the complexity of the rights governance system in Southeast Asia, through promoting multiple institutions and processes, and empowering access rather than engaging only in critique, increases the potential for 'drag' on poor performance, creates multiple fora for dialogue and debate and so more, rather than fewer, opportunities to develop compliance pressure. This pressure is never going to be transformative without prior change of ASEAN members, but in the absence of that alteration, it offers a reasonable balance of progressing rights governance and political realism.

Further readings on ASEAN, human rights, regional organisations and ritualism

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