

ASEAN BRIEFS

Paving a New Way for ASEAN:
A Proposal for a Regional Human Rights Court



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ASEAN Briefs is a regular publication about current developments on ASEAN regionalism, especially in the Political-Security, Economic as well as Socio - Cultural Pillars.

**The Habibie Center -
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Executive Summary

This issue of *ASEAN Briefs* puts forward the argument why ASEAN needs to establish a stronger human rights system beyond the current existing one through necessary instruments and mechanisms in order to move towards a rules-based ASEAN. There are numerous factors that need to be considered with regards to the protection of human rights and a dispute settlement mechanism for violations. A state's commitment to international laws and its own national justice system affect the measures such a state takes to protect the human rights of its people. This issue of ASEAN Briefs argues that a regional human rights court is essential as part of a strong human rights system, and further discusses the reasons why after all this time the establishment of such court has not taken place. As such, this issue of ASEAN Briefs takes the view that the current ASEAN Intergovernmental Commission on Human Rights (AICHR) falls short of a regional human rights court. While recognizing that a human rights court for ASEAN will not become an instant solution for all the human rights violations in the region, it is nevertheless a necessary step to be taken to ensure the commitment of ASEAN Member States to international human rights instruments, and also to guarantee to the people of ASEAN that no human rights will be left unprotected.





Introduction:

The year 2016 was a busy year for ASEAN Member States as the ASEAN Economic Community (AEC) was officially launched and became a reality. As a result, the spotlight was placed on the economic pillar of ASEAN's regional integration plans. While the implementation of the AEC has progressed at an adequate pace, one simply cannot look away from the grave situation of human rights violations happening all over ASEAN these past few months – or even years. Such human rights violations threaten to overshadow any progress made in the economic pillar.

Human Rights Watch, in their 2017 World Report,¹ confirm that Southeast Asian countries at large are now witnessing another steep decline in human rights protection. In particular, some have raised concerns on how Rodrigo Duterte, the President of the Philippines, will chair ASEAN this year, given allegations that he has ordered extra-judicial killings all over the nation.² Harsher criticism has also been aimed at Thailand, for continuing its democratic repression through the military junta,³ and Myanmar, which faces accusations that the state may have conducted crimes against humanity,⁴ as the Muslim Rohingyas have been receiving inhumane and discriminative treatments based on their religion. Many have fled their homes and found themselves stranded at seas,⁵ while others are stuck in their neighbouring states without recognition as refugees.⁶ Those neighbouring states are, disappointingly, the very same states who make up the regional bloc we all know as ASEAN.

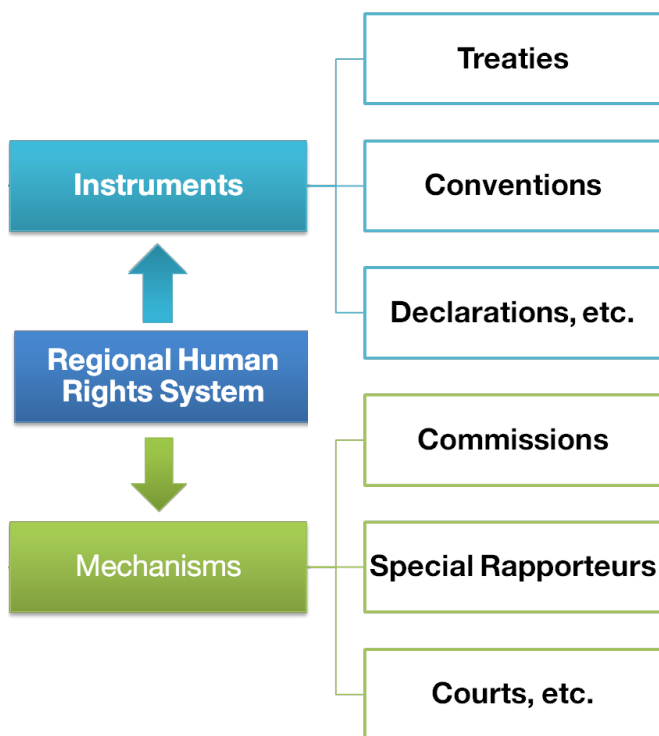
The commitment of ASEAN Member States to protect human rights has so far only come in the

form of the ASEAN Charter and the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR), whose mandate is far from serving as a judiciary body to the regional organisation. The idea of establishing an ASEAN human rights court has been floating around for quite some time, yet no significant progress towards its realisation has been seen. This issue of ASEAN Briefs will thus argue why ASEAN needs to establish a stronger human rights system through necessary instruments and mechanisms, and why after all this time such establishment has not taken place.

Why do we need a court?

The United Nations Office of the High Commissioner for Human Rights (OHCHR) acknowledges regional human rights systems, stating they play an important role in the promotion and protection of human rights. Such systems consist of regional instruments and mechanisms, in which regional instruments help localise international human rights norms and standards, so that they can reflect particular human rights concerns in the region, and subsequently, regional human rights mechanisms help implement these instruments on the ground.⁷

An effective regional human rights system is not only beneficial to the concerned people, but also of fundamental importance to the promotion and protection of human rights. The OHCHR argues that among all the advantages, such effective regional human rights system will be able to assist national governments with the implementation



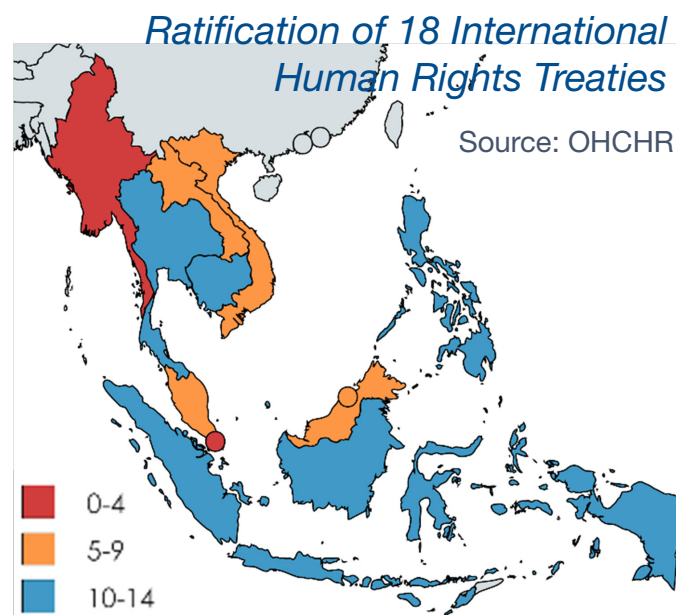
of their international human rights obligations, and to help raise the peoples’ awareness of their human rights, placing them in a more localised context and reflecting their particular human rights concerns, as well as to help national governments to better address regional human rights concerns that cross national borders; for example, human rights concerns related to migration, transnational crime and environmental disasters.⁸

The forum at the 26th ASEAN Ministerial Meeting (AMM) in Singapore in July 1993 made it clear that “in support of the Vienna Declaration and Programme of Action...ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”,⁹ which eventually resulted in the ASEAN Charter that aimed to give ASEAN a legal personality and to establish its institutional framework and rules of procedure. A human rights body was later formally established by ASEAN Leaders, and named as the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Currently, the OHCHR recognises nine core human rights instruments containing universally accepted human rights values. Among those are the Universal Declaration of Human Rights, the

International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, and the International Convention on Economic, Social, and Cultural Rights (ICESCR). Known together as the International Bill of Rights, these international treaties have universally accepted human rights ‘values’, if not rules. Both treaties were drafted as part of codifying customary international laws that have been practiced for a long time.¹⁰ However, although the fundamental nature of the International Bill of Rights (and other instruments) is widely recognised and practiced, ASEAN Member States’ response to them are not yet satisfying, as indicated by the status of ratification of various international human rights instruments among ASEAN Member States.

Disparity is noticeable in terms of some ASEAN Member States being more compliant with international human rights law compared with others. This can be when seen from the number of core human rights instruments signed and/or ratified by them.

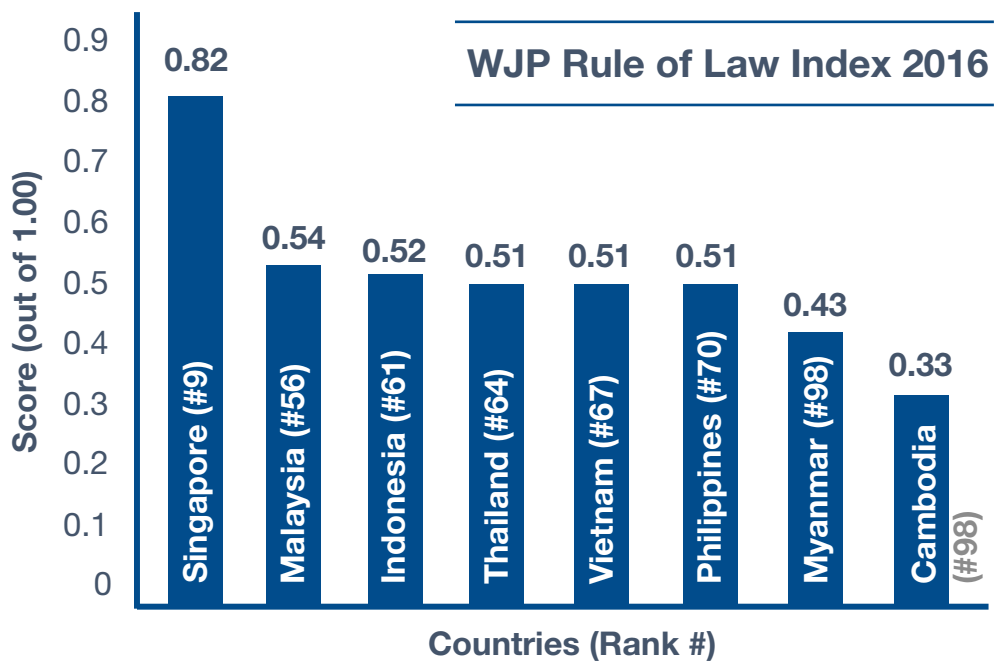


An examination reveals that there is no real relationship between a state’s economic performance and its commitments to human rights. Singapore for example sits on the higher percentile above other ASEAN Member States in terms of economic performance. However, as seen from the data above, Singapore has only ratified a few human rights instruments, and several

human rights concerns have been addressed to the Singaporean government. Indeed, some have portrayed the government as practising some sort of ‘dictatorship’.¹¹

This then becomes an illustration of how economic stability does not automatically signify the social welfare in the state. This example can potentially lead to the quick conclusion that ‘if a developed country only commits to a few human rights instruments and still performs well, why should an economically struggling country care more about doing so?’ However it could be asked whether or not the same applies the other way around. Can a poorly performing state in terms of economics be socially prosperous, to the extent that such state puts its peoples’ welfare first before their economic growth? On this, one must look beyond (philosophical) barriers: there are indeed more humanely important things beyond advancing a state’s economic welfare.

An example for this is the Philippines, a country ratifying 14 out of 18 international human rights instruments with continuously emerging issues of human rights violations. While the fact a state may ratify a large docket of international human rights instruments (and regions may have a human rights court) does not absolutely guarantee the fulfilment of the peoples’ rights and advancement of their economic status, nonetheless it can be argued that at the very least, a state’s general commitment to protect its people in terms of human rights can be seen from the actions they take upon international human rights instruments. At a larger scale, the existence of said human rights court then becomes an enabler for justice seekers coming from the civil society. Benefiting from this, people from states such as the Philippines may have a greater chance to have their complaints heard by such court, if their concerns have not been properly addressed by their own governments.



Yet another reason why strengthening regional human rights system is important is that, while individuals are allowed to file a complaint to the United Nations, their complaint would normally not be processed until it has passed an exhaustive list of admissibility criteria.¹² One of the criteria is to exhaust national remedies, which is perhaps difficult to do, because the due process of law tends to be on the slower side in a number of states in the ASEAN region. The 2016 Rule of Law Index from the World Justice Project¹³ shows that learning from the case of Indonesia, where the process can take up to many years, and Myanmar, where peoples’ human rights complaints are not even addressed in court at all, ASEAN should have a strong enough drive to play a more active role in protecting the human rights of individuals within its region, regardless of their nationality.

Although the exhaustion of local/national remedies has been regarded as part of customary international law, the European Court of Human Rights (ECtHR) response to this issue is by applying a moderated approach on the customary principle of domestic remedies exhaustion. They provide that although the nature of such principle is understood to be widely customary, exhaustion of domestic remedies is not absolute, to the extent that they “have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights”.¹⁴

If we are to examine existing regional human rights courts, they are understood to be quite effective. One of the reasons why regional human rights courts receive more complaints than international court do might be due to the distinctive characters of such regional courts, which were initially established to cater to the specific ‘needs’ of the respective regions. For example, the African Court of Human and Peoples Rights (ACHPR) through its charter is mandated to deal with the peoples’ right to free disposal of wealth and natural resources,¹⁵ which is different with the Inter-American Court of Human Rights (IACHR) which deals with, among others, the right to a name.¹⁶ This is in line with the argument of regional human rights system strengthening the international framework at large, because the judges in regional courts are relevantly more aware of not just the substantial matters, but how the real situation in the region is, including its Member States’ different approaches and priorities. Furthermore, bringing distinctive regional concerns to the international stage will be even less effective when compared to a regional one, because such international stage will possibly have a hard time understanding the different situations in every region.

The varying number of ratified international human rights instruments by states, as shown in the graph above, inherently plays a part in the poor protection of human rights within ASEAN Member States, as states are not legally bound by them. If we are to say that ASEAN needs to step in on this, it may seem far-fetched, but there are options: contentious jurisdiction and advisory jurisdiction, both practiced at the international level (i.e. the International Court of Justice) and the regional level (i.e. the IACHR and ECtHR). This proves that a regional human rights mechanism, particularly a court, has the ability to transcend borders – geographically, politically, and legally.

Until the establishment of AICHR, ASEAN had been making important progress in recent years towards the establishment of a regional human rights system for Southeast Asia, but since then, the progress has become static. The AICHR itself has not been able to prove that it can serve as a productive human rights council within the region. The case of human rights commissions in Europe

as well as Africa, and the Americas may serve as an important lesson as they respectively needed six and twenty years for the commission to then ‘develop’ as courts. It has been nearly eight years since AICHR was established, yet the idea to ‘develop’ it into a court has been somehow nothing but loose talks.

The fact that no strong human rights mechanism exists in ASEAN is difficult to comprehend. ASEAN thrives to become a rules-based institution, but even if there are rules, there is no one to implement them and to ensure Member States’ compliance to them.

Why haven’t we established a court yet?: ASEAN Way getting in the way

ASEAN needs to up its ante into a rules-based institution, but it is tough to become one when a dispute settlement mechanism, along with its rules of procedure, has not been properly established. The fact that ASEAN is running behind most regional institutions in terms of active protection of human rights is apparent – ASEAN does not mandate any established judiciary body as part of the dispute settlement mechanism.

At the time of its founding, ASEAN was not initially envisioned to play referee for the Member States. The organisation is renowned for its ASEAN Way, whose principles have been embodied as the institution’s characteristics. Among others these include the principle that they would not interfere with the internal affairs of any Member State, and that on agreeing upon something, there shall be consensus among all Member States. In a way, such principles are advantageous to the extent that when an ASEAN Member State has an internal problem, it may rest assured that other Member States would not meddle thanks to the non-interference principle, and through consensus, every Member State is placed on an equal level when it comes to deciding on any matter. However, with the problems ASEAN faces right now, such principles may no longer be able to accommodate current human rights concerns mentioned above. Arguably, for the sake of strengthening the regional human rights system, the so-called ASEAN Way should

no longer be projected as principles cast in stone, but rather as a set of negotiable attitude towards problems within the region. ASEAN Member States have been comfortable in their non-interfered position for too long, and it is not impossible that they become hesitant in opening themselves up for change, especially when their 'rights' are at stake. The 'rights' talked about here are, understandably, the principles of non-interference and consensus. ASEAN Member States need to fully understand that there are matters where consultation and consensus according to Article 20 of the ASEAN Charter cannot solve. As peaceful as the measures were intended to be at the initial establishment of ASEAN, Member States cannot turn away from the fact that human rights protection in Southeast Asia is weak, to the extent that AICHR has no actual power to solve ongoing human rights 'crisis', and a strong judiciary body is apparently necessary, to function as an authorised body to decide upon (human rights) matters as well as to realise ASEAN as a strong rules-based institution.

To establish a human rights court in ASEAN does not instantly mean that the court would undermine ASEAN's principles of non-interference, but rather, the court would uphold a people-centred ASEAN in the sense that everyone is entitled to the right for fair justice. AICHR as the only intergovernmental human rights body in ASEAN at the moment does not include the concerns and interests of civil society much through its tasks, as it is subordinate to ASEAN governments and therefore might not satisfactorily address the human rights concerns directly from the civil society. The Paris Principles acknowledge the existence of national human rights institutions, and they are allowed to represent individuals when their complaints are processed through the Human Rights Council.¹⁷ However, under the Paris Principles, ASEAN does not fulfil the criteria of an institution, thus they are not recognised as one, and neither ASEAN nor AICHR have the legal standing to represent ASEAN individuals in concern. ASEAN is then said to have failed as a treaty-mandated body in protecting human rights,¹⁸ and consequently, this adds more pressure to the establishment of a proper human rights court. Moreover, as an organisation,

ASEAN needs to look deeper into how its Member States comply with universal human rights values. There might be cases where, for example, a state declares in its constitution freedom of speech, but at the same time set out rules that to some extent limits such freedoms. The existence of a court then does not only serve for judiciary matters, but also advisory, as practiced in other regional courts. Individuals can file for advisory opinion which, if processed timely, can be a 'guide' for the concerned state and later be beneficial for the people of that state. Bearing this in mind, Member States are then also encouraged to think about how far they would be willing to be flexible to help the region establish a strong human rights system, while also putting into careful consideration the very different levels of human rights instruments compliance between such Member States.

It is understandable when a state refuses to have its national independence and sovereignty interfered by external parties, especially ASEAN. The ASEAN Way is indeed amendable, but there are fears that interference from other states or the regional organisation would consequently lead to a loss of national independence/sovereignty. However, it needs to be admitted that human rights issues can escalate to an extent in which a state is unable to address it adequately and requires help from others. Again, ASEAN is facing a regional decline in human rights protection, and when its Member States hesitate to agree upon a legally binding dispute settlement mechanism, one may question: how expensive a price does a state need to pay for actually having their peoples' problems heard, at the very least?



Conclusion and Policy Recommendations

The recent series of unfortunate events taking place within the ASEAN region and its respective Member States are troubling. We have discussed earlier in this issue of ASEAN Briefs how establishing a strong human rights system is more fundamental than simply beneficial, and how Southeast Asia is in need of such system. While challenges are there, ultimately, there are a few policy recommendations that can be made upon this issue.

First, ASEAN Member States must make ends meet on resolving human rights violations taking place within their respective national borders as well as the region as a whole, through measures as peaceful as possible.

Second, all ASEAN Member States must review their commitment to ratifying core international human rights instruments. Although there is little proof of the correlation between the numbers of instruments ratified and how the human rights protection is realised within a state's borders, taking action upon such instruments is a way to show commitment.

Third, ASEAN Member States must mutually agree to open up the space to criticise their own regional human rights system in AICHR meetings. As AICHR is currently the only human rights body in ASEAN with powers to at least raise human rights issues into high-level talks, meetings should be done effectively and productively, to the extent that the meetings actually result in concrete solutions as to what actions ASEAN Leader shall take to address the human rights issues.

Fourth, ASEAN must eventually establish a strong and proper human rights court. Considering to do so is no longer a feasible option. However, ASEAN must proceed with caution. It must be admitted that when a Southeast Asian human rights judiciary body is established, such body will not instantly solve every human rights concern in the region. A period of adaptation, including selection of judges and all the bureaucratic matters, will first

need to take place. The effectiveness of the court when it is active is also not guaranteed, because as seen in existing human rights courts around the world, many complaints are backlogged. This is inevitable, due to the fact that admissibility criteria of a complaint needs to be thoroughly studied and eventually decided upon whether it fulfils the stated criteria or not, but when the goal is to equalise and elevate human rights protection in the region, ASEAN has a big homework to finish as soon as realistically possible.





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The Habibie Center was founded by Bacharuddin Jusuf Habibie and family in 1999 as an independent, non-governmental, non-profit organisation. The vision of The Habibie Center is to create a structurally democratic society founded on the morality and integrity of cultural and religious values. The mission of The Habibie Center are first, to establish a structurally and culturally democratic society that recognizes, respects, and promotes human rights by undertaking study and advocacy of issues related to democratization and human rights, and second, to increase the effectiveness of the management of human resources and the spread of technology.

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The ASEAN Studies Program was established on February 24, 2010, to become a center of excellence on ASEAN related issues, which can assist in the development of the ASEAN Community by 2015. The Habibie Center through its ASEAN Studies Program, alongside other institutions working towards the same goal, hopes to contribute to the realization of a more people-oriented ASEAN that puts a high value on democracy and human rights. The objective of the ASEAN Studies Program is not merely only to conduct research and discussion within academic and government circles, but also to strengthen public awareness by forming a strong network of civil society in the region that will be able to help spread the ASEAN message. With the establishment of ASEAN Studies Program, The Habibie Center aims to play its part within our capabilities to the ASEAN regional development.

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Talking ASEAN is a monthly public dialogue held at The Habibie Center in Jakarta. Covering a wide array of issues related to ASEAN, Talking ASEAN addresses topics of: Economic Integration, Socio-cultural, & Democracy, human rights and regional peace, among others. Featuring local and visiting experts, Talking ASEAN is one of a series of twelve dialogues regularly held each month and open to a target audience consisting of ASEAN officials, foreign ambassadors & diplomats, academics, university students, businesses, and the media.

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