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The AICHR Framework for Action

ON 23 OCTOBER 2009, ASEAN formally launched the ASEAN Intergovernmental Commission on Human Rights at the 15th ASEAN Summit in Thailand. The ASEAN leaders also announced the 'Cha-am Hua Hin Declaration on the Inauguration of the AICHR'. In the Declaration, member states pledged full support to the new ASEAN body and emphasized their commitment to further develop cooperation to promote and protect human rights in the region. This Insight investigates current developments at the national, regional and international levels and how these developments can assist in formulating a framework for action for the new regional human rights body.

By Alistair Cook, Belinda Chng and Irene Kuntjoro



Bridging the Gap: From International Commitments to Local Realities

Within Southeast Asia, the course of human rights dialogue is fraught with the regional tussles over non-interference in the domestic affairs of ASEAN member states. With the signing of the ASEAN Charter in 2007, there were many arguments over an increasing significance of human rights at the expense of the non-interference principle and vice versa. This debate is part-and-parcel of the ongoing dialogue on human rights and, as such, is here to stay. This suggests that rather than any revolutionary changes being made at the regional level, the changes being made will be incremental and largely reflect the political realities amongst ASEAN member states.

However, that said, the signing of the ASEAN Charter and the establishment of the ASEAN Inter-governmental Commission on Human Rights (AICHR) is a significant development in establishing a codified set of rules by which each ASEAN member state should abide. The AICHR appears likely to focus on promotion activities publicly and its protection functions formally through ASEAN foreign ministerial meetings. With every new institution there are a plethora of competing concerns and challenges, and this Insight will evaluate the more salient concerns in an attempt to highlight some important considerations in turning word into deed. The two most imperative tasks will be to establish a code of conduct for its commissioners to ensure that, while the commissioners are appointed at the national level, there is mutual confidence among them and also at the regional level. The second task is the development of an agenda, with the drafting of a regional human rights declaration most likely at the top. Both of these tasks need to build confidence in the AICHR and so all its work and functions need to be as transparent as possible.

Each of the following three sections will focus on a different level of governance and what implications and assistance it can offer the new body. The first section examines the national level and what processes and linkages are in place and can be developed, and how they interact with the AICHR. These experiences will offer some important insights into how the AICHR can develop relationships with individual governments and draw on these experiences to further develop a regional human rights agenda. The second section concentrates on regional initiatives and what implications these have for the body and how it can build on these successes. The third section examines international commitments that have been signed by all ASEAN members and how the regional body can draw on these to further develop a regional human rights framework.

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National Strategies and Regional Interactions

When considering the various levels of governance that exist, the most important remains the national level, particularly in Southeast Asia. As a result, this first section focuses on this level and assesses what role it can play in developing a regional human rights

framework and assisting the AICHR. As the task of establishing a robust structure for dialogue and engagement lies ahead for its commissioners, the following is a list of recommendations that the AICHR could consider in drafting its framework and action plan.

Collaboration with National Human Rights Commissions

Given the existence of national human rights structures in Indonesia, Malaysia, the Philippines and Thailand, the AICHR could fill the gap by being a regional facilitator. To do so, it should partner the ASEAN National Human Rights Institutions (NHRI) Forum which is composed of the four national commissions and regional civil society networks in carrying out its work. This will enable the AICHR to gain access to information on the ground where violations of human rights have occurred or where there might be potential situations that warrant attention.

Access to information is pertinent in view of the fact that the AICHR does not have the mandate to receive complaints, monitor or investigate human rights abuses. It could, however, present its concerns and observations to the ASEAN secretary-general and the ASEAN foreign ministers. This move is supported by Article 4.8 and 4.13, which state that the AICHR must engage in dialogue and consultation with other ASEAN bodies, including civil society organisations and other stakeholders, and report as needed, to the ASEAN Foreign Ministers Meeting.

On a related note, the national commissions could contribute to the promotion of human rights in the region by advocating collaboration and partnership through training workshops and providing assistance, as needed, to countries intending to establish national commissions. The well-established national commissions could also work with the AICHR to organise opportunities for dialogue among government officials, the academe, and civil society to develop an ASEAN human rights regime.

The importance of engaging the NHRI Forum cannot be over-emphasised as they are stakeholders whose role vis-à-vis the AICHR is viewed as ‘catalytic, complementary, and cooperative in character’, as noted by the representatives of the NHRI Forum at the 4th Roundtable Discussion on Human Rights in ASEAN, held in Bangkok in November 2008.

Develop Support Networks

Besides collaborating with the NHRI Forum, the work of the AICHR should be supported by a network composed of civil society organisations such as non-governmental organisations, think-tanks and academic institutions. Such linkages are particularly important in countries without national commissions as the network could act as an informal monitoring mechanism, serve as a conduit between the AICHR and constituents, and assist the regional commission in disseminating information for the promotion and protection of human rights at the national level. Practitioners and scholars of human rights, humanitarian law and constitutional law based at the institutions within the network can also be called upon to assist the commission to draft the ASEAN human rights declaration, and examine the ways in which member states can sign up to international human rights treaties and conventions, and provide the necessary assistance.

Ensure Coordination with Parallel Processes

As there are parallel processes of human rights going on in the region which complement the AICHR, it will be crucial to identify where the AICHR fits into these processes to avoid complications and duplication of efforts. In this regard, the inter-governmental commission could perform the role of an overall coordinator between NHRIs and the support networks in non-NHRI states. This would entail the alignment and synchronisation of parallel processes related to human rights and maintains a keen focus on ensuring that each process adds to a larger sum that leads towards the ultimate goal of improving human rights in the region.

Currently, such parallel processes include ongoing developments regarding the advancement of the rights of women, children, migrant workers, and building regional cooperation to combat transnational crime and human trafficking. In its role as overall coordinator, the AICHR could cultivate regional responses to proposals, promote and facilitate the building of capacities of stakeholders across the region, and assist in the collation of feedback at the national level through its commissioners.

Create Catalysts for Action

The AICHR has the potential to issue statements and findings that may provide the catalyst for reform by triggering discussion of human rights issues and opening up spaces for action. One way of doing so, as suggested by Michelle Staggs Kelsall, lawyer and Deputy Director of the East-West Center’s Asian International Justice Initiative, is for the AICHR to insist that its annual reports and minutes of meetings be made accessible to the public. Doing so will be in line with its mandate to enhance public awareness of human rights and ensure transparent decision-making.

Therefore, despite the AICHR’s limited authority in ensuring that member states comply with human rights norms, it could maintain a catalytic effect and stimulate domestic discussions on issues of human rights and the individual positions taken by the representatives of the AICHR.

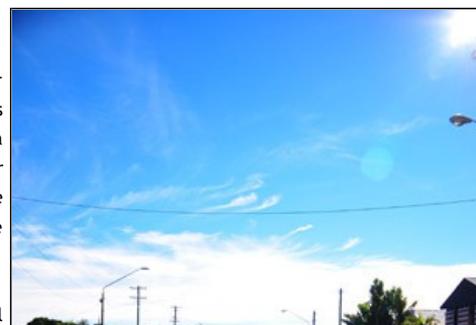
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Regional Dialogue: Linkages and Policy Lessons from Existing Initiatives

Alternative Approaches to Human Rights

The development of ASEAN reflects its member states’ concerns over sovereignty issues. This concern manifests in the form of preventive strategies to protect state sovereignty in its approach towards the development of a regional human rights framework. While it is perhaps inevitable that with greater regional integration come increasing tension between state sovereignty and the development of regional norms and values, alternative approaches can be considered in mitigating this tension.

In doing so, it is imperative to develop human rights norms that are contextual



to regional values, to embrace a comprehensive understanding of human rights and promote them through the ASEAN Socio-cultural and Economic Communities as well as the ASEAN Security Community, as these could provide alternative avenues to building regional cooperation on human rights. These approaches could help to realise the ASEAN Vision 2020 of a more people-oriented organisation. In addition, by recognising the broad implications of climate change as well as the different elements of human rights, the AICHR may be looking at several possible starting points that build upon existing initiatives to develop a new paradigm to address regional challenges. An example would be ensuring that human rights are taken into consideration in the planning and implementation of climate change adaptation and mitigation efforts.



Climate Change and Human Rights

The regional climate change initiatives illustrate a policy area which offers some interesting insights and collaboration opportunities for the regional human rights body. First, recent reports from international bodies such as the Intergovernmental Panel on Climate Change, Asian Development Bank and World Bank have highlighted the human consequences of climate change on Southeast Asia. As climate change is a priority area under the ASEAN Socio-Cultural Community Blueprint 2009-2015, it offers an opening for the promotion of human rights. The ASEAN Working Group on Climate Change (AWGCC) was officially formed during the 11th ASEAN Ministerial Meeting on the Environment on 29 October 2009, in Singapore. The AWGCC will be chaired by Thailand, and 'aims to promote closer regional cooperation and more effective regional response to the climate change situation.' (Lim, 29 October 2009). As a result of this commitment, and as these efforts are in their early stages, the regional human rights commission could carve out a role to assist in providing support and cooperation with the AWGCC, thus promoting human rights through a less controversial avenue. For example, the AICHR can discuss and cooperate on the rights of communities in coastal zones and forest lands in mitigation and adaptation efforts.

Second, there have been increasing international efforts to tease out the linkages between human rights and climate change. The report published by the Office of the High Commissioner for Human Rights (OHCHR) in early 2009 is, in fact, the first of its kind. It noted that the implications of climate change will infringe upon human rights, ranging from the right to food, water, health, housing, livelihood to the rights to life and self-determination. Furthermore the report concluded that international human rights standards provide protection to the rights of the people affected by climate change.

Human Rights Obligations Integrated with Climate Change Measures

The AICHR needs to ensure that climate adaptation and mitigation measures in the region take into account the human rights of individuals and communities. The OHCHR report argued that in principle, international human rights law can hold states responsible for failing to protect individuals against the effects of climate change. The AICHR could begin by formulating rights-based principles or a framework to serve as a reference for designing climate change policies. The AICHR could also coordinate with the AWGCC to implement a regional reporting mechanism that incorporates a rights-based approach with national climate change measures. As international laws also underline the importance of international cooperation and assistance in addressing the implications of climate change on human rights, the AICHR could help to foster regional cooperation in support of this idea. In the future, the AICHR could rely on the NHRIs to monitor potential violations of member states' national climate change mitigation & adaptation plans and providing recommendations.

Considerations for the ASEAN Human Rights Declaration

In order to ensure improved coordination and compliance among member states, careful drafting of the regional human rights declaration would be needed to clearly outline a framework for human rights promotion and protection. As noted by Kelsall, this move would be in line with the historical trend of regional human rights bodies that have been created throughout the world, such as the regional commissions and courts in Europe, Africa, and the Americas. Further, in drafting the declaration, the AICHR could consider the interaction between human rights and Islamic law, and refer to the recently ratified Arab Charter on Human Rights as a framework for comparison.

It is envisioned that the declaration would provide a foundation upon which the AICHR could ground its authority and enhance its capacity in making recommendations to member states. Ultimately, the document would enable clearer formulation of the AICHR's protection functions if any, and for the AICHR to create a robust structure for dialogue and engagement despite having no enforcement powers. Indeed, the formulation of a regional human rights declaration would follow a more traditional pathway in essence, but in practice the declaration could establish ways and means to recognise the concerns and challenges faced by Southeast Asians.

Cooperation on the Protection of the Rights of Migrants

The AICHR could formulate regional policies to protect the rights of cross-border migrants and people who have been forced to move as a result of climate-induced events. Several reports such as the 2009 Human Development Report by the United Nations Development Programme have indicated that climate change would create severe impact on human migration. It is projected that climate change will result in weather-related disasters, a rise in sea levels, and social upheaval, which could lead to forced human displacement from both within and across national borders. Currently, there is a lack of legal frameworks to address the consequent issues of climate-induced displacement. Hence, the AICHR could consider incorporating obligations for states to protect the rights of internally displaced persons (IDPs) at the national level and through a regional declaration on human rights.

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International Commitments and Local Implementation



In this section, a review of international obligations on Southeast Asian states is carried out along with an analysis of how these international obligations bolster the mandate of the AICHR. The investigation focuses on the international obligations of the two significant human rights treaties that have been signed by all 10



ASEAN member states, namely the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

As part of the negotiations furthering ASEAN integration, a series of agreements and implementation plans have been put into motion. In 1997, the 2nd ASEAN Informal Summit adopted the ASEAN Vision 2020 of an association closer to the people it governs. In order to implement this long-term vision, the 1998 Hanoi Plan of Action (HPA) was the first in a series of plans of action building up to the realisation of the Vision 2020.

Its time frame was for six years (1999 - 2004) with a three-year review to coincide with the ASEAN Summit Meetings. The HPA included two commitments under section IV, which offer an opportunity for the AICHR to assist member states to fulfil their commitments. These commitments are to:

4.8 Enhance exchange of information in the field of human rights among ASEAN Countries in order to promote and protect all human rights and fundamental freedoms of all peoples in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, and the Vienna Declaration and Program of Action.

4.9 Work towards the full implementation of the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination against Women and other international instruments concerning women and children.

These commitments were broadly reaffirmed in the 2003 Bali Concord II, Vientiane Action Program 2004 - 2010, and the 2007 ASEAN Charter. The ASEAN Charter codified the commitment in Article 2.2 (i) and (j) thus:

1. Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
2. Upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN member states.

In addition, there is a commitment in Article 14 to establish a regional human rights body, which paved the way for the 2009 Terms of Reference. It is important to note the importance of the CEDAW and CRC as two international human rights treaties that all ASEAN member states have signed, as Article 2.2 (j) above is specific in committing the member states to upholding instruments to which the ASEAN states have subscribed, essentially ruling out a binding commitment to customary international law in general.

In light of these commitments to the CEDAW and CRC, attention is now turned to how these international treaties can assist the regional human rights body in formulating its own plan of action once it is established. One of the AICHR's first moves will be to lead the discussion and deliberations on the formation of an ASEAN Declaration on Human Rights, as set out in the Terms of Reference under section 4.2 and so incorporating these international human rights treaties would be an appropriate starting point. Further to its role as the coordinating body for the development of such a declaration, the AICHR is mandated to,

4.1 Develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community.

With this mandate function, the AICHR would be best placed as the regional body to assist member states to implement the provisions in the CEDAW and CRC and provide the logistical support to the member states in reporting to the UN Secretary-General on its progress in implementing the convention at the domestic level. As the regional body tasked with such a mandate, the AICHR would also be well-placed to convene workshops on implementation of the conventions and facilitate sharing regional experiences, allowing member states to learn from one another. The AICHR can enhance regional integration through promoting collaboration through information exchange and establishing best practices for ongoing law reform and harmonisation of domestic laws with CEDAW and CRC norms and standards.

The AICHR would also provide a suitable forum through which to engage civil society and member states' officials, bringing the reality of a more 'people orientated' ASEAN into practice. As the ongoing discussion continues about how the AICHR will put its mandate into practice, it is important to highlight the areas upon which ASEAN member states already have agreement and see how these particular agreements, such as the universal ASEAN signing of the CEDAW and the CRC, can assist in making the AICHR as successful as possible. If these issue areas are identified, then the AICHR can start to work on a positive footing with member states and build the trust it needs to tackle more controversial areas.

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In Letter and In Spirit

This Insight has highlighted the significant areas from which the AICHR can draw upon for new policy ideas, offered alternative avenues for framing human rights, and illustrated international commitments to bolster its mandate. Over the coming months, the newly-appointed commissioners need to carve out an agenda for their term in office and this will necessarily include confidence building measures so that member states and people in Southeast Asia have faith in the AICHR. These confidence building measures can take on many forms, focusing on the less confrontational perspectives mentioned above for human rights promotion or the crafting of a regional declaration on human rights. Whichever policies make it to the forefront of the AICHR's agenda, it needs to ensure that it has the confidence and legitimacy of the people and the states it represents. Without this confidence and legitimacy, the AICHR could well be sidelined by the more progressive ASEAN members such as Indonesia, Malaysia and the Philippines who want a more robust response to human rights, which would have far-reaching consequences for ASEAN as a prominent regional grouping.

Indeed, one of the immediate challenges the AICHR faces is how the new commissioners will be held accountable and how accessible the body will be. As state-appointed commissioners, they will need to be seen as independent once their terms begin, in order to raise public confidence and be as transparent as possible, if it is to establish itself as an important and credible human rights actor in Southeast Asia. Given that the ASEAN Foreign Ministerial Meeting is the process for bringing human rights concerns to the fore, there will need to be some internal safeguards so that the commission is trusted. The AICHR would do well to put in place procedural guarantees such as a robust code of conduct for commissioners and a system to include civil society as much as possible to promote the free flow of concerns and ideas. Above all, while the AICHR begins its new journey, there is a measured hope that it will be able to promote and uphold the human rights that it was established to oversee.

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