

THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: 15 YEARS AND STILL NOT MUCH TO CELEBRATE

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Abstract - *At the time of writing the ASEAN Intergovernmental Commission on Human Rights is in its 15th year of operation. This is a timely moment to reflect upon the previous decade and a half progress of the world's youngest regional human rights organization. Upon establishment AICHR raised the hope of many in region that there would finally be an organization that could protect human rights in ASEAN states from abuse by those same governments. That hope was quickly tempered with the adoption of the ASEAN Human Rights Declaration in 2012. However, over the next decade AICHR has been active and it is a good time to reflect on positive and negative points since establishment.*

Keywords: ASEAN; AICHR; Human Rights; ASEAN Human Rights; Sovereignty

INTRODUCTION

The ASEAN Charter came into force on 15 December 2008 (ASEAN, 2007). Article 14 established what would become the ASEAN Intergovernmental Commission on Human Rights (AICHR) and with it the realization that ASEAN would finally have a regional human rights body (Ibid). This year marks the 15th anniversary of AICHR and as such it is worth taking stock of its progress, failures and why it is so.

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established on October 23, 2009 at the 15th ASEAN Summit (AICHR, 2012). The establishment of AICHR brought to an end, the long process of trying to get human rights mainstreamed and a regional mechanism established beginning with the Vienna World Conference and the 24th ASEAN Ministerial Meeting (United Nations, 1993; ASEAN, 1993). Many individuals and groups were influential but the most influential, The Working Group for an ASEAN Human Rights Mechanism (The Working Group) was most prominent, having been established in 1995 (The Working Group for an ASEAN Human Rights Mechanism, n.d.).

This opened a new chapter of human rights institutionalism with the 1st AICHR which drafted the ASEAN Human Rights Declaration and continues to present. Since its establishment AICHR has been underwhelming for activists and NGO's. A common criticism is that AICHR lacks teeth and refuses to condemn or remedy the worst human rights abuses in the region (ASEAN Parliamentarians for Human Rights, 2020; Darwis, 2020; Forum-Asia, 2012a; Ilaw, n.d.; Mutaqin, 2018; Olivia, 2014; SEA Junction, 2019). The view of ASEAN member states has been far more positive, viewing it as a process in motion to continually improve human rights in the region (Ministry of Foreign Affairs Thailand, 2023; Ministry of Foreign Affairs Singapore, 2019). The answer to whether AICHR is performing dismally or well is dependent on the terms in which AICHR was established, which impacts the structural and normative performance.

The primary reason for uneven and at times retrogressive advance of human rights in ASEAN lies in the core purpose of human rights; to protect people from the arbitrary use and abuse of state power. From this writers' perspective, there are three main questions that arise when viewing AICHR since its founding. What has AICHR engaged in since its founding? What has AICHR done in terms of substance and deliverables to the people of ASEAN? Why has it performed as it has since its founding? In answering these questions, hopefully I can shine a light on the direction of travel and what we as observers, residents, and people's living in ASEAN countries can expect from AICHR in the future.



AICHR IN BRIEF

The 1st AICHR had as its mandate the drafting of a Human Rights Declaration. It drafted the ASEAN Human Rights Declaration which was adopted in 2012 at the Phnom Penh Summit (ASEAN, 2012). The AHRD is considered by many advocates and scholars to fall short of basic international standards of human rights (Forum-Asia, 2012b). The AHRD embodies principles of sovereignty and non-interference, but most importantly identifies duties as important as rights. It also incorporates the language of human rights understood in the context of 'regional particularities'. Language reminiscent of the tired and now discredited 'Asian Values' (Boll, 2001). Needless to say the AHRD did not lead to celebration or much hope for the future of human rights in region.

Since its founding, AICHR has published and engaged states and civil society through its 5 year workplans. The evolution of these workplans has shown a degree of expansion of activities and depth of engagement. The current 5 year plan includes encouraging member states to ratify and follow through on treaty obligations as well as institute mini Universal Periodic Reviews which shadow ASEAN states United Nations obligations (AICHR, 2024).

Since establishment AICHR has organized hundreds of events (AICHR, 2024b; Forum-Asia, 2019). These engagements have two primary characteristics; they are small in scale and they are all promotional activities. Engagements have tended to be along the lines of workshops, intergroup dialogues and training. AICHR has carried out five thematic studies on different areas of human rights from Corporate Social Responsibility to Women and Juvenile Justice (AICHR, 2019). Perhaps, the most impactful so far has been in the area of Business and Human Rights. This advancement was largely due to the efforts of former Thai Representative Dr. Seree Nonthasoot, who was able to leverage his personal contacts, raise money and engage in networking based on his experience. Whilst, these efforts are important, the impact for a citizen or resident of ASEAN is left unanswered.

'Of Teeth and Tongues'

Tommy Koh once remarked that while AICHR did not have 'teeth, it has a tongue, and a tongue has its uses'. Ambassador Koh's words have rang hollow with the test of time. Since AICHR's establishment, ASEAN has faced three major crisis. The 2014 military coup d'état in Thailand, Rohingya ethnic cleansing and genocide of 2017 and military coup of 2021 in Myanmar. In each of these cases AICHR did not mention a word or issue single collective statement.

After the 2014 coup in Thailand, AICHR did not condemn nor call for the restoration of democracy (AICHR, 2022). Thailand's representative Dr. Seree Nonthasoot went so far as to acknowledge that "we all know AICHR has a tacit agreement not to discuss such issues". It does not speak well when Thailand's own representative at the time and subsequent representative could not raise the issue of the coup nor the repression and abuse of rights over the next 5 years of military rule (Ashayagachat, 2014).

During and after the mass expulsion and alleged genocide of the Rohingya from Rakhine state in 2017-2018 AICHR again did not raise a single question to Naypyidaw. Instead Indonesian and Malaysian AICHR representatives issued statements, but only in their *individual capacity* (Septiari, 2019). This has led to over 1.2 million Rohingya being displaced and an unending regional tragedy (Medicins Sans Frontieres, 2022). Instead of AICHR, The Gambia took up the call for justice and brought a case of Genocide against Myanmar to the International Court of Justice (Human Rights Watch, 2022).

When the Myanmar military seized power in the coup of February 2021, AICHR again did nothing. Instead former AICHR representatives issued a statement of condemnation and call for return to democratic processes in the country (SOC DEM ASIA, 2021). Since the coup Myanmar has spiraled into ever deepening conflict and civil war with no end yet in sight.

Why has AICHR Stagnated?

This section will outline "ASEAN Way" and most importantly the impacts that this has on ASEAN structures, institutions and performance of the like. ASEAN's founding as organization in 1967 was for the expressed purpose of national security and regional order. (Acharya, 2013). ASEAN's founding principles are outlined in the "Bangkok Declaration" of 1967 which established ASEAN



among its five original member states; Indonesia, Malaysia, The Philippines, Singapore and Thailand. ASEAN's founding principles are insinuated in the following "DESIRING to establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality" (The ASEAN Declaration, 1967; *supra* 2). This can be understood as indicative of sovereignty and sovereign equality of member states. The following paragraph highlights "CONSCIOUS that in an increasingly interdependent world, the cherished ideals of peace", understood as peaceful settlement of disputes (The ASEAN Declaration, 1967; *supra* 3). The final principle "CONSIDERING that the countries of South-East Asia share a primary responsibility for strengthening...to ensure their stability and security from external interference" (The ASEAN Declaration, 1967; *supra* 4). The final principle referenced is non-interference in one another's internal affairs. The Treaty of Amity and Cooperation further codified the inferred ASEAN principles into a formal treaty which stands as ASEAN's primary legal instrument for signing, ratifying and state accession to the organization as well as external parties who seek formal relations with ASEAN. The TAC formalizes ASEAN principles in Article 2 as:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful means;
- e. Effective cooperation among themselves (Treaty of Amity and Cooperation, 1976; Article 2 a-f).

The aforementioned principles of ASEAN as a regional organization are not novel but rather echo principles of the United Nations in Article 2 of the UN Charter (United Nations Charter, 1945; Article 2.1, 2.3, 2.4, 2.6) and are reflective of original principles of international relations writ large established with the Treaty of Westphalia (Asbach and Schröder, 2014). The underpinning of ASEAN principles in terms of its performance is referred to as "The ASEAN Way". The ASEAN Way denotes a two primary meaning, first are ASEAN's constitutive norms that guide ASEAN member states in their interactions as well as third parties interacting with ASEAN (Acharya, 1997; Acharya, 2001; Ba, 2009). ASEAN's collective constitutive norms are sovereignty and independence, no external interference or subversion (Treaty of Amity and Cooperation, Article 10), non-interference in internal affairs and peaceful settlement of disputes (Treaty of Amity and Cooperation, Article 2, 11, 13). Furthermore, ASEAN constitutive norms are conjoined with procedural norms that inform the method of conducting diplomacy and substantive agreements which are consultation and consensus in decision-making process of (Bessho, 1999; Chiou, 2010; Guan, 2004; Narine, 1998).

ASEAN's constitutive norms are crucial to understanding all institutional and structural configurations within ASEAN frameworks. They serve to make ASEAN a purely intergovernmental regional organization. In the maximalist sense this means that every member state has veto power over the pace of integration, areas of cooperation and depth of regional initiatives. A more pragmatic and realistic view is that sensitivities of member states are taken into consideration prior to embarking on integrative projects and a significant degree of give and take does in fact occur within ASEAN integration, nonetheless ASEAN regionalism is first and foremost, state led (Beeson, 2008; Thompson and Chong, 2020). Former Singaporean Foreign Minister S. Jayakumar stressed that the ASEAN Way stresses informality, organization minimalism, inclusiveness, intensive consultations leading to consensus and peaceful resolution of disputes (Thompson and Chong, 2020). This broad but substantive understanding impacts every institutional aspect of ASEAN and its initiatives.

In addition, to impacting the pace of regionalism the ASEAN Way in tandem with state practice dictates that regional interests often are subservient to national interests. This is especially so in areas of acute sensitivity to ASEAN member states such as security and human rights issues (Collins, 2007; Jones, 2010; Jones and Smith, 2007; Juan, 2018). Within the context of sensitive issue and consensus based decision-making fragmentation and lack of ability to comprehensively deal with regional issues of concern are also accentuated. In the case of human rights this is readily



apparent. A lack of universally understood and accepted consensus on the issue area of human rights has led to a fractured and often paralyzed institutional architecture that is simply not designed to act in crisis situations nor in a progressive manner in its day-to-day operations (Beeson, 2002; Rüländ and Jetschke, 2008). Jones (2008) fleshes this out further by framing ASEAN as a concert of regional states with limited goals for the organization of security and development. More critically Jones argues that the dichotomy of sovereignty and human rights is affected by ASEAN political culture is ‘resistant both to abstract rationalism and to the universal norms such rationalism entails...change in the direction of democracy in an environment of economic uncertainty would have centrifugal rather than centripetal consequences for regional order’ (Jones, 2008 p. 745). The resistance to human rights liberalism is underpinned by the relative low levels of development in ASEAN and the inherent weaknesses of most ASEAN states, many of which are still early in the nation-building projects (Jones, 2023). By definition the ASEAN Way of integration not only puts domestic interests above regional or communal interests they also shield national elites and governments from intrusions into areas and issues which those governments do not want scrutiny (Nesadurai, 2009; Rüländ, 2012). The nature of ASEAN’s regional architecture of institutions being molded for domestic interests also has the effect of decentralizing ASEAN decision-making and ASEAN institutional performance back to its origin of the member states rather than at the regional level (Beeson, 2009; Yukawa, 2017).

Furthermore, they also serve to provide resistance to institutional change and, many time initiatives that are less than to make all parties satisfied of conduct and agreements achieving international standards. Leviter (2010) has argued these structural and regulative norms mixing with varied understandings and internalization of non-interference, democracy, human rights and national interests often lead ASEAN to the lowest common denominator outcomes and weak systems of enforcement. Furthermore, as ASEAN agreements can be considered as soft law that are premised on relational dynamics of a regional community that heretofore has engaged in agreements that lacking legally binding characteristics and enforceable status.

The problem with ASEAN’s structural configuration lay in its constitutive norms which simultaneously strengthen and shield member states from external interference while slowing down regional initiatives of progressive member states with regards to institutional change and reform. The reasons for this of course are historically bound in the establishment of ASEAN as a Cold War organization of newly independent states with weak governments but ASEANs historical DNA carries over to the present in an unaltered official form. Alternatively, the consistent paralleling of ASEAN principles with UN principles does offer ASEAN states a significant level of legitimacy in the conduct of their affairs whilst maintaining some degree of regional integrity and order. As late as 2003 ASEAN Secretary General Yong on the verge of the second Iraq war the fundamental nature of UN principles as focal points of national to regional importance to ASEAN institutionalism by stating “ASEAN members clearly differ in many aspects, such as political ideologies and government systems, levels of economic development, sizes of population, cultural affinities, world views and external relations. The ASEAN membership is never intended to replace the national policy of each member government. But it is the indispensable “glue” binding these countries together in “unity in diversities”...[ASEAN members] uphold the principles and purposes of the UN as enshrined in the Charter of the United Nations.” (cited in Jones, 2014b).

AICHR TERMS OF REFERENCE: STRUCTURAL CONSTRAINTS

AICHR’s Terms of Reference dictate that it operate according to region’s method of doing business, the ‘ASEAN Way’. The ASEAN Way centers on state sovereignty and non-interference in internal affairs as organizational principles, consultation and consensus for decision-making. This in effect gives every ASEAN member a veto over all agenda and initiatives. In reality this means AICHR is held to the standard of the region’s most troublesome member.

AICHR’s Terms of Reference state that “each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government” (ASEAN, 2009 supra 5.2). On the surface this is rather innocuous but it belies two very critical factors. First, there

is no set criteria for who can or cannot be an AICHR representative. This has had the effect that some member states appoint persons who are human rights advocates, human rights lawyers and scholars whereas some member states consistently appoint persons from their respective Ministry of Foreign Affairs. Second, is the notion of accountability to which representatives are not accountable to other member states, civil society or citizens of ASEAN but rather to the political leadership that appointed them. Observers have observed that AICHR representatives are not but should be fully independent from member states, enabling them to have agency which would lend credibility to AICHR and by extension ASEAN (Ginbar, 2010; Wahyuningrum, 2013). Internal documentation further supports that notion that a very serious limiting factor of AICHR is that “the inconsistency to which ASEAN member states appoint representatives has strong impacts on its ability to function (Confidential Ministry of Foreign Affairs, 2013).

AICHR representatives while nominally being ‘independent’ many times view themselves as government representatives instead of national representatives. This leads representatives from conservative states, though not exclusively to view their role as protecting their governments rather than people (Ashayagachat, 2013).

Table 18 AICHR Representatives by Batch and Background

	2009-2012	2013-2015	2016-2018	2019-2021	2022-2024
Brunei	Mr. Pehin Dato Dr. Awang Hj. Ahmad bin Hj. Jumat Government official Minister of Culture, Minister of Industry and Primary Resources	Mr. Pehin Dato Dr. Awang Hj. Ahmad bin Hj. Jumat Government official Minister of Culture, Minister of Industry and Primary Resources	Mr. Haji Mohammad Rosli bin Haji Ibrahim Government official Permanent Secretary at the Prime Minister's Office	Ms. Datin Paduka Hajah Nor Hashimah Haji Mohammed Taib Government official Prime Ministers Office, Attorney General's Chamber	Ms. Datin Paduka Hajah Nor Hashimah Haji Mohammed Taib Government official Prime Ministers Office, Attorney General's Chamber
Cambodia	Dr. Om Yentieng Government official President of the Anti-Corruption Unit, Senior Minister	Mr. Srun Thirith Lawyer - Office of the Council of Ministers, Cambodia Human Rights Committee	Mrs. Polyne Hean Government official Director-General, Department of International Cooperation	Mrs. Polyne Hean Government official Director-General, Department of International Cooperation	Mr. Keo Remy Government official Prime Ministers Office, Cambodia Human Rights Committee

Indonesia	Mr. Rafendi Djamin Human rights advocate - SAPA Task-Force on ASEAN and Human Rights, Coordinator of the Coalition of Indonesian NGO for International Human Rights Advocacy	Mr. Rafendi Djamin Human rights advocate - SAPA Task-Force on ASEAN and Human Rights, Coordinator of the Coalition of Indonesian NGO for International Human Rights Advocacy	Mrs. Dinna Wisnu Academic Binus University	Ms. Yuyun Wahyuningrum Human Rights Advocate ASEAN Parliamentarians for Human Rights, Oxfam, SAPA Task Force	Ms. Yuyun Wahyuningrum Human Rights Advocate ASEAN Parliamentarians for Human Rights, Oxfam, SAPA Task Force
Lao PDR	Mr. BounkeutSangsomak Government official and Politician Ministry of Foreign Affairs, Vice Chairman of the Commissions on Foreign Relations of the National Assembly	Mr. Phoukhong Sisoulath Government official Ministry of Foreign Affairs	Mr. Phoukhong Sisoulath Government official Ministry of Foreign Affairs	Ms. MalayviengSakonhni nhom Government official Ministry of Foreign Affairs	Mr. Yong Chanthalangsy Government official Ministry of Foreign Affairs
Malaysia	Mr. Tan Sri Dato' Sri Dr. Muhammad Shafee Abdullah Government official, Lawyer Commission Member to SUHAKAM (Malaysian Human Rights Commission), Federal Counsel, Ministry of Home Affairs	Mr. Tan Sri Dato' Sri Dr. Muhammad Shafee Abdullah Government official, Lawyer Commission Member to SUHAKAM	Mr. Edmund Bon Tai Soon Lawyer and Human Rights Advocate AmerBON Advocates, Director Malaysian Centre for Constitutionalism & Human Rights	Mr. Eric Paulsen Human Rights Advocate, Lawyer Fortify Rights, Executive Director to Lawyers for Liberty	Dato' Dr. Aishah Bidin Lawyer, Academic Human Rights Commission of Malaysia (SUHAKAM), National University of Malaysia

		(Malaysian Human Rights Commission), Federal Counsel, Ministry of Home Affairs			
Myanmar	Mr. Kyaw Tint Swe Government official Ministry of Foreign Affairs	Mr. Kyaw Tint Swe Government official Ministry of Foreign Affairs	Mr. Hla Myint Government official Ministry of Foreign Affairs	Mr. Maung Wai Government official Ministry of Foreign Affairs	TBA
Philippines	Ms. Rosario Gonzales Manalo Government official Ministry of Foreign Affairs	Ms. Rosario Gonzales Manalo Government official Ministry of Foreign Affairs	Mr. Leo Herrera-Lim Government official Ministry of Foreign Affairs	Mr. Jaime Victor B. Ledda Government official Ministry of Foreign Affairs	Mr. Hans Mohaimin Lim Siriban Government official Ministry of Foreign Affairs
Singapore	Mr. Richard Magnus Government official State Enterprises, Judge	Ms. Chan Heng Chee Government official Ministry of Foreign Affairs	Mr. Barry Desker Government official, Academic Ministry of Foreign Affairs, Dean of Rajaratnam School of International Studies	Dr. Shashi Jayakumar Academic S. Rajaratnam School of International Studies	Dr. Shashi Jayakumar Academic S. Rajaratnam School of International Studies
Thailand	Dr. Sriprapha Petcharesree Academic - Mahidol University Human	Dr. Seree Nonthasoot Academic and	Dr. Seree Nonthasoot Academic and Lawyer - United	Dr. Amara Pongsapich Academic and Human Rights - Chulalongkorn	Dr. Amara Pongsapich Academic and Human Rights -

	Rights Institute	Lawyer - United Nations ECOSOC, Director Stock Exchange of Thailand	Nations ECOSOC, Director Stock Exchange of Thailand	University, Chair of the National Human Rights Commission of Thailand	Chulalongkorn University, Chair of the National Human Rights Commission of Thailand
Vietnam	Mr. Nguyen Duy Hung Government official Ministry of Foreign Affairs	Ms. Le Thi Thu Government official Ministry of Foreign Affairs	Ms. Nguyen ThiNha Government official Ministry of Foreign Affairs	Dr. Nguyen Thai Yen Huong Government official, Academic Ministry of Foreign Affairs, Diplomatic Academy of Viet Nam	Dr. Nguyen Thai Yen Huong Government official, Academic Ministry of Foreign Affairs, Diplomatic Academy of Viet Nam
*adapted from ASEAN Intergovernmental Commission on Human Rights and Forum-Asia data https://aichr.org/key-documents/ https://hrasean.forum-asia.org/wp-content/uploads/files/cv/VIET%20NAM-H.E.%20Amb.%20Nguyen%20Thi%20Nha_0.pdf					

AICHR lacks the capacity of a complaints mechanism thus breaking the link between people and the member states at the collective level. At the individual level national representatives have received complaints and forwarded these onto national bureaucracies. So far Dr. Nonthasoot of Thailand and Ms. Wahyuningrum of Indonesia have done so, both received no response to their complaints.

Representatives are not paid or receive remuneration from their states equally. Some representatives such as Malaysia receive a decent salary and stipend. Indonesia representatives receive a small salary (\$500 during Rafendi Djamin's tenure). Cambodia receives their very modest government salary. Thailand's representatives receive no payment at all. Funding of AICHR is lackluster with AICHR funded more by donors such as USAID, European Union and AusAID than ASEAN member states.

The lack of equal funding of AICHR representatives is intentional as these issues have been brought up since the 1st AICHR but most importantly they inhibit the ability and capacity of representatives to act. Without funding representatives must be fund their own offices or pay out of pocket for assistants. Given that AICHR has been in existence for 15 years there is a considerable amount of work and institutional knowledge that must be kept up and is often overlooked or lost. This led a former representative to get creative with 'track changes diplomacy' (Interview with former AICHR representative, 2023). Track changes diplomacy refers to his strategy of getting initiatives that are somewhat controversial passed by simply clicking 'accept change' or 'delete change' on internal AICHR documents what are in doc format and sending these on. Other representatives are so busy and inundated with work that they do not notice these changes and issues and agenda get passed which otherwise would not (Ibid)



CONCLUSION

AICHR's Terms of Reference state that the mandate and ToR 'shall be revised every 5 years', but 15 years in and no revision has taken place. In 2019 ASEAN Foreign Ministers agreed to convene a high-level panel to study and propose revisions to AICHR's mandate. To date only Cambodia, Indonesia, Malaysia, Thailand, and Philippines have nominated representatives (Department of Foreign Affairs, 2022).

It has to be inferred by practice that many ASEAN states are perfectly content with how AICHR performs. AICHR was never envisioned to be a powerful body or challenging state power. It has not interacted with UN human rights system and national bodies. In essence AICHR operates alone at the regional ASEAN level, carrying out activities of limited impact whilst providing a veneer of human rights legitimacy.

It must be stated that the author is not arguing that any of the shortcomings are a fault of AICHR. Rather, the way in which AICHR was configured by its political leaders predetermines outcomes from a systemic analysis. Many authors have focused on microlevel performance of AICHR representatives to argue that incremental change does happen (Collins and Bon Tai Soon, 2023). The author does not dispute this claim. Instead I have argued that incremental change in the larger scheme of human rights in the region, does not matter much. AICHR is systemically and structurally limited in what it can engage in on a political level which is continually conditioned at the member state level and dictated by national level politics. No amount of incremental change at a microlevel will ever significantly impact the macro regional level of human rights in ASEAN.

At present there does not appear to be any pressure to reform, change or alter AICHR's structure or mandate. Given AICHR's previous performance it can only be inferred that AICHR will likely continue to perform as it has since establishment. That said, if change is to happen to AICHR it will come from its member states acting in unison. The only way this can happen as this author sees is if human rights as a field becomes less threatening to state elites or if major liberal change happens within the region.

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