International human rights law has become the dominant 21st-century global moral language shaping international relations. Human rights are considered the primary method for advancing human flourishing by asserting rights based on a universal theory of justice, which influences domestic legal orders by shaping the contours of freedom and authority within a polity. Asian states have at various times supported and resisted the development and deployment of human rights standards as criteria for evaluating government legitimacy.

Two points are commonly highlighted in discussing human rights in Asia. First, this region produced the ‘Asian values’ discourse of the 1990s, driven by political leaders and diplomats, particularly from China, Singapore and Malaysia. They credited their nation’s economic success to cultural values and to restraining civil-political rights to secure the political stability crucial to attracting foreign investment and trade. This foray into cultural relativism was criticized as an apology for authoritarianism, threatening the universality of human rights. Second, ‘Asia’ alone lacks a regional human rights system based on a human rights instrument establishing supervisory and enforcement institutions. This is not to say that there is no vibrant human rights discourse in Asia or import the absence of any protective mechanisms. Both do exist, as does the gap between theory and practice, and lip service and authentic commitment.

This chapter explores the context and contour of human rights practice and culture in Asia; it identifies factors shaping how Asian states negotiate human rights, which together with the rule of law and democracy form the prescriptive triumvirate of ‘good governance’. This includes the colonial histories and immense diversity extant in Asia in terms of culture, religious faiths, political systems and levels of economic development. A key document examined is the 1993 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (‘Bangkok Declaration’). This represents the latest collective human rights statement of Asian governments, providing insights into the particularities, problems and priorities informing Asian human rights discourse, which transcends the ‘Asian values’ debate. Asian states accept the concept of human rights and obligations under Article 55 of the UN Charter to promote and protect “human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”
Asian states have been socialized into engaging with human rights issues by becoming party to human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). However, the potential transformative domestic impact of such treaties may be truncated by extensive reservations or unwillingness to incorporate treaty standards into legislation. All UN members are subject to the Universal Periodic Review (UPR) process, in which the international community, including Asian non-governmental organizations (NGOs), scrutinizes and discusses state-authored human rights reports. States issue recommendations to their peers, often referencing core human rights treaties that the reviewed state may not be party to. Asian states have become used to responding to human rights criticisms and may be moved to take remedial steps.

UN Special Rapporteurs have been given country mandates over egregious human rights violators like Myanmar and North Korea. Many Asian nations have adopted judicially enforceable constitutional rights paralleling human rights. Some, like Indonesia, the Philippines, China and Sri Lanka (UN High Commissioner for Human Rights Handbook, 2002), have adopted national human rights action plans and actively engage in human rights dialogues before international fora. Since 1991, for example, China has published human rights white papers in English; at least since 1998 (Tiezzi, 2016), it has issued critical reports about the United States’ human rights failings, showing a desire to engage and counter hypocritical posturing as no state has a monopoly of virtue in relation to human rights compliance.

However, divergent views about the foundation, scope and content of human rights persist. For example, the universality of human rights rests on the principle of inherent dignity. Foundational documents like the 1948 Universal Declaration of Human Rights (UDHR) treats this as a self-evident proposition in speaking of “the equal and inalienable rights of all members of the human family.” It is ambiguous whether the UDHR embodies a specific ideology demanding a uniform political and economic system or if it finds normative resonance with plural philosophies, thereby framing the range of human rights-compatible political and economic systems beyond the dominant one of liberal individualism. Asian human rights discourse grapples with what ‘dignity’ requires and how to balance rights against competing rights, duties and public goods.

This dialogue is not just between governments but includes international civil society, which broadens the informational streams and range of views non-state voices offer. A good example is the 1993 Declaration on the Rights of Asian Indigenous Peoples adopted by the Indigenous Peoples Pact. This expresses concerns over traditional land conservation, preserving indigenous identity and group autonomy, and is distinct from statist priorities over development and modernization, which sit in tension with indigenous peoples’ rights. More deleteriously, it heightens the prospect of what Joseph Raz (2010: 47) described as the “reckless activism” of non-state actors. This manifests through shrill ‘human rightism’ (Pellet, 2000) or militant ‘human rights fundamentalism’ (Kinley, 2007) in which political agendas and claims are cast in the garb of legal rights and in which human rights are dogmatically touted as the panacea for all social ills. This can be anti-democratic as framing a controversial interest as a ‘new right’ operates to terminate debate by insulating a claim from scrutiny. Human rights are not merely invoked as legal rights before judicial bodies but also as political claims before public forums, as seen from the contemporary proliferation and politicization of human rights claims. This has precipitated a call by some Asian governments to differentiate between universally accepted ‘core’ human rights, such as the UDHR, as opposed to ‘contested’ claims (Wong, 1993). Asian scholars have pointed out that NGOs and dissenting
activists are not necessarily more legitimate or representative than elected governments, which ‘represent the people as a whole’ (Yasuaki, 1999: 105), and, indeed, may be prey to or funded by foreign powers or organizations with their own political agendas (Glendon, 2001: 229).

This may be one factor stoking the broader fear that human rights constitute a form of neocolonial moral imperialism adverse to Asian cultures, religious faiths and development priorities, and that human rights embody the latest incarnation of the standard of civilization declared by Western powers. They invoked this to justify colonial rule as a sacred trust by which Western powers tutored backward African and Asian peoples until they were deemed qualified to enter the family of nations. The humiliation some Asian states feel towards their colonial past sustains the jealous guarding of their sovereign prerogatives; colonial history has fuelled resentment where ‘Western’ (Euro-American) countries use human rights to criticize Asian governments. These Asian states view this as an intervention in internal affairs and exercise in double standards, as colonialism is considered a gross human rights violation.

While accepting the concept of human rights, some Asian states hold particular views about how to best implement them, which critics view as undermining the understanding that “all human rights are universal, indivisible” (Vienna Declaration, 1993: para 5). The states also differ in terms of which institutional mechanisms and what methods of engagement best protect human rights. This chapter examines human rights implementation in Asia by focussing on initiatives at the domestic (courts and national human rights institutions), subregional and international level to secure human rights compliance. In particular, it examines the subregional turn towards institutions and the negotiation of sovereignty costs in adopting human rights processes and structures within the Association of Southeast Asian Nations (ASEAN).

**Preliminary observations**

‘Asia’ is a vast continent of more than 4.4 billion inhabitants; it does not import a monolithic or cohesive concept or identity in any political or cultural sense. Some have described Asia as ‘not Europe’ (Ruskola, 2011), implying Asia’s failure to live up to the European standard of civilization (Gong, 1984) in terms of politics and culture. This standard shaped the content of international law, which Asian states did not participate in making until after the era of decolonization (Anghie, 1999). This Eurocentric idea can be traced to the designation by the Assyrians, who conquered Mesopotamia, of lands to the east as *Asu* and to the west as *Ereb*, which approximate the categories of *Asia* and *Europe*.

There are multiple conceptions and contested visions of ‘Asia’ in both material and ideological or spiritual terms (Acharya, 2010). Within Asia, an Asian identity arose in opposition to the Western colonial system and anti-Western sentiment. However, any move towards a pan-Asian movement was quelled by the strong nationalist orientation in many Asian states, mitigated by a desire for regional cooperation and interdependence in matters like security and trade. This has produced intergovernmental institutions like ASEAN, the South Asian Association for Regional Cooperation (SAARC) and the Asia-Pacific Economic Cooperation (APEC). Only ASEAN has set forth its normative vision of human rights in its 2012 Human Rights Declaration, which received criticism from various quarters in Asia and beyond. This is significant, as ‘human rights’ was not a founding objective of ASEAN in 1967 but featured in the 2007 ASEAN Charter. This sought to formalize the now expanded ten-member ASEAN grouping in its shift towards a rules-based regime and to fortify community identity and objectives, of which respect for human rights was an express component.
A working description of ‘Asia’ would encompass Northeast Asia (China, Japan, Mongolia and Korea), South Asia (India, Sri Lanka, Bangladesh, Pakistan, Bhutan, Nepal and the Maldives) and Southeast Asia (the ten ASEAN nations and Timor Leste). The UN geoscheme for Asia would include states in Central Asia (affiliated with the Commonwealth of Independent States) and Western Asia (encompassing the ‘Middle East’).

Asian states and human rights standards: key milestones from birth to Bandung to Bangkok

The United Nations Charter and Universal Declaration of Human Rights: 1940s

The historical record reveals that certain Asian nations were at the forefront of human rights standard-setting initiatives. During the drafting of the League of Nations Covenant (1919), Japan’s proposal to include a racial equality clause was rejected for fear it would delegitimate colonial rule or the race-based immigration laws in states like Australia (Lauren, 1998). It was the three ‘Big Powers’, the United States, Great Britain and the Union of Soviet Socialist Republics, that wanted to minimize the mention of ‘human rights’ in the draft text of the UN Charter as this would interfere with their sovereignty. Indeed, their Jim Crow, immigration and press control laws could not pass muster. Ironically, the ‘sovereignty argument’ mirrored what China articulated in its 1991 white paper on human rights; it was the Republic of China delegate Wellington Koo who unsuccessfully pressed for the inclusion of a clause underscoring ‘the equality of all states and all races’ in the UN Charter. The higher profile human rights assumed in the final Charter was largely the efforts of small- and medium-sized states as well as NGOs at the San Francisco Conference in 1945 (Lauren, 1983).

Asian experts and states made an impact in drafting the first and only universal human rights document, the UDHR. Some critics argue that the UDHR’s authors attempted to universalize a particular set of ideas and impose them on the rest of the world, who did not participate in its drafting. Mary Ann Glendon has convincingly presented a case against this view, arguing that the drafters represented a broad range of cultures and considered the UDHR to be an important milestone rather than the final word on universal human rights. Six members of the General Assembly Third Committee were from Asia (China, India, Pakistan, Burma, the Philippines and Siam). Among the most active members of the Human Rights Commission were PC Chang (China), Charles Malik (Lebanon), Carlos Romulo (the Philippines) and Hansa Mehta (India) (Glendon, 2001: 225). It was Mehta who ensured that Article 1 inclusively referred to ‘all human beings’ rather than ‘all men’. The Filipino and Chinese delegates were responsible for adding specific content to Article 25 and the socio-economic rights to food and clothing. The Pakistani delegate objected to a Saudi Arabian proposal with respect to Article 16 in insisting that marriage required the consent of both spouses (Waltz, 2002: 444). Further, the UDHR had features that were more in line with the communitarian vision of society many Asian nations favour, such as references to brotherhood, duties, public goods and the ‘dignitarian’ drafting of rights clauses, which recognizes the non-absolute character of rights.

Bandung Conference: 1950s

It has been argued that human rights questions were seriously engaged, through an enthusiastic third world lens, by Afro-Asian countries at the 1955 Bandung Conference, convened to promote cultural and economic cooperation (Burke, 2006). There was a clear
anti-colonialist and anti-racism tenor in the Final Communiqué, which ‘took note’ of the UDHR as the common standard of achievement for all as a matter of consensus, affirming that self-determination was a precondition for the enjoyment of human rights.

**Bangkok Declaration: 1990s – challenges to universality and indivisibility**

The 1993 Bangkok Declaration articulated the collective view of Asian governments towards human rights. The UDHR as the normative baseline was affirmed, and the ratification of the 1966 Covenants on Civil and Political Rights and Economic Social and Cultural Rights (ICCPR & ICESCR) was encouraged. This shows broad Asian support for what is collectively known as the ‘International Bill of Rights’.

However, disquiet was expressed on several fronts. The upcoming world conference was an opportune time to “review” human rights to ensure a “just and balanced approach,” suggesting something was out of joint. Grievances included the need to increase the representation of developing countries in the Human Rights Centre and to redress the lopsided focus on one category of rights (civil-political) contrary to the principle of indivisibility. The Declaration urged an objective and non-selective approach towards implementation to avoid double standards and the politicization of human rights, particularly through attaching human rights conditionalities to development assistance (paras 3–5). Human rights were not to be used as an instrument of political pressure, and the principles of national sovereignty and territorial integrity were to be respected (para 5). Human rights should be realized through international cooperation and consensus, not confrontation and ‘the imposition of incompatible values’.

What is worthy of note is the emphasis placed on certain rights as well as the attitude expressed towards the universality of human rights.

The chief problems occupying Asian states related to political and economic self-determination, with emphasis accorded to the right of states to freely determine their political systems and economic development (para 6). No discrete human rights violations in relation to free speech or religious freedom was highlighted; the accent was on systemic gross human rights violations, such as racism, apartheid, ethnic cleansing (para 14) and terrorism (para 21). The collective right to self-determination for peoples “under alien or colonial domination and foreign occupation” (para 12) was underscored, though its exercise was not to undermine the territorial integrity, political independence and national sovereignty of states (para 13). Cursory reference was also made to the rights of ethnic minorities, indigenous peoples and vulnerable groups like migrant workers and refugees (para 11), as well as women and children (paras 22–23). More unusually for its time, the third-generation ‘solidarity’ right to a healthy environment (para 20) was affirmed.

However, another third-generation collective human right assumed central importance in the text and continues to dominate Asian human rights discourse: that of the human right to development (RTD), described as a fundamental and inalienable right. This was key to addressing the pressing problem of poverty (para 19), a “major obstacle” hindering the full enjoyment of human rights. The Declaration on the Right to Development (DRD) (1986) was mentioned twice in the preamble and operative text (para 17); international cooperation was needed to realize this right as no state possessed sufficient resources to do so as the problem was structural, existing at the ‘international macroeconomic level’ as evidenced by the widening North-South gap between the rich and poor (para 18). Although Article 2 of the DRD states that the human person is the “central subject of development” and should actively participate and benefit in the RTD, sceptics fear that this right is a state rather than
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a human right as it would in practical terms be exercised by an institutional right-holder, the state (Sengupta, 2006). It empowers the state with the discretion and duty to formulate appropriate national development policies designed to promote popular participation in all spheres and to ensure socio-economic reforms to promote equity and end social injustice; while this would enhance human welfare, the progressive realization of the RTD would be hard to measure and monitor; this could sustain the unaccountable state. Furthermore, international cooperation is necessary to realize the RTD, although the right itself does not specify determinate obligations. This raises concerns that this vague ‘right’ embodying worthy aspirations cannot be meaningfully operationalized.

Nonetheless, the RTD and its linkages to poverty eradication remain a priority of many Asian states. A 1991 Chinese white paper stated that the ‘right to subsistence’ was the most important human right, without which securing all other rights were “out of the question.” It underscores the importance of meeting basic needs (Kent, 1993) as “To eat their fill and dress warmly were the fundamental demand of the Chinese people who had long suffered cold and hunger.”

The need to prioritize socio-economic welfare is implicit in one aspect of the ‘Asian values’ school, which asserts a sort of ‘trade-off’ or ‘economics first’ approach in advocating restricting civil-political rights and restraining democratic excesses to secure the social discipline and stability needed for economic development. With economic growth, in theory, political liberalization should ensue, although this empirically based approach was shaken by the Asian financial crisis of the late 1990s (Fukuyama, 1998). Nonetheless, challenges to the idea of ‘indivisibility’, that all human rights be simultaneously promoted, persist. The critique is that developing countries with limited resources should be able to plan the sequencing of human rights realization in accordance with developmentalist priorities. They should be able to concentrate on certain rights first, such as the right to education, and make judgement calls as to which rights, such as a right to a court interpreter, to delay or accord less resources to (Nickel, 2008).

With respect to the universality of human rights, the Bangkok Declaration ambiguously recognizes the universal nature of human rights but stresses that they must be considered “in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds” (para 8). It expressly recognized that Asian countries could contribute to the forthcoming World Conference in Vienna, drawing from “their diverse and rich cultures and traditions.” This belies the non-participation of many Asian states, then colonies, in authoring key human rights instruments and the desire to have their views duly considered. The Vienna Declaration adopted in June 1993 at the World Conference noted this point about particularities while insisting states were obliged to protect and promote all human rights “regardless of their political, economic, and cultural systems” (para 5).

However contested, regions like Europe can speak meaningfully about a degree of cultural unity, drawing from Judeo-Christian and Greco-Roman worldviews; the same cannot be said about Asia. This is unsurprising given the vast divergence in terms of economic development and wealth, which impacts the progressive realization of socio-economic rights. A wide range of political systems exist in Asia, from authoritarian or organicist states like North Korea with its statist juche ideology, to socialist states like China, Vietnam, Laos, and to communitarian and liberal democracies, such as Singapore, India, Japan, Cambodia. Political culture determines the degree of political freedoms civil society enjoys.
If human rights embodies a liberal project, a form of politics and not a neutral ideology, the ‘Asian values’ school may be apprehended as a counter-cultural challenge. Not all Asian states view liberal democracy as normatively desirable. Instead, communitarianism, with secular or theocratic elements, is favoured. The cultural dimension of the Asian Values school challenges the hyper-individualism, adversarial ethos, demise of the common good and social decay associated with Western liberal democracies. There is a Neo-Confucianist tenor to many ‘Asian values’, which include prioritizing community interests and solidarity over individual interests and autonomy, responsibilities over rights, consensus-seeking through consultation over adversarial contention, respect for authority and a strong work ethic. Critics characterized this alternative model of law and development as an apology for power; it was invoked to shield domestic abuses from external scrutiny. They questioned the ability of governments to authentically represent the people of Asia, particularly where democratic rights and media freedom were restricted.

There is some truth to these competing views. Examining human rights in Asian states provides insight into whether the human rights corpus mandates universalism (requiring a uniform political and economic system) or accommodates universality (recognizing that legitimate particularities exist), in a plural and postmodern world. Particularities are illegitimate where local or regional human rights standards dilute global standards, and legitimate where they enrich global norms. Asia has both. The usual litany of violations of personal and civil freedoms through excessive national security laws, corrupt judiciaries, gender discrimination, extensive limits on religious freedom, speech, conscience and association, rights to food and housing undoubtedly exist (Muntarbhorn, 2000). However, there are positive instances in which Asian states have norms that exceed universal standards, such as community rights to public hearings before decisions with significant environmental impact are made (Thai Constitution). Other Asian constitutions recognize special rights for senior citizens, consumer rights, or the right of citizens to disobey illegal orders affecting their fundamental freedoms and to access personal data (Timor Leste Constitution).

Within Asia, worldview and ideological diversity is broadened and deepened by religious faiths beyond the Western liberal paradigm, which feeds the dominant strain of human rights. Religion is a vital force in private and public life. One cannot discount the influence of public religion in shaping both state and society, such as Islam in Muslim-majority states (Malaysia, Brunei and Indonesia), Catholicism (the Philippines and Timor Leste), Buddhism (Bhutan, Thailand and Sri Lanka) and Hinduism (Nepal and India). Integration and cooperation of religion and state is the norm, rather than a separationist model preferred by liberal secularity. Religion (which is not a monolithic category) is variously seen as both an obstacle to realizing human rights and a normative resource for developing human rights values (Witte and Green, 2012: 18) and promoting support for human rights within religious communities through cross-cultural dialogue (An-Naim, 1990). Taking religion seriously is necessary to understanding Asian human rights discourse.

Religions with comprehensive worldviews, such as Islam, are better framed as a competing universalism in relation to human rights universalism, rather than a cultural relativist challenge (Sachedina, 2007).

Some states, in Asian and beyond, have demonstrated disquiet against the perceived radical secularist basis of human rights. This has fuelled the adoption of alternative religiously based human rights declarations, such as the Organisation of Islamic Conference (OIC) Declaration of Human Rights in Islam (1990). This contains norms clearly incompatible with the UN-based human rights corpus, violating norms on gender discrimination, religious freedom and
expressive freedoms that must not be contrary to the Islamic shariah. Sixteen of the OIC’s 57 members come from Asia, broadly understood. Islamic jurists and Muslims do differ on human rights issues. Some, such as Malaysia’s Sisters in Islam, work to demonstrate the compatibility of Islamic values and human rights (Akbarzadeh and MacQueen, 2010: 139).

When religious norms influence law and public policy, this can affect the scope and content of human rights, in degree and in kind. For example, while Singapore and Malaysia were the chief proponents of ‘Asian values’, they differ dramatically in their understandings of religious freedom. While freedom of religious conscience for all is protected in Singapore, the position differs in Malaysia where Islam is the religion of the Federation. Malaysian courts have upheld apostasy laws that prevent Muslims from changing religion as this is viewed not as an individual right but as a public order matter (Saeed and Saeed, 2004). This is a difference in kind as the Malaysian approach truncated religious freedom but excising the right to have or change a religion or belief, as Article 18 UDHR recognizes.3

A difference in degree is evident in contrasting the free speech laws of both Singapore and Malaysia with Western jurisdictions. Free speech is a generally recognized human right, but its scope differs between jurisdictions. Both multiracial Asian countries rejected the primacy the United States accords free speech. This is evident in their criminal and sedition laws, which penalize speech that wounds the religious feelings of citizens, causing ill-will and enmity between the races and classes. The shared history of racial and religious riots has contributed to making racial and religious harmony a public good, which restricts expressive rights.

Non-religious factors also restrict free speech, such as culture with respect to Thailand’s strict lese majeste laws, which impose onerous penalties on speech that insults the revered Thai royal family (BBC News, 2016). Another factor is security concerns, as reflected in South Korea’s National Security Law permitting restrictions on speech, which “praises, incites or propagates the activities of an anti-government organization” (Kraft, 2006).

Contextual factors like religion, culture, security must be closely examined to appreciate why free speech is accorded generous or parsimonious protection as constitutional and human rights texts tell us a right is recognized but not whether it is realized.

Culture and religion shape moral values; unsurprisingly, Asian states do not take uniform stances towards morally controversial issues framed as human rights issues. They differ on whether capital punishment violates human rights law. China, India, Japan, Thailand, Singapore, Malaysia and Indonesia have retained the death penalty, while Bhutan, the Philippines, East Timor and Hong Kong have abolished it. This evidences a lack of general consensus that must support every customary international legal norm. Marked divergence exists over issues of abortion, euthanasia, anti-sodomy laws and same-sex marriage, where these are advanced by protagonists as ‘human rights’. Thus, while Hong Kong decriminalized sodomy, on the basis that anti-sodomy laws violated privacy rights or equality, they have been upheld by the apex courts in Singapore and India.4 The proposition that discrimination on grounds of ‘sexual orientation’ is a human rights violation remains a heavily contested one.

A review of national approaches within and beyond Asia yields only dissensus. This sharp divergence in matters implicating public morality is to be expected in a plural world. Indeed, the European Court of Human Rights recognizes a margin of appreciation, which leaves a matter to the democratic deliberation of contracting states where little or no common ground exists between them with respect to sensitive issues, such as same-sex marriage: Schalk and Kopf v Austria, no. 30141/04. This stems from the different cultural, historical and philosophical differences of these states. In a more diverse global setting, a global margin of appreciation may be deployed to manage politicized rights claims, in acknowledging fundamental value divergences and the importance of pluralism, democratic politics and subsidiarity.
Normative developments: 2000s

The Bangkok Declaration (1993) remains the only region-wide official human rights instrument. NGOs like the Asian Human Rights Commission have authored 'people’s charters', such as the Asian Human Rights Charter (1998), drawing on the expertise of jurists and academics.

There have been subregional human rights standard-setting initiatives within ASEAN. The centrepiece is the 2012 ASEAN Human Rights Declaration (AHRD), adopted as part of a broader community-building exercise. It sets the framework for human rights cooperation. Other human rights-related instruments include the 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region, 2007 Declaration on the Protection and Promotion of the Rights of Migrant Workers and the 2015 Convention against Trafficking in Persons, Especially Women and Children.

The declarations are non-binding and framed as state duties rather than individual rights, while the convention contains legal norms obliging member states to promote international cooperation in relation to transnational offences. The AHRD alone speaks of the rights of "every person" though it does not provide for any institutional processes for raising complaints.

This subregional instrument terminates the position that human rights are merely politicized imposition of foreign standards. It conclusively accepts that human rights are the common heritage of mankind, applicable irrespective of geography. It sets out the range of rights subscribed to, specifically mentioning the UDHR, UN Charter, Vienna Declaration and Programme of Action and “other international human rights instruments” to which ASEAN member states are parties, as indicated later (Table 26.1).

The AHRD clearly identifies core human rights, declaring that it affirms all civil-political and socio-economic rights in the UDHR (paras 10, 26), although various rights are diluted. For example, the right to ‘freedom of thought, conscience and religion’ (para 22) is truncated, compared to Article 18 of the UDHR, which also recognizes the right to change religious belief and to manifest this belief alone or in community. The unqualified right to life in Article 3 of the UDHR provides stronger protection as the clawback clause in para 11 AHRD provides that a person may not be deprived of life ‘save in accordance with law’. The AHRD expands on established rights like the right to health, by specifically obliging

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<th>Instrument</th>
<th>No. of ASEAN state parties or signatories</th>
<th>Non-parties</th>
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<tr>
<td>ICESCR</td>
<td>6</td>
<td>Brunei, Malaysia, Myanmar, Singapore</td>
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<tr>
<td>ICCPR</td>
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<td>Convention against racial discrimination</td>
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<td>Brunei, Malaysia, Myanmar</td>
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<td>CEDAW</td>
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<td>Convention against torture</td>
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<td>Migrant workers convention</td>
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<td>Brunei, Lao, Malaysia, Myanmar, Singapore</td>
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<td>Disabled persons convention</td>
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<td>Singapore, Thailand, Vietnam</td>
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states to adopt measures to overcome the stigma associated with communicable diseases like HIV/AIDS (para 29(2)). Collective or third-generation rights figure prominently, such as the RTD (paras 35–37). This is elaborated upon: The RTD must be fulfilled in a way that meets intergenerational developmental and environmental needs, be oriented towards poverty alleviation and equitable sharing of benefits to narrow the development gap within ASEAN. The need for a favourable international economic environment and international cooperation is acknowledged; further, the lack of development cannot excuse violations of recognized human rights. In addition, the more novel ‘right to peace’ is declared (para 38). In general, the non-absolute nature of human rights was affirmed, qualified by corresponding duties (para 6) and public goods (para 8), as well as the need to consider the regional and national contexts, while supporting principles established in the Vienna Declaration that human rights are “universal, indivisible, interdependent and interrelated.” Civil society groups have denounced the AHRD as falling short of international standards, decrying the omission of rights, such as indigenous peoples’ rights, associational rights, freedom from enforced disappearances and the LGBT agenda (Human Rights Watch, 2012; Chooi, 2012). Others urged optimism as the AHRD was a “remarkably realistic” (Severino, 2013) instrument, the basis upon which quiet diplomacy may be conducted that can actually improve lives, which pointless “bluster or threats” could not do. It is the lengthiest elaboration of human rights within ASEAN, records member states aspirations and will form the basis for future human rights dialogue and expectations.

Implementation of human rights

International level

At the multilateral level, Asian states engage with the UN human rights regime and are subject to the treaty-based state reporting system and the channels of dialogue and non-binding recommendation by supervisory bodies. UN procedures generally cannot produce individualized justice, although various optional protocols provide a forum for individuals to raise petitions alleging human rights violations. However, Asian states are reluctant to become parties to these protocols. For example, some 26 Asian states have signed or are party to the optional protocol of ICCPR and 5 in relation to the ICESCR optional protocol. Treaty monitoring committees may provide observations on whether a treaty provision has been violated but cannot issue binding judgments. Still, it can be a moral comfort and form of vindication for victims of human rights violations who did not receive a domestic remedy, as in the case concerning Filipino Karen Vertido who invoked the optional protocol to CEDAW. The CEDAW Committee held that the prohibition against gender stereotypes was violated as the judge had acquitted a rapist, relying on a sexist gender stereotype in finding Vertido did not sufficiently resist or try to escape robustly enough and so must have consented to sex. This process provides a limited degree of accountability although remedies are rarely forthcoming; nonetheless, a supportive decision by a human rights committee may promote human rights consciousness and publicity, spurring future domestic political and legal reform domestically.

National level

There have been significant changes in the law and political culture of many Asian states in the 21st century. At the domestic level, human rights may be promoted and protected
through courts and non-judicial national human rights institutions, like petitioning parliamentarians; these remedies differ in terms of accessibility and efficacy.

Many Asian constitutions contain chapters on rights, but the degree of protection this affords depends on the range of rights protected, whether these are judicially enforceable, and the judicial philosophy, including the attitude towards human rights standards, which shape how constitutions rights are interpreted and balanced against competing interests.

China has a constitution with extensive civil-political and socio-economic rights, but after the anomalous case of *Qu Yuling*, which recognized a constitutional right to education, the Supreme Court has held that the constitution is non-justiciable and cannot form the basis of the judgement of courts (Kellogg, 2009). Japanese courts have referenced international human rights law to augment the meaning of existing constitutional provisions or to found independent rights. In *Bourtz v Suzuki*, a Japanese court gave indirect effect to the anti-race discriminations of CERD, extending the constitutional prohibition against racial discrimination beyond state bodies to private persons. Article 27 of the ICCPR was also invoked in *Kayano v Hokkaido Expropriation Committee* (Levin, 1999) to underscore the rights of indigenous groups to culture. Human rights standards may influence courts to acknowledge, weigh and sometimes apply international values. Asian courts, as in Singapore, have acknowledged customary international law norms, such as the prohibition against torture, cruel and inhuman punishment as codified in Article 5 UDHR; this could influence how the constitutional right to life and personal liberty is interpreted. The Singapore court disputed whether ‘death by hanging’ fell within the ambit of cruel and degrading punishment, drawing support from *Campbell v Wood*, a US Court of Appeals decision. Indian courts have been particularly creative in seeking to protect certain human rights, although the record is mixed (Rajagopal, 2006). Although its fundamental liberties chapter contains only civil and political rights, it has famously interpreted the Article 21 right to life and personal liberty to include socio-economic rights, such as the right to livelihood, education, healthy environment and food. The ‘starvation death’ cases, such as the Supreme Court case *People's Union for Civil Liberties v Union of India*, issued orders requiring government authorities to resume mandatory school meals, stipulating the number of calories categories of schoolchildren should receive. This delves into the realm of governance. Indeed, Indian courts have produced extraordinary remedies, such as ‘legislating’ ‘guidelines’ against workplace sexual harassment, drawing from CEDAW standards in *Vishaka v State of Rajasthan*, which would be legally binding until the derelict legislature enacted suitable legislation.

The 1993 Vienna Declaration encouraged the establishment of national human rights institutions (NHRI) in accordance with the “Principles relating to the status of national institutions” (Paris Principles). The Bangkok Declaration welcomed the role played by NHRI in “the genuine and constructive promotion of human rights.” Both instruments recognized the right of states to choose what type of NHRI to adopt.

Many Asian states adopted NHRI. After 1993, in 1996, various NHRI banded together to form a currently 22-member coalition – the Asia Pacific Forum of National Human Rights Institutions (APF) – to develop independent NHRI. This includes NRHIs from South Asia (India, Bangladesh, Nepal, and Sri Lanka), South-East Asia (Indonesia, Malaysia, Myanmar, the Philippines, Thailand, and Timor Leste) and North-East Asia (Mongolia and South Korea). These represent countries at all stages of development. Conversely, Singapore has resisted having a NHRI, pointing to the courts and Parliament as venues for raising rights issues, and preferring to focus on results rather than institution building (Thio, 2004). Bills for an independent NHRI in Japan, first submitted in 2003, have not obtained traction.
NHRIs occupy a third space in mediating between civil society and the government. The mandates of NHRIs as non-judicial institutions vary but generally relate to human rights education, research, drawing attention to alleged violations, reviewing domestic law against international standards and proposing reform, and in some instances, investigating and mediating complaints. To sceptics, NHRIs are seen as placatory initiatives to deflect human rights criticism without effecting real change for lack of independence, weak powers, insufficient resources or inadequate engagement with civil society. However, NHRIs as official agencies do play a role in localizing global standards and developing a human rights culture. They may adopt a ‘carrot and stick’ approach, in publicizing human rights deficiencies or praising positive developments, through open letters and reports freely available on the internet. Despite operating in an authoritarian environment, the Myanmar National Human Rights Commission (MNHRC) has done this and even issued statements criticizing discrete human rights abuses, such as misuse of police powers in fatally firing upon demonstrators (Zaw, 2015).

While they cannot issue binding judgements or require remedies, their greatest weapon is publicity, which serves the ‘name and shame’ pressuring strategy. For example, the Philippines Human Rights Commission in 2015 agreed to launch an inquiry in response to a complaint filed by typhoon victims against 50 ‘carbon majors’ or international fossil fuel companies charged with violating human rights by driving climate change. This is a formidable challenge, but such publicity may elicit change as company reputation is at stake (Goering, 2015).

NHRIs in Asian states also raise concerns with each other where the human rights of their nationals are at stake. The MNHRC urged Thailand to protect the process rights of two Burmese migrant workers sentenced to death for murder (Finney, 2015). The Indonesian human rights commission officially asked Japan to reconsider a $4 billion thermal power plant project it partially funded because of human rights violations committed during the land acquisition process (Japan Times, 2016). This promotes some degree of transparency, which feeds into promotional activities. Asian NHRIs are also subject to an accreditation process based on the Paris Principles administered by the International Coordinating Committee for National Human Rights Institutions; the prospect of being downgraded is a pressuring tactic insofar as national prestige is at stake; in 2015, it featured in Malaysian human rights discourse (Ar, 2015).

Subregional level

Paragraph 26 of the Bangkok Declaration recognized the “need to explore the possibilities” of establishing an Asian human rights system, which, to date, does not exist. However, the ASEAN human rights mechanism has emerged at the subregional level. This was inaugurated by the 2007 ASEAN Charter, which lists amongst its purposes and principles the promotion and protection of human rights in conjunction with promoting democracy and the rule of law (arts 1(7), 2(i)). Article 14 provided for the establishment of “an ASEAN human rights body,” which eventually took the form of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) (Thio, 2007).

In times past, ASEAN preferred to deal with human rights issues within member states through quiet diplomacy, keeping the matter within the ‘family’ and stressing the principle of non-intervention in internal affairs as part of the ‘ASEAN way’. Constructive engagement with states like Myanmar, then under military rule, was favoured over confrontational, sanction-based approaches (Thio, 1999: 37). This aligns with the “balanced and
non-confrontational” approach the Bangkok Declaration (para 3) advocated. However, prior
to 2007, ASEAN states hardened their approach towards Myanmar, advocating ‘flexible
engagement’ and ‘enhanced consultations’ in response to egregious or embarrassing viola-
tions. In 2009, ASEAN issued a statement of concern over the detention and trial of then
opposition leader Aung San Suu Kyi, which the military junta denounced as interference in
internal affairs (Joshi, 2009).

The increasing focus ASEAN was according human rights is evident in the turn towards
institutionalization, creating ASEAN bodies with general and specific human rights man-
dates. The ASEAN Committee to Implement the Declaration on the Protection and Promo-
tion of the Rights of Migrant Workers (ACMW) was established in 2007, charged primarily
with promotional functions, including developing a binding ASEAN migrant workers in-
strument. In 2010, the ASEAN Commission on the Promotion and Protection of the Rights
of Women and Children (ACWC) was established with the specific mandate of upholding
CEDAW and CRC rights, treaties ratified by all ASEAN states.

In 2009, AICHR came into being; a consultative body, it operated on the principle of
consultation and consensus as does the ACWC. Its terms of reference focus on promotional
activities like dialogue, cooperation, technical assistance, research and drafting the AHRD.
No ASEAN human rights body has protective functions in the sense of receiving complaints
and issuing binding judgements (Ciorciari, 2012).

At its inception, AICHR was criticized as a ‘toothless’ entity (Wall Street Journal, 2009).
ASEAN states had mixed motives towards establishing AICHR. Some were ideationally
motivated by the persuasive force of human rights, viewing themselves as ‘progressive’. For
others, it was a rational decision, based on cost-benefit analysis of some sort, in hopes that
the system could help socialize states like Myanmar into practicing the rule of law and ob-
serving basic human rights. This would terminate the embarrassment of having any ASEAN
member states be viewed as an egregious human rights violator and pariah before the inter-
national community. The pressure to assimilate and to adopt common standards relating to
the decent treatment of individuals and their welfare would account for the motives of other
members (Munro, 2011). Given this range of attitudes, realists were not expecting the hu-
man rights body to assume the form of a human rights court with compulsory jurisdiction,
after the European model.

Nonetheless, its focus on education, research and cooperation, its lack of power to receive
and investigate complaints and the delay in addressing how to deal with civil society12 proved
frustrating to many stakeholders; NGOs published reports13 criticizing the composition, pow-
ers and performance of AICHR, and its failure to take action over cases brought to its atten-
tion, such as the 2013 disappearance of Lao activist Sombath Somphone (Ponnudurai, 2013).

The creators of AICHR embodied their preference for an evolutionary rather than revo-
lutionary approach towards developing human right norms in paragraph 2.5 of the AICHR
Terms of Reference. AICHR and other related ASEAN bodies also are evolving and argu-
ably, what is not prohibited is not proscribed. At present, the ASEAN system works pri-
marily through promotional activities and peer pressure, seeking periodic accounts for
non-progress, though certain ASEAN states like Indonesia, Thailand and the Philippines
as well as civil society hope future developments will include stronger protective functions
like powers to conduct regular reviews, to initiate investigations and on-site visits and
to receive individual complaints. State and non-state action influences how AICHR as an
institution may evolve; Indonesia, for example, takes the approach of ‘converting’ ASEAN
states to good human rights practices leading by example and not proselytization, such as
voluntarily initiating a human rights dialogue with AICHR in 2013.
The ASEAN human rights institutions were a product of political will and compromise, the offspring of pragmatism and starting somewhere, with a view to building momentum for incremental changes. It signalled ASEAN’s interest in human rights to the international community, acknowledging the basic rights of citizens in ASEAN states. This subregional development has added a new dimension to human rights discourse, from being one of marginal dissent and resistance, to also being a language of good governance. This institutional platform for dialogue and experience sharing is conducive to the transmission and socializing effect of human rights values. Only time will tell whether the ASEAN human rights system will develop positively, by accretion rather than design, and help form a people-centric ASEAN community within the southeast Asian subregion.

Conclusion

There is evidence of active human rights discourse within Asia as well as subregional institutional developments. In an era of globalization, fears about new types of human rights violations have emerged. Asian scholars number among those who identify wrongs committed by transnational corporations or the negative impact of austerity programmes imposed by international financial institutions, which curb the flow of resources given to socio-economic rights, to the especial detriment of women and children (Baxi, 2006).

Human rights violations are a universal phenomenon. In Asia, the realization of human rights has to be coupled with increased democratization and public participation within Asian states as well as economic development to fund socio-economic welfare. Although human rights dominate the field of emancipatory possibility, in Asia, there are alternative approaches, such as ‘human development’. This focuses on government duties to execute programs that promote development in aid of securing human welfare, which includes basic freedoms and basic needs. Whether human rights form the best moral language is also questioned by Asian scholars as rights languages operates in the key of adversarial assertion of claims, rather than what Baxi (2009: 177) calls the historic role of lived relations “of sacrifice, support and solidarity,” of kinship and the common good rather than the valorization of individual autonomy.

It is clear that although human rights are not considered absolute and determinative trumps, they have become a relevant, if not important factor in the deliberations and policies of governments in Asia, many of whom eschew utopian idealism in favour of pragmatic approaches to human rights. This centres on consolidating consensus on core rights, agreeing to disagree on contested claims and developing institutions in incrementalist fashions. Nonetheless, human rights remain the benchmark by which states and non-state actors criticize and assess government legitimacy.

To counter criticisms that human rights is a vehicle for West-centric universalism and self-righteous diplomacy, the inclusive participation of Asian states and non-state actors in global and regional dialogues about human rights and foundational questions concerning human dignity and the human good is necessary. In this ‘Asian Century’, it appears states in Asia are increasingly disposed to engage vigorously in this conversation and to take steps to actualize aspiration, even if the pace is cautious and progress is modest.

Notes

1 The Committee overseeing the Covenant on Economic, Social and Cultural Rights has noted that the Covenant does not preclude or require “any particular form of government or economic system” provided it is “democratic and that all human rights” are respected: General Comment 3: (Art 2(l)), Fifth Session, 1990, para 7.
2 Compare Nappalli Peter Williams v Institute of Technical Education [1999] 2 SLR 569, 575G-H (Singapore Court of Appeal) with the Malaysia Lina Joy litigation: [2004] 2 Malayan Law Journal (MLJ) 119 (High Court); [2005] 6 MLJ 193 (Court of Appeal); [2007] 4 MLJ 585 (Federal Court).
3 Notably, Saudi Arabia, which abstained from voting for the UDHR, objected to this aspect of religious freedom.
4 Koushal v Naz Foundation (Civil Appeal No. 10972 of 2013, Indian Supreme Court); Lim Meng Suang v AG [2014] SGCA 53 (Singapore Court of Appeal).
8 18 F 3d 662 (1994), cited by the Singapore Court of Appeal in Nguyen v Public Prosecutor [2005] 1 SLR(R) 103.
9 Supreme Court Order, Nov 28 2001.
10 AIR 1997 SC 3011. It was only in 2013 that the Sexual Harassment Act was enacted.
12 Guidelines on AICHR’s relations with Civil Society Organizations were adopted on 11 February 2015.

References


