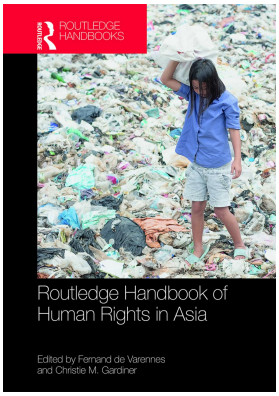

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An emerging Asian human rights regime as a tool for protecting the vulnerable in Asia?

Lessons from the UN human rights system and other regional human rights regimes

Debra L. DeLaet

Introduction

In advance of the 1993 World Conference on Human Rights in Vienna, a group of governmental representatives from Asian states met in Thailand to formalise their support for the Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights.[1] This document, which has come to be known as the 'Bangkok Declaration', represented the position of these Asian governments at the 1993 World Conference and Human Rights.

The Bangkok Declaration includes a number of provisions that articulate support for universal human rights, including reaffirmation of commitment to the Universal Declaration on Human Rights (para. 1) and to the 'interdependence and indivisibility' of economic, social, and cultural rights and of civil and political rights (para. 10). Although the document recognises interdependence and indivisibility among rights, it includes numerous provisions emphasising the importance of economic rights as foundational, including highlighting the right to development (para. 17) and identifying global inequities and poverty as fundamental obstacles to the attainment of human rights (para. 18 and para. 19). The Bangkok Declaration notably stresses the importance of guaranteeing fundamental human rights for vulnerable groups, including ethnic, national, racial, religious, and linguistic minorities, migrant workers, disabled persons, indigenous populations, and refugees and displaced persons (para. 11).

The Bangkok Declaration qualifies its support for universal human rights in a number of significant ways. It discourages the use of human rights conditionality in the provision of development assistance (para. 4) and stresses the ongoing importance of respect for the principles of national sovereignty, territorial integrity, and non-interference in the internal affairs of states (para. 5). Relatedly, it reaffirms the importance of self-determination, encompassing rights to freely determine both political systems and economic, social, and cultural development (para. 6 and para. 12). The Bangkok Declaration emphasises that universal human rights must be considered in the context of 'national and regional peculiarities and various historical, cultural, and religious backgrounds' (para. 8) and claims for states the primary responsibility for promoting and protecting universal human rights (para. 9).

In its expression of both commitments and qualifications to universal human rights, the Bangkok Declaration balances an aspirational rhetoric, inspired by a universalistic normative framework, and a more pragmatic discourse deferring to state interests and cultural values. This delicate balancing act is evident in the potential institutional responses that the Declaration identifies for advancing human rights in Asia. The declaration calls for a 'balanced and non-confrontational approach' in pursuit of human rights (para. 3). To this end, it acknowledges the need to explore the possibilities for establishing regional approaches to human rights protection and promotion (para. 26) but does not provide significant detail regarding the necessary elements for an effective regional human rights regime.

The Bangkok Declaration highlights an ongoing debate over the compatibility of 'Asian values' and universal human rights (Ciorciari 2012: 700–703). Lee Kuan Yew, the former prime minister of Singapore, famously argued in favour of an 'Asian values' perspective that would justify authoritarian governance. In a high-profile piece in *The New Republic*, Amartya Sen strongly contested the notion that 'Asian values' are inconsistent with human rights. Characterising the tendency to depict Asia as a single, homogenous entity as a Eurocentric view, Sen countered, 'there are no quintessential values that separate the Asians as a group from people in the rest of the world and which fit all parts of this immensely large and heterogeneous population' (Sen 1997: 34).

The fact that Asia, unlike other world regions, does not have a well-developed human rights regime has been used to support the argument that a cohesive set of 'Asian values' are inconsistent with human rights. Conversely, others have argued that it is precisely the lack of cultural, economic, or political cohesion in Asia that helps to explain the lack of established regional human rights procedures and mechanisms (Donnelly 2013: 179). Regardless of the reason, the lack of strong regional human rights norms and institutions distinguishes Asia from most other regions in the world; only the Arab world has been similarly slow to institutionalise human rights at a regional level (Donnelly 2013: 178).

Despite limited progress to date, a nascent human rights regime is emerging in Asia, or at least in sub-regions across Asia. In 2009, the Association of Southeast Asian Nations (ASEAN) created the Intergovernmental Commission on Human Rights (AICHR). Following this development, ASEAN created the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in 2010. The Asia Pacific Forum of National Human Rights Institutions (APF), a body that coordinates the activities of national-level human rights commissions in the area, also represents progress on the goal of institutionalising human rights in Asia. Because this body involves institutions *within* states, it arguably does not constitute the beginnings of a truly regional regime. Similarly, the ASEAN bodies are limited to a sub-region within Asia and, as such, cannot be described as a regime for the entire region. At the same time, these institutional developments indicate the emergence of bodies that represent a potentially unique path to institutionalising universal norms within a regional context.

In examining these institutional developments, this chapter compares and contrasts the emerging human rights regime in Asia with the global human rights regime and with other regional regimes. In doing so, the chapter challenges the notion that the institutionalisation of human rights at the regional level in Asia reflects a distinctly Asian approach to human rights, rooted in divergent 'Asian values'. Undoubtedly the development of formal human rights mechanisms in Asia has proceeded slowly, and the institutionalisation of human rights in Asia lags far behind that of most other regions. At the same time, the obstacles to human rights institutionalisation in Asia are similar to barriers to the effective promotion and protection of human rights via formal law and institutions at the global level and in regional regimes elsewhere. Further, the limitations of the emerging Asian human rights regime, a system characterised by a limited number of

institutions governed by ambivalent norms with weak enforcement mechanisms, are shared, to varying degrees, with international human rights law as institutionalised in the UN system and with other regional regimes.

The UN human rights system

The United Nations (UN) system is the primary site of governance for the international human rights regime. The impressive body of international human rights treaties developed in the aftermath of the Second World War provides the legal foundation for this regime. Although these treaties codify human rights as universal rights, international human rights law ultimately remains a state-centric body of law. Likewise, UN human rights institutions reflect the statist dynamics of the international system, which limits its capacity to generate substantial and meaningful change.

The progressive codification and institutionalisation of international human rights law has been one of the most impressive and hopeful political developments in the twentieth century and beyond. Before the Second World War, distinct international human rights laws and institutions did not exist, apart from humanitarian laws governing state conduct during war and the 1926 Slavery Convention. In the aftermath of the Second World War, the development of international human rights laws was rapid and prolific, beginning with the adoption of the non-binding Universal Declaration of Human Rights by the General Assembly in 1948.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both signed in 1966 and entering into force in 1976, are binding treaties that codify an expansive list of universal human rights. They constitute the core of the international human rights regime. In addition to these core legal documents, the international human rights regime consists of numerous specialised human rights treaties that codify human rights norms in specific issue areas, including genocide, refugees, slavery, racial discrimination, torture, enforced disappearance, the protection of migrant workers, women's rights, and children's rights (DeLaet 2015: 31–35).

The codification of international human rights norms represents an important development in the emergence of a system of global governance, operating primarily within the framework of the United Nations. Governments and non-governmental actors leverage international human rights norms in domestic policy-making and legislative processes, an indication that international norms may contribute to the advancement of human rights in specific countries. Moreover, national courts have drawn on international human rights laws in domestic legal decisions. Yet, states and non-state actors continue to commit systematic and gross violations of human rights across the globe without consequence, and meaningful progress in improving the status of global human rights via international law and institutions has, to date, been limited.

The institutionalisation of international human rights laws within the UN illustrates the state-centric nature of the UN human rights system and helps to explain why international human rights law has not been more effective in promoting global human rights. The core of the UN human rights system includes nine treaty-monitoring bodies, one for each of the major treaties that constitute the international human rights regime: (1) the Human Rights Committee (ICCPR); (2) the Economic, Social and Cultural Rights Committee (ICESCR); (3) the Committee Against Torture (UNTC); (4) the Committee on the Elimination of Racial Discrimination (CERD); (5) the Committee on the Elimination of Discrimination Against Women (CEDAW); (6) the Committee on the Rights of the Child (CRC); (7) the Committee on the Rights of Persons with Disabilities (CRPD); (8) the Committee on Enforced Disappearances (CED); and (9) the Committee on Migrant Workers (CMW). In each case, the

pertinent treaty establishes a committee with only weak monitoring powers, largely based in the voluntary submission of regular reports to the associated treaty-monitoring body followed by committee review and constructive dialogue with state parties (Office of the High Commissioner for Human Rights, 'United Nations Human Rights Programme'). Because treaty-monitoring bodies may only make non-binding recommendations in this process, states commonly do not follow these recommendations (DeLaet 2015: 139–141). Each treaty-monitoring body also issues general comments that offer interpretations of treaty obligations intended to influence state implementation efforts and that may be used by human rights groups in their advocacy efforts (Donnelly 2013: 167–168).

International complaint procedures also allow individuals to bring claims to the pertinent treaty-monitoring bodies, with the exception of the CRPD and the CMW for which complaint mechanisms have not yet entered into force. These complaint procedures allow individuals to lodge claims with treaty-monitoring committees against states if the state in question has both ratified the relevant treaty *and* recognises the competence of the committee to hear such claims. If a treaty-monitoring committee decides against a state in regards to an individual complaint, it will invite the state party to supply information within a specified time period regarding steps it has taken in response to the committee's findings. Although the decisions of human-rights-monitoring committees are considered authoritative interpretations of the treaties over which they have jurisdiction, their recommendations and rulings are not legally binding on states (Office of the High Commissioner for Human Rights, 'Human Rights Treaty Bodies: Individual Communications').

In addition to the treaty-monitoring bodies, the UN human rights system includes subsidiary bodies and specialised agencies with particular responsibilities for the promotion of human rights. The Human Rights Council (HRC), a body comprising 47 members elected by a majority of the General Assembly, has responsibility for promoting universal respect for the protection of all human rights and for making recommendations regarding human rights violations. This responsibility is carried out primarily through a 'universal periodic review' of the human rights records of all member states. The universal periodic review is based on state submission of reports detailing their records for fulfilling treaty-based human rights obligations, and the HRC does not have any mechanism to sanction states for non-compliance. The HRC also can receive and investigate specific complaints from states, non-governmental organisations, and individuals regarding patterns of systemic violations of human rights. However, the HRC may not publicise the nature of specific complaints or its discussion and, upon reaching decisions, can do little more than condemn rights violations (DeLaet 2015: 137–139). Notably, even absent strong enforcement mechanisms, these complaint procedures may be perceived as too adversarial to generate cooperative behaviour from states against which complaints have been brought (Donnelly 2013: 164). Nonetheless, Donnelly contends that the reporting process itself can be valuable in encouraging states to reflect on their human rights processes, procedures, and institutions, especially in countries with an active civil society, and that such reflection may lead to incremental change (Donnelly 2013: 166).

The UN Office of the High Commissioner for Human Rights (OHCHR) serves as a coordinating agency for human rights activities in the UN system. In this capacity, it plays an advisory role to other human rights institutions, supports and conducts research, and writes reports. Other specialised agencies with responsibilities for promoting specific human rights include the UN International Children's Emergency Fund, the UN High Commissioner for Refugees, and the UN Development Programme. In all cases, these agencies have responsibilities limited largely to norm creation, information gathering and dissemination, and the coordination of aid. The UN human rights system also includes offices of special rapporteurs or working groups in

specific issue areas, including torture, arbitrary detention, freedom of religion, and the right to food that have had success in improving the human rights situations of particular individuals (Donnelly 2013: 163).

Collectively, the institutions in the UN human rights system emphasise norm creation, information gathering, monitoring, and, sometimes, public condemnation as tools for promoting international human rights. The international human rights regime includes only fledgling judicial mechanisms for rendering authoritative interpretations and applications of international human rights law that have not developed into effective mechanisms for consistently and comprehensively prosecuting violations of human rights. The limitations of the UN human rights system reflect the lack of political will on the part of states to engage in serious efforts to implement human rights norms rather than an inherent flaw in the UN system. As Nigel White (2002: 232) concludes, 'the problem is not the lack of human rights standards and mechanisms but the willingness of states to comply with obligations. The law is binding on states; the lack of enforcement is a combination of institutional deficiency and state unwillingness'.

Regional human rights regimes

Regional human rights systems offer an alternative path for promoting and protecting universal human rights in specific regions of the globe. Regional regimes have been institutionalised to varying degrees in Europe, the Americas, and in Africa. To a lesser extent, Arab countries have begun to institutionalise a regional framework for implementing human rights in the Arab world. Similarly, governments in Asian countries have begun to develop mechanisms for coordinating the promotion of human rights in parts of Asia.

The regional human rights regimes vary significantly in terms of the degree of institutionalisation, the scope of their activities, and the extent to which they create meaningful mechanisms for enforcement. Despite significant differences, regional regimes mirror the UN human rights system in replicating a predominantly state-centric and non-adversarial approach to the advancement of human rights. This section provides a brief overview of the human rights institutions in different regions to illustrate the similarities and differences among them as well as between regional regimes and the UN system.

The European human rights system

The European human rights system is the strongest and most fully developed among the regional human rights regimes. In fact, the human rights regime in Europe goes beyond the UN human rights system in creating concrete obligations for states. The foundational treaties for the European human rights regime include the European Convention for the Protection of Human Rights and Fundamental Freedoms, which codifies civil and political rights, and the European Social Charter, which delineates economic, social, and cultural rights.

Currently, the European Court of Human Rights provides the institutional core of the European human rights system. This Court has the strongest of any regional human rights regime and, indeed, surpasses the enforcement authority of existing institutional mechanisms in the UN human rights system. Under Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1997 and entered into force in 1998, individuals as well as states have direct standing and can bring complaints before the Court. Prior to this time, a now-defunct European Commission on Human Rights, a political body with elected members from states parties to the Convention, had automatic jurisdiction in the case of state complaints and optional jurisdiction in the case of complaints from individuals

or NGOs. The Commission could engage in fact finding, help to negotiate settlements, and issue non-binding recommendations regarding its review of complaints received in either manner. The Court has the authority to issue binding decisions, and the Committee of Ministers of the Council of Europe has responsibility for overseeing the 'execution of judgments' by states.

The enforcement authority of the Court has function as well as form—member states have altered human rights policies in numerous cases involving a range of issues, including the treatment of immigrants, prisoner detention policies, and matters related to privacy and freedom of the press (Donnelly 1998: 69–70). Beyond the fact that its rulings have directly led to policy changes, the Court's decisions also have shaped domestic court decisions in member states. Despite having meaningful enforcement powers, the European Court of Human Rights does not entirely displace the statist politics that characterise the international human rights regime. The Court's membership, elected by the Consultative Assembly of the Council of Europe, comprises a member from each state party to the European Convention.

Enforcement mechanisms for economic, social, and cultural rights are not as strong as the framework for protecting civil and political rights. Under the European Social Charter, member states are supposed to submit biennial progress reports that are reviewed by a Committee of Experts, appointed by the Committee of Ministers of the Council of Europe. The Committee of Experts issues its findings to the Committee of Ministers that may make non-binding recommendations (Weston, Lukes & Hnatt 1992: 247). In addition to this obligatory review process, the European Committee of Social Rights, the body responsible for overseeing the implementation of the European Social Charter, may receive and review complaints from individuals against states who have accepted an optional protocol to the Charter (Forsythe 2000: 119).

The European human rights regime also includes the Office of the European Commissioner for Human Rights, created by the Council of Europe in 1999. Elected by the Parliamentary Assembly of the Council of Europe for a six-year term, the European Commissioner has the responsibility and authority to raise awareness and promote human rights education in member states, to monitor member states' human rights records in order to identify shortcomings in their compliance with human rights obligations, and to promote and advance human rights norms among member states. The Commissioner is not authorised to receive or evaluate individual complaints of human rights abuses and pursues a largely non-adversarial engagement with governments.

One of the reasons that the European human rights regime has been relatively successful is that, generally speaking, European countries have relatively strong human rights records and share a basic commitment to the idea of universal human rights. As Jack Donnelly has noted,

> A cynic might argue that the breadth and strength of the European human rights regime simply illustrate the paradox of international action on behalf of human rights: strong procedures exist where they are least needed. Because they require the permission of states, they are likely only where states have a high interest and good records.
>
> *(Donnelly 1998: 71)*

In sum, the European human rights regime has been effective largely because of the political commitment among European states to fundamental human rights norms and not because the regime has superseded the statist nature of politics in the region.

The inter-American human rights system

The Inter-American Commission on Human Rights (CHR), created by the Organization of American States (OAS) in 1959, is the core institution in the inter-American human rights system.

The Commission comprises 11 members, elected by the OAS General Assembly, and has limited authority for promoting human rights. The CHR may engage in activities to raise awareness about human rights and can request information about human rights issues from member states. The CHR also has the authority to engage in efforts to negotiate friendly settlements to disputes. In these cases, the Commission reports its involvement to the OAS secretary-general and, in the event that a settlement is reached, the secretary-general issues a public report. If efforts to resolve disputes fail, the secretary-general can issue a confidential report or can make non-binding recommendations to the parties involved. The Inter-American Commission also receives, reviews, and issues non-binding recommendations on annual human rights reports from member states. Although the Inter-American Commission may receive and review individual complaints, it has rarely exercised this authority. When it has reviewed individual complaints, its decisions in these cases have generally been disregarded by member states (Donnelly 1998: 72).

The Commission also may file cases with the Inter-American Court of Human Rights, at which individuals do not have standing and may not bring cases directly to the Court. The Court, with 11 members elected by member states, issues binding decisions that the OAS General Assembly may seek to enforce by imposing sanctions on states. However, the OAS has not widely used its enforcement authority in the limited number of cases decided by the Court (Baehr 2001: 79).

The African human rights system

The 1981 African Charter on Human and Peoples' Rights provides the legal framework for the African human rights system. The African Commission on Human and Peoples' Rights is the institutional core of the African human rights system. With a membership comprising 11 members elected by the heads of state of the African Union, the Commission fundamentally reflects the statist nature of the regional system in Africa, even though members are supposed to serve in an independent capacity and do not represent their home governments. The African Commission has adopted a non-adversarial approach to human rights promotion, primarily centred on educational initiatives, information exchange, and the capacity to negotiate friendly settlements to disputes. Like other monitoring bodies in the UN and other regional systems, the Commission reviews biannual reports that states parties are required to submit under the African Charter. However, the Commission may only issue non-binding recommendations in response to these reports.

The Commission also has the power to receive communications from individuals and non-governmental organisations as well as states regarding state violations of human rights. Upon receiving a complaint and deciding it is admissible, the Commission first seeks to mediate a friendly settlement among parties. If efforts at friendly dispute settlement fail, the Commission rules on whether or not a violation has taken place and, in cases of violations, may make non-binding recommendations. The Commission's recommendations are only made public if accepted by the state that is the subject of the complaint (African Commission on Human and Peoples' Rights). In general, the Commission emphasises cooperative mechanisms rather than adversarial processes.

The African Court on Human and Peoples' Rights (ACHPR), which came into existence in 2004, is charged with interpreting and protecting the rights enumerated in the African Charter. To date, the Court has not been terribly active and has only issued rulings in a few cases. In a manifestation of the ways in which regional regimes might actually undermine the promotion of universal human rights, the African Union actively discourages the prosecution of international crimes in the ICC and asserts a preference for prosecuting human rights violations in the

ACHPR, despite its limited activity to date (*The Economist* 2012). In 2008, African Union states adopted a new protocol to the African Charter that calls for the African Court on Human and Peoples' Rights to merge with the Court of Justice of the African Union (created in 2003) to form a single court to be called the African Court of Justice and Human Rights. To date, no such merged court has been brought into existence, and judicial action in the African human rights system remains limited.

The human rights system in the Arab world

The human rights system in the Arab world remains underdeveloped. Since 1968, the Permanent Arab Commission on Human Rights, created by the League of Arab States, has operated with a focus on the occupation of the West Bank and Gaza (Donnelly 2013: 172). In 2004, the League of Arab States adopted the Arab Charter of Human Rights that entered into force in 2008. This Charter calls for the creation of a Committee of Experts on Human Rights that will receive reports and monitor progress toward human rights in member countries. To date, progress on the institutional development of this Charter has been limited. Like other regional commissions, the powers of this Committee are restricted to the review of state reports and the subsequent issuing of non-binding recommendations.

A new human rights regime for Asia?

Unlike most other regions of the world (with the exception of the Arab world), Asia has been slow to institutionalise international human rights. Asian states have generally low rates of ratifying international human rights treaties (Mayer 2013: 315; Rathgeber 2014: 158–160). Even when Asian states have ratified international human rights treaties, they have frequently attached reservations to their ratifications (Ciorciari 2012: 707). The Human Rights Council's universal periodic review processes have revealed significant gaps between treaty-based commitments to universal rights and actual respect for human rights in Asian countries (Rathgeber 2014: 158–160). Asian countries have also been resistant to monitoring by Special Rapporteurs (Rathgeber 2014: 158).

Further, the politics of human rights in Asia are characterised by a notable deficit in the development of regional norms and mechanisms for advancing rights. To the extent that Asian countries, collectively, have sought to institutionalise human rights, they have done so only to a limited extent. Unlike other regions, Asian states have not adopted a human rights treaty that covers the region in its entirety. Accordingly, there is no human rights commission or court that sets human rights standards or processes for the region as a whole. The region does not have a common complaint mechanism that might provide redress for individuals or groups whose rights have been violated.

One challenge to the creation of a broad regional human rights regime in Asia is the lack of a clear-cut demarcation of the geographical and cultural boundaries of Asia. The region as a whole includes a multitude of potential sub-regional divisions, including Central Asia, Eastern Asia, Southeastern Asia, Southern Asia, and Western Asia.[2] Asia is the world's most populous region and contains a multitude of languages, ethnicities, religions, and cultures. In this context, it is reasonable to ask whether Asia—broadly defined—can be expected to have a collective identity and a common approach to human rights (Mayer 2013: 315–316).

Despite the lack of a comprehensive set of human rights institutions across Asia, sub-regional institutional developments, especially in Southeast Asia, suggest the potential emergence of a

nascent human rights regime in Asia. It is important to acknowledge and examine the sub-regional progress that has been made in recent years in order to accurately assess the ways in which the Asian approach to human rights differs from other regions.

The institutionalisation of human rights in the Association of Southeast Asian Nations

Formed in 1967, the Association of Southeast Asian Nations (ASEAN) did not adopt a formal charter until 2007. This Charter, which entered into force in 2008, represented a significant first step towards the creation of a sub-regional human rights system. Article 14 of the ASEAN Charter asserts that the organisation shall establish a human rights body with responsibilities for promoting and protecting human rights and fundamental freedoms in the region. The Charter includes other provisions that articulate support for universal human rights. At the same time, the Charter reaffirms the importance of the principle of non-interference in the internal affairs of member states. Ultimately, the Charter upholds the fundamental importance of state sovereignty as a norm that ultimately trumps universal human rights (Ciorciari 2012: 711).

Despite the statist underpinnings of the Charter, ASEAN followed through on its commitment to establish a human rights body soon after the Charter entered into force with the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. Soon thereafter, in 2010, ASEAN created the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The AICHR has already advanced the development of sub-regional human rights norms via its adoption of the ASEAN Human Rights Declaration in 2012 (Rathgeber 2014: 161). Although the creation of these two human rights bodies and the Declaration are noteworthy, it is important to acknowledge that these developments represent minimal steps towards the creation of a weak sub-regional human rights system.

The ASEAN Declaration is a non-binding set of norms. Although it articulates an ambitious set of human rights norms, it undercuts these aspirations with qualifications that defer to state sovereignty and the principle of non-interference. Its state-centric nature is underscored by the fact that state representatives were exclusively involved in its negotiation; civil society actors were excluded from the process (Davies 2014: 111–114).

The AICHR is primarily a consultative body and does not have investigative or enforcement powers. Instead, its responsibilities largely involve consultation and constructive dialogue with states parties. The commission does not have the authority to receive complaints from individuals or non-governmental organisations. Moreover, the body has sought to limit the capacity of non-governmental organisations to shape human rights policies by limiting its engagement to civil society organisations that have received governmental approval (Gomez & Ramcharan 2012: 27–28). AICHR decisions are to be made on the basis of consensus, which results in each member state having a de facto veto over Commission recommendations (Ciorciari 2012: 715). AICHR has the authority to gather information about human rights issues, to develop non-binding strategies for advancing human rights, and to issue reports about human rights conditions in the region. Underscoring the state-centric nature of this nascent human rights framework, the Commission reports to the foreign ministers of ASEAN (Rathgeber 2014: 161).

Not only have ASEAN human rights norms and institutions failed to create strong enforcement mechanisms, but they may also make it more difficult for non-state actors to pressure ASEAN governments on human rights issues (Ginbar 2010: 517–518). According to Ciorciari, the AICHR and the ACWC

> 'institutionalize' human rights in the sense of confining them to a controlled bureaucratic environment, enabling ASEAN members to address (or deflect) criticism by discussing human rights in a safe political space in which incumbent government officials control the pace and content of the discourse.
>
> *(Ciorciari 2012: 697)*

In short, the ASEAN human rights bodies provide legitimacy gains for member states without creating concrete obligations for these states to make progress on specific human rights commitments.

ASEAN states have also cooperated in developing norms in specialised issue areas. The ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children, adopted in 2004, calls for further development of a regional regime to combat human trafficking. Similarly, in 2007, ASEAN states adopted the Declaration on the Protection and Promotion of the Rights of Migrant Workers, which includes non-binding recommendations for ASEAN governments to take steps to protect migrant workers and, to this end, to develop a formalised legal instrument codifying and institutionalising such protections. ASEAN progress in articulating new norms legitimates the international human rights project and may serve as a model for human rights standard-setting in the region (Davies 2014: 123; Rathgeber 2014: 161–163). However, non-binding declarations do not create concrete, enforceable commitments for states. In this way, they remain very deferential to state interests and preferences even as they articulate aspirational human rights norms.

Not surprisingly, human rights indicators from Freedom House, the US State Department, and Amnesty International demonstrate that most states in Southeast Asia have not made progress subsequent to the development of ASEAN human rights institutions (Ciorciari 2012: 708). Worse, the Commission may actually undermine the capacity of non-governmental organisations to advocate on behalf of human rights in Southeast Asia. Again, according to Ciorciari,

> if the Commission does just enough to placate some constituencies and outside observers, it may actually provide a thin layer of added political cover for continued abuses. This is the sense in which 'institutionalizing' human rights can mean something more akin to imprisonment than reification.
>
> *(Ciorciari 2012: 720)*

The Asia Pacific Forum of National Human Rights Institutions

The Asia Pacific Forum of National Human Rights Institutions (APF-NRI), a body that coordinates the activities of national-level human rights commissions in the region, represents another development in the formation of a nascent human rights regime in Asia. The Asia Pacific is the broadest geographical categorisation of the Asian region and encompasses a broad set of states, including Pakistan, India, China, Japan, Southeast Asia and other sub-regions, Australia, New Zealand, and other Pacific islands (Croyden 2014: 289–290). National human rights bodies of Australia, India, Indonesia, and New Zealand joined together to create the APF-NRI in 1996 as a means of coordinating their institutional activities. The APF-NRI shares expertise, fosters institutional partnerships, and leverages institutional networks in striving to advance human rights objectives among its membership.

As its name suggests, the APF-NRI consists of national-level human rights commissions from countries in the Asia Pacific region. Although these commissions have been formally established by national legislation in their respective countries, they operate with a degree of

independence from the state. APF-NRI members must be accredited by the International Coordinating Committee of National Human Rights Institutions. To this end, national human rights institutions must demonstrate compliance with the Paris Principles, a set of international standards related to the independence of domestic human rights bodies, in order to be accredited. The Paris Principles, generated under UN auspices in 1991, identify six criteria for effective national human rights institutions, including a clearly defined and broad-based mandate based on universal human rights standards, autonomy from the government, independence explicitly protected by legislative measures or the constitution, pluralistic and representative membership, adequate resources, and adequate powers of investigation. Notably, APF members are subject to re-accreditation every five years, so their compliance with the Paris Principles must be ongoing (Croyden 2014: 292).

The APF-NRI currently has 15 full members that have been accredited as complying fully with the Paris Principles. These members include the national human rights institutions from Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, the Philippines, Qatar, Republic of Korea, Thailand, and Timor-Leste. The APF-NRI also has seven associate members that have not been accredited as complying fully with the Paris Principles. National human rights institutions from Bangladesh, Kazakhstan, the Maldives, Myanmar, Oman, Samoa, and Sri Lanka are associate members.[3] In addition to fostering cooperation among their members, the APF-NRI seeks to improve human rights conditions in the region by expanding its membership. To this end, the APF-NRI has advocated on behalf of the creation of national human rights institutions in Japan, Taiwan, and China. APF-NRI efforts have generated some progress in Japan and Taiwan, where national human rights institutions are being formally considered (Croyden 2014: 296–302).

The APF represents a distinctive approach to balancing aspirational norms with statist politics in the effort to develop a regional human rights framework. On the one hand, the APF-NRI appears to preserve even more power for states than other regional regimes by locating the site of human rights institutions *within* states. In this regard, it arguably does not constitute the beginnings of a truly regional regime. On the other hand, the APF-NRI creates conditions for membership that transcend the authority of the state. Further, the independence of the national human rights commissions that are members of the APF-NRI may reflect a greater deal of autonomy than regional (or sub-regional) institutions whose authority fundamentally defers to state interests.

The fact that human rights are institutionalised *within* the state in the APF-NRI model does not necessarily mean that this approach is more state-centric than one built on regional institutions that transcend the state. Indeed, when human rights institutions are located beyond the state, state elites may be more likely to shape policy and implementation measures without pressures from civil society actors who do not have the same access to these institutions. In contrast, because national human rights institutions are located within particular states, they may be more likely to remain accessible to domestic human rights advocacy groups and to create political spaces in which civil society actors have opportunities to influence human rights policies. In this regard, the APF model may be more likely to generate bottom-up implementation efforts to advance human rights that fundamentally differ from the more top-down model of creating formal law and institutions above the state.

Conclusion

As this chapter has shown, Asia does not have a well-developed human rights regime. The development of regional human rights institutions has largely been limited to the sub-region of Southeast Asia, as represented by ASEAN human rights initiatives, and to the development of national

human rights bodies coordinated by the APF. The low degree of human rights institutionalisation in Asia has been cited in support of the argument that a cohesive set of 'Asian values' are inconsistent with human rights and that the institutionalisation of human rights (or lack thereof) represents a distinct Asian approach to universal human rights. According to Acharya, an Asian approach to human rights implementation 'involves a high degree of discreteness, informality, pragmatism, expediency, consensus-building, and non-confrontational bargaining styles' (Acharya 1997: 329, quoted in Rathgeber 2014: 160).

If the institutionalisation of human rights in Asia is looked at in isolation, the argument that there is a unique Asian approach to human rights might be compelling. However, a close examination of other regional human rights systems suggests that the Asian approach is not as distinctive as it might appear at first glance. To be sure, the institutionalisation of human rights frameworks in other regions far surpasses what has happened in Asia to date. Yet, even the most well-established regional regimes face the same barriers to the effective promotion and protection of human rights that have constrained the development of a more comprehensive human rights system in Asia.

Regional human rights systems typically remain deferential to state sovereignty in their efforts to promote human rights. They tend to be governed by legal documents that contain ambivalent norms, loopholes, and ill-defined state obligations. Regional human rights institutions have minimal monitoring powers and weak enforcement mechanisms. The European human rights system, which challenges sovereignty more than any other regional system, provides a limited exception to these tendencies.

In comparison to Asia, most other regions may have more formal laws on the books and a larger number of institutions that are active in the sphere of human rights. However, these institutions are primarily engaged in monitoring, norm creation, and non-adversarial mediation roles. These activities may contribute to human rights improvements at the margins and may provide relief in a limited number of cases to individual victims of human rights violations. Yet, it is not evident that regional mechanisms have been effective at a macro-level in producing systemic improvements in human rights conditions.

Jack Donnelly (2013: 178) has observed that 'the character of regional mechanisms is a consequence, rather than a cause, of the regional pattern of human rights performance'. Human rights scholars and advocates are well-served to heed this insight. When it comes to the promotion of universal human rights and the protection of the vulnerable anywhere, the problems run far deeper than the absence of effective regional human rights mechanisms. Although the differences in the institutionalisation of human rights across regions matter at the margins, the similarities in state behaviour are more striking and meaningful.

The systemic causes of human rights violations lie within states and the state system. International human rights law—as a body of law created by states—is inherently state-centric and, as such, cannot provide the solution to systemic human rights violations. At the end of the day, regional human rights regimes do not escape the statist dynamics that characterise international human rights law and institutions. Ultimately, the state-centric nature of the international human rights system has had limited effects on actual state behaviour and policy (Hafner-Burton 2013: 44–66). The same can generally be said of regional human rights systems, regardless of how well they are institutionalised.

This reality is a difficult one to accept for proponents of human rights for whom formal law and institutions often seem an obvious response to persistent and pervasive human rights abuses across the globe. However, the limited effectiveness of regional human rights systems—and the international human rights regime in general—suggests that change must originate with politics and not the law. Public international law is rooted in a top-down conception of change. Instead,

bottom-up pressures arising within states are more likely to leverage change than abstract and distant formal law and institutions (Ciorciari 2012: 724). To be sure, non-governmental organisations and civil society actors may leverage the law in their efforts to mobilise change (Davies 2014: 123). However, formal law and institutions are not sufficient. Further, in some cases, they may actually serve as an obstacle to change if states use their participation in formal human rights frameworks to gain legitimacy without taking concrete steps to improve human rights and if these frameworks create exclusionary political spaces that limit the extent to which non-governmental organisations and civil society actors participate in human rights discussions. In this regard, the APF may present a more promising model for regional implementation than formal regional human rights institutions.

At the end of the day, the nascent human rights regime in Asia does not represent a distinctly Asian approach to human rights. Rather, it represents the prevailing statist approach to international human rights that characterises the generally weak international legal order. The state-centric nature of the international system is deeply entrenched, and achieving advances in human rights in this context will never be easy. However, initiatives that focus on particular local contexts within states as potential sites of change may have more promise than efforts centred on international or regional legal frameworks given state dominance of these formal legal institutions.

Notes

1 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/125/95/PDF/G9312595.pdf?OpenElement.
2 These sub-regional divisions are categorised by the United Nations Statistics Division.
3 See Membership of the Asia Pacific Forum, www.asiapacificforum.net/members.

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