

USALI Perspectives

Adaptive Protection: Strengthening ASEAN's Human Rights Regime through Scrutiny

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Human rights advocates frequently criticize the Association of Southeast Asian Nations (ASEAN) for addressing human rights through soft rather than hard law mechanisms. The ten-nation group's human rights system – comprising the ASEAN Intergovernmental Commission of Human Rights (AICHR), ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and the ASEAN

Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) – mainly carries out [promotional activities](#) for public education. It lacks the formal reporting, monitoring, and complaints functions of other international and regional human rights systems. There is also no ASEAN human rights court.

Yet as ASEAN's human rights system evolves, [there are grounds for optimism](#) that it is gradually developing scrutiny mechanisms to increase human rights protection. Evidence for this can be found in the little-studied ASEAN human rights reports produced by the AICHR and ACWC. A phenomenon that I term "adaptive protection" is quietly occurring.

Adaptive protection is a three-phase process in which ASEAN human rights officials, by building upon member states' growing familiarity with the reporting, reviewing, and recommendation processes of the UN's human rights system -- such as Universal Periodic Review (UPR), review by expert bodies established under the Convention on the Elimination of Discrimination against Women and Convention on the Rights of the Child, and the various [complaints mechanisms](#) – have stealthily adapted (albeit loosely) similar scrutiny functions to protect human rights. This is primarily done by asking ASEAN states for more human rights data, thus increasing transparency and seeking greater state accountability for actions taken to address abuses and prevent future occurrences.

Surprisingly, this has garnered [grudging](#) acquiescence by ASEAN states, as evinced in the formal recognition of an ASEAN informal [complaints mechanism](#) in 2019 and the 2020

undertaking by AICHR to institute a monitoring and evaluation mechanism (although implementation has been delayed by the pandemic).

Adaptive protection comprises three concurrent phases of establishing scrutiny functions: foundational institution-building, thematic reporting, and nascent protective mechanisms of scrutiny. In the first phase, ASEAN human rights officials develop institutional, administrative, and programmatic foundations that allow protective scrutiny to arise. These include establishing common human rights positions and non-arbitrary operational protocols, transparent data collection, and cross-sectoral linkages.

As foundations firm up, thematic reporting is initiated as the second phase. Since 2014, AICHR and ACWC officials have been soliciting member state input and compiling regional reports on specific human rights topics, such as the right to education and trafficking in women and children. Over time, protective scrutiny through thematic reporting has intensified to spotlight more sensitive topics such as access to justice that involve law enforcement agencies and judicial processes of ASEAN states.

Apart from such data transparency, the thematic reports introduce three new "scrutiny measures" to pressure member states to make progress. First, the

reports candidly identify problems faced regionally and by individual members. Second, they make incisive recommendations that direct members to rectify rights violations and implement their rights commitments. Third, the reports emphasize that regular monitoring and the establishment of a formal complaint mechanism would improve ASEAN people's rights. This thematic reporting process has become increasingly cross-sectoral, involving officials who do not formally hold rights portfolios, such as the police, judicial officers, and social workers. This raises awareness that human rights protection necessitates cross-sectoral cooperation. The thematic reporting process is also supported by external actors — civil society organizations and foreign aid agencies — that underscore the need for protective scrutiny.

Even as the work of phases one and two deepens, ASEAN has entered the critical third phase, a potential turning point where nascent protective mechanisms of scrutiny such as regularized general reporting (apart from thematic reporting), monitoring, and hearing complaints take form as standalone features of the human rights system. To date, no regular reporting mechanism exists, but opposition may be ebbing. The AICHR and ACWC thematic reports evince ASEAN members giving candid submissions of their activities and challenges, with little

pushback against the commissions' critical recommendations.

AICHR's work plans expressly call for it to obtain copies of ASEAN members' country reports submitted to the UN human rights bodies and invite them to furnish additional information as part of its competences. Though this mandate has not been executed and is not repeated in the 2021–2025 work plan, it is noteworthy that AICHR currently focuses on [improving ASEAN states' UPR participation](#). This includes greater intraregional transparency in sharing experiences of UPR reporting during the regular AICHR meetings and implementing the resulting recommendations. While the ACWC does not explicitly call for regular reporting, it pushes member states to improve data collection and analysis on human rights implementation.

Heightening protective scrutiny via monitoring by the AICHR and ACWC appears to have more traction than regularizing reporting as it dovetails with ASEAN members' ongoing efforts to improve compliance across the ASEAN Community. For example, the ACWC 2016–2020 work plan reinforces the process of adaptive protection by emphasizing the roles of human rights officials and cross-sectoral stakeholders, stipulating implementation timelines, and monitoring midterm and concluding outcomes. For AICHR, the quest to

monitor implementation is slowly concretizing. An AICHR Monitoring and Evaluation (M&E) framework was proposed in the 2021–2025 work plan to scrutinize whether ASEAN members meet their annual, midterm, and conclusory deadlines in the human rights work plans.

Lastly, the most intrusive protective scrutiny mechanism is the complaints portal. Victims of rights abuses, their families, and civil society have relentlessly lobbied for complaints mechanisms despite ASEAN members' reluctance to institute them. An **informal complaints mechanism** has arisen in which AICHR officials have begun to accept submissions from victims via the ASEAN secretariat. Public pressure produced a watershed moment during AICHR's special summit in 2019 in which the ASEAN complaints mechanism procedure was formalized. As a result, the ASEAN secretariat now must officially acknowledge receiving communications, which it may forward to the relevant AICHR country representative. However, any follow-up action by AICHR remains confidential and there is no available data on investigations using the 2019 procedure.

Despite being criticized for its secrecy, this mechanism continues to be activated (fifty-five complaints received and counting). AICHR Indonesia has also openly encouraged its citizens to

use it. Public use is vital and shows the deep desire ASEAN people have for access to justice. Persistent submissions also compel ASEAN members to take notice of the need for protective scrutiny mechanisms.

Adaptive protection is a pragmatic pathway in a restrictive regional environment. It exemplifies a subtle yet viable way to strengthen the ASEAN human rights system amid the limits of the overarching regime. The protective characteristics of ASEAN's human rights system at present must not be overstated: all three phases of adaptive protection must be developed in the face of substantial challenges, and the ASEAN human rights system currently addresses only less serious human rights abuses. Egregious human rights violations such as those committed against the Rohingya and civilians in post-coup Myanmar are dealt with at the state-to-state level among ASEAN leaders and thus are currently outside the remit of the ASEAN human rights system. But as past experiences of human rights and democracy in ASEAN attest, adaptive protection can meaningfully acculturate the region to more substantive human rights standards that will only benefit ASEAN's people.

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This essay draws on Tan Hsien-Li, **Adaptive Protection of Human Rights:**



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