

The ASEAN Human Rights Architecture: Its Development and Challenges

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Introduction

Amidst criticisms from international communities and civil society groups within the region, the Association of Southeast Asian Nations (ASEAN)² leaders signed and adopted the ASEAN Human Rights Declaration (AHRD) on 18 November 2012 during the 21st ASEAN Summit held in Phnom Penh, Cambodia. In the Phnom Penh Statement on the adoption of the AHRD:

“[The] Heads of state/government of the member states of ASEAN reiterate ASEAN and its member states’ commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN member states are parties as well as to relevant ASEAN declarations pertaining to human rights.”³

The adoption of the AHRD, the first broad based human rights document in the region, in spite of criticisms, raises the expectations of ASEAN people that their rights will be better promoted and protected.

Three years earlier, in October 2009, under the Thai chairpersonship, the Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015) was adopted by the 10 ASEAN leaders. The leaders agreed, that:

“[T]he ASEAN political-security blueprint, the ASEAN economic community blueprint, the ASEAN socio-cultural blueprint and the Initiative for ASEAN Integration (IAI) Work Plan II (2009-2015) shall constitute the roadmap for an ASEAN community (2009-2015), and each ASEAN member state shall ensure its timely implementation.”⁴

The ASEAN leaders, in that same Declaration, also pledged “their resolve and commitment to promote ASEAN peoples to participate in and benefit fully from the process of ASEAN integration and community building”.⁵ The adoption of the three blueprints, according to ASEAN, will be instrumental to building the ASEAN community by 2015. This, together with the ratification of the ASEAN Charter by all ten member states in December 2008, the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in October 2009, the ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children in early 2010 and the recent adoption of the AHRD, makes ASEAN one of the most advanced sub-regions in Asia from a human rights institution building perspective. These institutions and standards constitute what this author calls the “ASEAN human rights architecture”.

Although ASEAN seems to be progressing towards institutionalising human rights in the region by giving them due recognition in the ASEAN Charter, the blueprints and the AHRD, its development has not been without challenges. The human rights architecture was designed with a number of shortcomings to becoming an effective (sub)-regional human rights regime. One of the challenges to the development of human rights infrastructure lies on the principles that all ASEAN member states adhere to: “the ASEAN Way” which remains unchallenged.

This paper attempts to examine the way in which the ASEAN human rights architecture was designed and developed. It further assesses the current infrastructure already put in place and attempts to explain and analyse why the infrastructure has been developed in such a way that it might not serve the purpose of the protection and promotion of human rights of ASEAN peoples. Based mainly on desk research, the article starts with a study of the development of the ASEAN human rights infrastructure. The introduction is followed by an examination of the contents of the AHRD and its concepts as well as debates behind some particular provisions. The third section attempts to explain and analyse why the regional human rights architecture has been designed the way it exists now by looking at how ASEAN member states perceive human rights. It concludes by reflecting whether or not the regional human rights architecture could be redesigned and if there are prospects for any effective human rights system in the region.

Development of a Human Rights Regime in ASEAN⁶

Established in 1967 as a political and economic entity with seven objectives as stated in the ASEAN Declaration of 1967, ASEAN

has never been considered nor considers itself a human rights organisation. The first two objectives as set out in the 1967 Bangkok Declaration were: a) to accelerate economic growth, social progress and cultural development; and b) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter. The term “human rights” was not explicitly used in the Declaration. However, human rights advocates tend to believe that by affirming adherence to the principles of the UN Charter, the five founding members of ASEAN⁷ inevitably accepted the purposes and principles set forth therein. Article 1(3) and Article 55 of the UN Charter⁸ enshrine the universal respect for and observance of human rights and fundamental freedoms and call for international cooperation to achieve such purposes.

Although ASEAN does not have specific legal documents on “human rights”, the term has been mentioned from time to time in a range of non-legally binding documents such as joint communiqués and joint declarations or statements both among its members and with dialogue partners. In the 1990s there were some references to human rights in a number of official statements. In 1991, ASEAN affirmed its original position with regards to human rights in its Joint Communiqué stating that:

“[W]hile human rights are universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regard for the complex variety of economic, social and cultural realities. They emphasised that neither the international application of human rights be narrow and selective nor should it violate the sovereignty of nations.”⁹

Although this 1991 Joint Communiqué demonstrated that ASEAN still guarded against certain concepts of human rights, the universal nature of human rights was more or less accepted by ASEAN leaders (with certain reservations). This same position was repeated in the Joint Communiqué of the 25th ASEAN Ministerial Meeting (AMM) held in Manila in 1992.¹⁰

ASEAN then made a marked change in its position on human rights in 1993. For the first time in ASEAN history, a separate section on human rights was incorporated in their Joint Communiqué. The Joint Communiqué of the 26th AMM held in Singapore in July 1993, one month after the Vienna World Conference, contained three elaborated paragraphs including:

“ASEAN recognises that human rights are interrelated and indivisible, it affirms its commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration. It agreed that ASEAN should consider the establishment of an appropriate regional mechanism on human rights.”¹¹

The fact that the Joint Communiqué was adopted just a month after the Vienna World Conference on Human Rights in which all ASEAN member states participated suggests that ASEAN’s declaration of its commitment to the Vienna Declaration on Human Rights through its inclusion of a human rights section within a lengthy AMM Joint Communiqué was perhaps more in accordance with the global discourse rather than strong affirmation of its human rights policy. This observation has proved to be true because for the following five years, no section on human rights, or even the term “human rights”, appeared in any ASEAN Joint Communiqué.

Only in 1998, when the world commemorated the 50th anniversary of the Universal Declaration of Human Rights (UDHR), did human rights reappear. This happened in two paragraphs of the AMM Joint Communiqué, one noting the establishment of the Working Group for an ASEAN Human Rights Mechanism, and another recognising the importance of international conventions and declarations of human rights, and the rights of women and children in particular.

Another development was the Vientiane Action Program (VAP) adopted in Vientiane in November 2004 by all ASEAN member states. The VAP served as a roadmap for ASEAN to strengthen political, security, economic, social and cultural cooperation among its members between 2004 and 2010.¹² This time, ASEAN put forward a much more concrete agenda on human rights. Under the program areas and measures for political development of the ASEAN Security Community, ASEAN committed to promote human rights through, among others activities: the promotion of education and public awareness on human rights; the establishment of a network of cooperation among existing human rights mechanisms; the elaboration of an ASEAN instrument on the protection of the rights of migrant workers; and the establishment of an ASEAN Commission on the promotion and protection of the rights of women and children.

The tireless efforts and initiatives made by the Working Group for an ASEAN Human Rights Mechanism since 1996 must be given recognition. Many of the human rights elements included in the VAP were proposed by the Working Group through different engagements with ASEAN. The accelerated progress made by ASEAN members in the field of human rights (at least in official

documents) has been remarkable and the VAP is one of the most concrete examples of such progress.

After over four decades of its existence, ASEAN has made tangible progress towards the institutionalisation of human rights as follows:

1. The adoption of different ASEAN declarations pertaining to human rights, namely the ASEAN Declaration on the Advancement of Women (1998), the ASEAN Declaration on the Elimination of Violence Against Women (2004), the ASEAN Declaration Against Trafficking in Persons, particularly Women and Children (2004), the ASEAN Declaration on the Protection of the Rights of Migrant Workers (2007) and the ASEAN Human Rights Declaration (2012). The two last documents are the first human rights based documents in ASEAN.

2. The increasing number of national human rights institutions. Between 1987 and 1997, only two National Human Rights Commissions were established – in the Philippines (1987) and Indonesia (1993). However, there has been acceleration, with institutions established in Malaysia (1998), Thailand (1999) and Myanmar (2011). Cambodia has been attempting to establish one since 2000 but has not yet been successful. Singapore and Vietnam are still considering whether to establish institutions.

3. Ratifications of international human rights instruments. Although only two international human rights instruments, the Convention on the Rights of the Child (CRC) and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), have been ratified by all ASEAN member states, there has been a remarkable increase

in ratifications of other major international human rights instruments such as the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), etc. Only the Convention on the Protection of the Rights of Migrant Workers and Their Families and the Convention for the Protection of All Persons from Enforced Disappearance have a limited number of ratifications. Another notable progress made by the ASEAN member states is the withdrawal of reservations made to the different conventions.

4. Positive change can also be seen in the relationship between ASEAN and civil society. The word “people” was used in most, if not all, early ASEAN documents, but it seemed that “people” were, in fact, invisible until 1998 when ASEAN recognised the civil society group, the Working Group for an ASEAN Human Rights Mechanism. In 2000, ASEAN supported the first organisation of an ASEAN people assembly, and then, a few years later, the ASEAN civil society meetings. By engaging with civil society, ASEAN has been taking positive steps to become a “people-centred” organisation. However, ASEAN engagement with civil society groups remains very limited. The phrase “ASEAN people-centred”, as specified in the ASEAN Roadmap, remains rhetoric. In reality, ASEAN and ASEAN member states are still reluctant to allow space for participation of civil society groups.

No one can deny that human rights issues and the establishment of an ASEAN human rights mechanism, as well as a commitment to allow greater participation of civil society in the development process, are still very challenging matters in ASEAN. However, as Tun Musa Hitam, Chair of the Eminent Persons Group on the ASEAN

Charter stated in Kuala Lumpur during the 5th Workshop on the ASEAN Regional Mechanism on Human Rights:

“[R]ecent developments in ASEAN show that human rights emerge as an important concern in the organisation and it is time to go forward rather than recount it. It has been shown that although ASEAN may not make quick progress on human rights there has been some progress. But, only the time and actions to be taken by ASEAN will prove how serious ASEAN is with human rights issues.”¹³

ASEAN “considered” for 15 years from 1993 to 2008 whether to legalise and legitimise human rights and fundamental freedoms in ASEAN by including both concepts and terminologies in the ASEAN Charter. The ASEAN Charter came into force in December 2008 and this was considered to be a turning point in ASEAN becoming “a rules-based organisation” and also a cementing of the “political will” of ASEAN to develop a human rights regime in the region.

The success of ASEAN in including human rights and fundamental freedoms in both the principles and purposes of ASEAN was not without challenges. Consensus was reached with various compromises including: first, the principles of respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice were (counter) balanced by the principles of non-interference in the internal affairs of ASEAN member states; and second, the prescription for the establishment of an ASEAN Human Rights Body in Article 14 was not as specific as it should have been as it was subject to the Terms of Reference which were determined at an ASEAN foreign ministers meeting and were accordingly the result of negotiations and compromises.

As expected, the AICHR established and inaugurated in October 2009 was the result of this compromise. The body is now called the “Intergovernmental Commission” not just the “Commission” as commonly called in other regions. By adding the term “Intergovernmental” the Commission has had to be conscious that it is accountable to the governments and is not an independent body. This fact has been repeatedly emphasised by a number of representatives to the AICHR. Another mechanism which was established six months later – the ASEAN Intergovernmental Commission on the Protection of the Rights of Women and Children – followed more or less the same pathway but with more progressive elements to its terms of reference. In addition to the two commissions, another body of a slightly different nature, the ASEAN Committee on the Implementation of the ASEAN Declaration of the Protection of the Rights of Migrant Workers, was also set up in 2007. In spite of some different elements in their respective terms of reference, they share some common characteristics. None of these bodies has monitoring or investigation powers. ASEAN seems to be allergic to the term and concept of “monitoring”. The bodies are expected by ASEAN member states to focus on the promotional aspect of their mandates, not on protection, although generally speaking they are supposed to promote and protect the rights of ASEAN people.

It is important to note here that ASEAN does not follow the same approach as other regions in the world in that it started with “bodies” rather than “standards” or human rights instruments. A number of NGOs, human rights advocates and academics are of the opinion that, for the region, it would be better not to have, for the moment, regional human rights standards to avoid the risk of having something which may be lower than internationally recognised standards. A

good example is the advocacy made by the Working Group for an ASEAN Human Rights Mechanism. This group has, for years, been advocating for the setting up of an “effective” human rights mechanism in ASEAN rather than pushing for any regional human rights standards. However, since the development of an ASEAN human rights declaration is part of its mandates and functions, the AICHR has strived to deliver. By November 2012, ASEAN adopted the AHRD.

The ASEAN Human Rights Declaration: An Examination

The AICHR was equipped with 14 mandates and functions specified in its terms of reference. Paragraph 4.2 mandates the AICHR to:

“[D]evelop an AHRD with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights”.

There are a few elements included in the particular mandate, namely:

1. The AICHR is expected to develop ASEAN human rights standards;
2. The very purpose of such standards is to provide a framework for cooperation;
3. In order to do so, not only would an AHRD be developed, but various human rights conventions and instruments would be put in place.

The most problematic terminology mentioned in paragraph 4.2 is “human rights cooperation”, as standards, once set, would need to be monitored for compliance. In the international monitoring system, cooperation means “consent”. However, some particular special procedures may not require

consent. In ASEAN, cooperation means no confrontation, no questions, no criticisms, as such things may be considered to amount to interference in the internal affairs of member states.

The AICHR took this mandate very seriously and was committed to delivering it. Under the chairpersonship of Cambodia, Prime Minister Hun Sen instructed the Cambodian representative to the AICHR that the AHRD had to be adopted under his chairmanship in Phnom Penh.

The AICHR finally agreed that there would be a two step process. The first step was to set up a drafting team with ten representatives appointed by each AICHR representative. In the discussions, the expertise of the members of the drafting team needed to be taken into consideration. However, with the exception of a few countries, the majority of the members of the drafting team were appointed from amongst government officials by respective governments. This showed the political sensitivity of both the drafting process and the issues to which it related. The drafting team spent seven months producing a very detailed and long draft declaration which was then submitted to the AICHR for negotiations. The fact that the drafting team did not have the full power to negotiate meant that different views and formulations had to be represented in the draft, resulting in a very lengthy draft of the AHRD.

The second step was the negotiation process among AICHR representatives. The meetings and negotiations were intensive until the last meeting in September 2012. The AICHR attempted to have different working groups among interested AICHR representatives, discussing different aspects of the draft. However, in the end all representatives joined each working group, with the exception of

Myanmar which preferred to negotiate the product mainly in plenary. The most controversial sections of the draft were the general principles and civil and political rights sections, both of which took up much of the time of the drafting team and the AICHR.

It was during the second step of the processes that dialogues and consultations were organised. The AICHR was required to report the progress made and challenges faced to the AMM and did so twice. In the AMMs, some particularly controversial issues were discussed, such as whether or not to release the draft AHRD, the use of particular concepts in the draft, given regional and national particularities, the reference to national laws and consultation with civil society groups. Although the draft AHRD was not formally made public, many drafts were leaked to some NGOs. Two regional consultations were organised with sectoral bodies including the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The dialogues could not be considered a success as inputs were very limited due, to the fact that the draft AHRD was not shared with those bodies. The AICHR organised two regional consultations with selected national, regional and international human rights NGOs, during which all AICHR representatives agreed that the inputs were meaningful. Some representatives tried to negotiate for the inputs to be integrated into the draft but without much success.¹⁴ In addition to regional consultations, a meeting was held with three regional experts where some particular terminologies and concepts such as “public morality” and “sexual identity” were clarified. Although conceptual clarifications were very much appreciated and accepted, no consensus could be reached to improve or modify the draft. There was resistance

from a minority of the AICHR. According to the ASEAN way of working, if even one open objection is made, nothing can move. In ASEAN, minority rule applies rather than majority rule; this is what this author calls “minority hegemony”.

In terms of substance, the AHRD which was adopted in November 2012 has some shortcomings. Although some provisions go beyond the UDHR – for example, the inclusion of the right to development, right to peace and some others which are in line with internationally recognised standards – one cannot deny that some other provisions fall short. This section briefly examines the content of the current AHRD.

It is of note that, when the Universal Declaration of Human Rights (UDHR) was drafted in 1947, according to Asbild Samnøy, there were five facilitating factors to reach the “compromise” on the content of the UDHR: a) rejecting controversial issues; b) using general and vague formulations; c) explicit use of limitations clauses; d) avoiding philosophical justifications; and e) moderating crosscutting cleavages.¹⁵ It is interesting to point out that in the process of negotiations of the AHRD, those factors were not really applied; rather, some issues which were considered controversial, such as the attempt to include limitations clauses, or philosophical and conceptual justifications, were subjected to heated debates. A number of provisions in the final text of the AHRD cannot be said to be the result of “compromise” but are a minority imposition made possible due to the ASEAN principle of consultation and consensus. This principle requires that when one country says “no” or expresses its desire to change some particular items, the rest are obliged to compromise if things are to progress.

The first critical shortcoming is reflected in the general principles, especially those expounded in Articles 6,¹⁶ 7,¹⁷ and 8.¹⁸ The text which was adopted by the ASEAN leaders includes:

“[P]rovisions that subject the enjoyment of fundamental rights to a ‘balancing’ against government-imposed duties on individuals. The Declaration also challenges the principle of universality of human rights by making them subject to regional and national contexts. In addition, it allows for broad and all-encompassing limitations on rights, including those that may never be restricted under international law.”¹⁹

The quoted views were shared by many organisations, including the Office of the High Commissioner for Human Rights (OHCHR).

Criticisms of the wide-ranging limitations on rights were particularly strong in relation to limitations on the basis of “national security” and “public morality”. Arguments and debates on these matters during the negotiation process were heated but did not result in a change in stance of some representatives who insisted on the inclusion of the clauses in spite of strong objection not only from experts and civil society but also from within the AICHR itself. More positive formulations were proposed, such as deleting the phrase that “[t]he enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties”. It is recognised that the term “balancing” is not used in international human rights law and definitely falls below international standards. It was repeatedly suggested during the negotiations that the wording from the Vienna Declaration and Programme of Action (Paragraph 5) should be used in Article 7. However, all these suggestions were met

with objections by one or two representatives. In ASEAN/AICHR, this was enough to result in the text remaining unchanged.

The second serious concern that was raised was that, in a number of articles, the formulation “in accordance with law” or “as prescribed by law” is used (Articles 11, 18, 19). Elsewhere, rights are defined “in accordance with national law”, or “as determined by national laws”, e.g. Articles 25, 27 and 30 which risk being used by governments as a justification to go below international human rights standards. Of particular concern is Article 11 (right to life). The wording “save in accordance with law” could be understood as encompassing international as well as national law. This has attracted a lot of criticism from the international community due to the fundamental nature of this right upon which all other rights depend. The main argument of those supporting the limitation clause to this fundamental right is based on Article 6 of the International Covenant on Civil and Political Rights (ICCPR).²⁰ The proposal made by some representatives for the AICHR to use either the formulation used in the UDHR or ICCPR was not accommodated.

Another concern relates to non-discrimination. Although the principle of non-discrimination is enshrined in the general principles (Articles 1, 2, and 3), Article 34²¹ departs from the general principles by allowing member states to discriminate against non-nationals by determining the extent to which they protect the economic and social rights of non-nationals. Even though the formulation used in the text of the AHRD follows that of in the International Covenant on Economic, Social and Cultural Rights (ICESCR), it deserves serious criticism. The proposal to delete the whole paragraph in order to guarantee the non-discrimination principle common to all international human rights instruments

was rejected by a number of representatives. When it comes to the protection of the rights of non-nationals, the AHRD, although listing some groups such as migrant workers and vulnerable and marginalised groups in Article 4, risks excluding some groups from the list, as the non-discrimination formulation may be interpreted as exhaustive. Efforts made by a few representatives to add reference to indigenous peoples, given the support of ASEAN member states for the Declaration on the Rights of Indigenous Peoples, were in vain.

Moreover, by examining some of the provisions in the ADHR which apply directly or indirectly to non-nationals, the position of non-nationals under the Declaration becomes clear.

First, Article 12 guarantees the right to personal liberty and security.²² There were negotiations to include references to enforced disappearance and exile and to reformulate the article to cover "any other arbitrary form of deprivation of liberty". This was not accepted. Also, the draft does not include specific guarantees such as *habeas corpus* and judicial control over arrest, as contained in Article 9 of ICCPR:

"Anyone who is arrested or detained is entitled to due process and to access to a court which may decide, without delay, on the lawfulness of his detention and order his or her release if the detention is not lawful".

These omissions disproportionately impact on non-nationals, given the tendency in the region for refugees, asylum-seekers, and stateless persons to be arbitrarily or indefinitely detained for immigration offenses.

Secondly, Article 16 relates to the right to seek and receive asylum.²³ The way the pro-

vision is formulated is rather unusual as it provides that the right to seek and enjoy asylum is only "in accordance with the laws of such state and applicable international agreements". Through this article ASEAN member states deny the fundamental principle of *non-refoulement*, which is legally binding on all states under customary international law and applies to all persons. This clause is almost meaningless considering the fact that only a few countries in ASEAN have ratified the 1951 Convention relating to the Status of Refugees and its Protocol and only a few member states are equipped with national law recognising refugee status.

In Article 18²⁴ on the right to nationality, the clause "as prescribed by law" is included again. In the negotiations, a few representatives tried to get agreement for the words "no one shall be rendered stateless" to be included in the provision but this was rejected. The provision could have followed the formulation of Article 15 of the UDHR, Article 9 of CEDAW or Article 7 of the CRC considering the fact that all ASEAN members adopted the UDHR and ratified CEDAW and CRC.²⁵

In addition, non-nationals, according to Article 25 of the AHRD, are denied some political rights, namely the right to vote and to participate in the government, as the Article uses the term "every citizen" and "every person who is a citizen of his or her own country", rather than "every person", as commonly used throughout the document. As already pointed out, Article 34 states that:

"ASEAN member states may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies."

With a different formulation from Article 2 of ICESCR, the provision clearly allows discrimination against non-nationals.

In summary, whilst the principle of non-discrimination is clearly recognised as a general principle under the AHRD, a number of its other provisions do not comply with that principle.

The above mentioned shortcomings in the AHRD can be better understood by the examination of ASEAN's perceptions about human rights.

Human Rights in ASEAN: Perception and Misperception²⁶

To understand the way the ASEAN human rights architecture (which includes both human rights institutions and standards) was designed and crafted, it is important to examine how ASEAN governments perceive human rights. This will help elucidate why the established ASEAN human rights mechanisms are not equipped with monitoring power and why the AHRD includes some provisions which do not accord with international human rights standards.

According to Tommy Koh, "[there was no] issue that took up more of our time, [no issue] as controversial and which divided the ASEAN family so deeply as human rights."²⁷ According to Tay and Estanislaio:

"[M]uch of ASEAN's credibility and attraction to the outside world was built on the economic success of many of its members (...) ASEAN's other strong points were the stability in the region and a good measure of cohesion among its members."²⁸

These comments are still relevant today and most understand that such success and

cohesion are based on at least two pillars, which include the written norms of non-interference and the principle of consensus. These founding principles were stated in the 1976 Treaty of Amity and Cooperation in South East Asia and are clearly repeated in the ASEAN Charter.

Three of the principles stipulated in Article 2(2) emphasise: respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; non-interference in their national affairs; and respect for the right of every member state to lead its national existence free from external interference, subversion and coercion. ASEAN has long emphasised that the promotion and protection of human rights by the international community must recognise national sovereignty, national borders and non-interference in another state's affairs. ASEAN views human rights as an internal affair. Nevertheless, events since the early 1990s, especially since the advent of ASEAN 10,²⁹ have posed difficulties for ASEAN in dealing with new challenges. ASEAN is still divided on the issue of human rights. It is hard to imagine how these differences can be bridged, especially while the concept of "Asian values" is still alive. This observation is confirmed by Tommy Koh's advocacy of a "human rights definition in an ASEAN context".³⁰

Including human rights clauses in the Charter has not helped ASEAN to develop a human rights discourse or to change its perception of human rights. Koh reminds us of the perceptions of ASEAN governments, which are reflected in official documents such as AMM Joint Communiqués. First, ASEAN governments believe that human rights are not universal. While ASEAN leaders accept the concept of the universality of human rights, they argue that there are differences between international human rights stand-

ards and practices in the region. For ASEAN, human rights are shaped by each society's specific history, traditions, cultures and religions. All these elements form the basis for social values.³¹ This idea is reflected in the Joint Communiqué of the 25th AMM in 1992:

“[B]asic human rights, while universal in character, are governed by the distinct culture and history of, and socio-economic conditions in each country, and that their expression and application in the national context are within the competence and responsibility of each country.”³²

This discourse was repeated by Singapore's foreign minister at the 1993 World Conference on Human Rights in Vienna when he emphasised that “universal recognition of the idea of human rights can be harmful if universalism is used to deny or mask the reality of diversity”.³³ The same was reiterated by Prime Minister Hun Sen in 2006 when he said that “there is no such universality and international standard. Each country has its own standard.”³⁴ This perception is clearly reflected in Article 7 of the AHRD.

Second, one category of rights is prioritised over another. Some ASEAN governments are not comfortable with the concept of the indivisibility of human rights. Many prefer advocating for economic, social and cultural rights rather than civil and political rights. ASEAN claims that political rights and civil liberties could be a hindrance to economic development and social or public order. There has always been a trade-off in which economic, social and cultural rights have been given priority over political and civil rights. Leaders of ASEAN seem to agree with Jieng Zemin, the then Chinese leader, who said that “rights of the survival of China's population are more important than political rights”.³⁵ They are reluctant to admit that

violations of one set of rights will impact on others. Examples demonstrate that violations of economic, social and cultural rights are often the result of the political system. In ASEAN the typical sequence of development is first the economic take-off and then political freedoms. The sensitivity of political and civil rights was felt during the process of the drafting and negotiations of the AHRD and pronounced in a number of provisions provided for by the AHRD as already explained in the above section. The fact that the provision on the right to freedom of assembly was removed from the draft AHRD just before its adoption is evidence of ASEAN's perception on human rights.

Third, in most ASEAN countries there has been more concern with order and discipline, and more concern with duties than with rights. A citizen has responsibilities towards his or her society. Many ASEAN governments believe that individual rights must give way to the demands of national security and economic growth. They believe that duties or responsibilities to the state and to other citizens come before the need to respect individual human rights.³⁶ In this regard, the former Prime Minister of Singapore, Lee Kuan Yew, said in 1993 that “society has always been more important than the individual. I think that is what saved Asia from greater misery.”³⁷ Here again, Article 8 of the general principles of the AHRD is the reflection of the way ASEAN governments perceive rights and duties.

Fourth, as noted above, since its inception, the working principles within ASEAN have been based on non-intervention and freedom “from external interference in any form or manifestation in order to preserve their national identities”. These principles have been confirmed and reconfirmed throughout the history of ASEAN. Article 2 of the Trea-

ty of Amity and Cooperation in South East Asia provides guiding principles for ASEAN members in their relations with one another that they all adhere to: (a) mutual respect for the independence, sovereignty, equality, territorial integrity and national identities of all nations; (b) the right of every state to lead its national existence free from external interference, subversion and coercion; and (c) non-interference in the internal affairs of one another.

The former Thai Minister of Foreign Affairs, Surin Pitsuwan, who recently ended his term as the ASEAN Secretary General, and Anwar Ibrahim, the former deputy Prime Minister of Malaysia, have proposed the concepts of constructive engagement and flexible engagement, respectively. In 1998, Surin said that:

“[I]t is time that ASEAN’s cherished principle of non-intervention is modified to allow it to play a constructive role in preventing or resolving domestic issues with regional implications (...) when a matter of domestic concern poses a threat to regional stability, a dose of peer pressure or friendly advice at the right time can be helpful.”³⁸

Other ASEAN member states have rejected these ideas. In his paper presented in 1999 to the Asia-Pacific Roundtable, Termsak Chalermphanupap points out that the “ASEAN way will continue to adapt to the changing situation, but its key principles, specifically of non-intervention, will not change”. For him, “there is no valid reason to change something that has worked successfully for over three decades in ASEAN”.³⁹

There has been little observable change in the stance in the period since 1999. Prime Minister Hun Sen affirmed this, not only in the debate on universality and particularity

but also on the non-interference principle by saying that:

“Many Asian countries advocate state sovereignty and non-interference in internal affairs. No state can dictate and make judgments on others about human rights. Foreign policies should not be linked to human rights.”⁴⁰

All these principles are enshrined in the ASEAN Charter, the Terms of Reference of AICHR and the AHRD. The principles have been invoked on a number of occasions during discussions in the AICHR, especially when civil society groups send human rights violation cases to AICHR for review. The latest cases of the plight of Rohingya in Thailand and Malaysia and the disappearance of the leading NGO in Laos were submitted to the AICHR. So far, there has been no response. It seems that any reconciliation between the principle of human rights and that of non-interference is not foreseeable in the near future.

Resistance to the universal concept of human rights, a trade-off between two categories of rights as well as rights and duties, and the strict principle of non-interference in internal affairs have prevented ASEAN from setting out any clear human rights policies or including any human rights elements in their cooperation agenda. Until recently, ASEAN was more at ease with using other terms for human rights in official texts.

The inclusion of an ASEAN human rights body in Article 14 of the ASEAN Charter is an act of compromise in the sense that it was included as a “body” without any specific name. The AICHR established in 2009, unfortunately, is not equipped with monitoring and/or investigative powers. It cannot reconcile the principle of non-interference in internal affairs with that of the protection

of rights. It does not work with an accusatory approach, meaning there is no “naming and shaming”. Rather, it upholds ASEAN’s traditional principles, emphasising the need to take into consideration the different histories and circumstances of member states. The question has been asked how, after the adoption of the AHRD, this regional human rights instrument will be implemented and how such implementation is to be monitored. This question is left unanswered.

Conclusions

Thai Foreign Affairs Ministry’s permanent secretary Sihasak Phuanketkeow said:

“Thailand will be working closely with international agencies, including the UN High Commissioner for Refugees, to extend help to 857 Rohingya people found illegally entering Thailand earlier this month. We will proceed in line with laws and humanitarian principle”.⁴¹

He said the UNHCR, the International Organisation for Migration (IOM), and UNICEF had expressed concerns and the wish to help the Rohingya people, “[s]o, we will have close discussions on what to do next. Otherwise, when the legal process in Thailand is completed, we will have to consider deporting them.”⁴² In fact, the Thai government still has no clear long term policy on the issue of Rohingya. The same is true of ASEAN and the AICHR who both remain silent on the issue. The adoption of the AHRD has not prompted AICHR or ASEAN to do more than before.

The AHRD is just another reflection and confirmation of the ASEAN perception of human rights as already explained. It took AICHR quite some time to agree on the section covering civil and political rights. The section on economic, social and cultural

rights, although easier, contains some limitations. The notion of national sovereignty was pronounced throughout the text in the forms of the reference to national laws, the inclusion of limitation clauses as well as the emphasis on the responsibilities of the individual vis-à-vis society and state and the direct reference and repetition of the principle of non-interference in internal affairs. Although ASEAN shows some political commitments and one could take the adoption of AHRD as another step towards the development of a human rights architecture in ASEAN, one has to be realistic as any steps towards effective human rights mechanisms and stronger human rights standards will take a long time.

There has been criticism that the AHRD “bolsters the position of those who think that the half a billion people in the ASEAN region do not deserve the same human rights protections as the rest of the world”.⁴³ Although this criticism may be partly correct in the sense that some provisions of the AHRD could be considered sub-standard, it does not do justice to the AHRD which does recognise, to a certain extent, many rights enshrined in international instruments. One cannot deny, though, that the AHRD has its deficiencies, not least of which is the fact that it could be interpreted and used to discriminate against some groups who deserve the same human rights protection as the rest of ASEAN.

The ASEAN human rights infrastructure at present seems to be full of defects and therefore is not effective. However, whether or not ASEAN is ready to re-design the regional human rights architecture depends on a number of factors including a review of the ASEAN Charter and a review of the Terms of Reference of the AICHR and other specialised human rights bodies. It is time for all stakeholders to push ASEAN to change its

perception of human rights as well as to enable greater space for ASEAN people to participate in ASEAN's decision-making process on matters which will impact their lives.

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2 A brief background of ASEAN is available at: <http://www.asean.org/asean/about-asean/history> (last accessed 2 September 2013).

3 Phnom Penh Statement on the adoption of the ASEAN Human Rights Declaration, 18 November 2012.

4 Association of Southeast Asian Nations, Roadmap for an ASEAN Community 2009-2015, ASEAN Secretariat, Jakarta, 2009, p. 2.

5 The Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015).

6 Part of this section was modified from Chapter I of the research report "Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children" written by the author (and the team) and published by the Working Group for an ASEAN Human Rights Mechanism, May 2009.

7 Indonesia, Malaysia, the Philippines, Singapore and Thailand.

8 UN Charter, Article 1 Para 3 stipulates that states resolve "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion." Article 55 further reiterates that "the United Nations shall promote (...) c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion."

9 Joint Communiqué of the 24th ASEAN Ministerial Meeting, Kuala Lumpur, 19-20 July 1991.

10 Joint Communiqué of the 25th ASEAN Ministerial Meeting, Manila, 21-22 July 1992, Para 18.

11 Joint Communiqué of the 26th ASEAN Ministerial Meeting, Singapore, 23-24 July 1993, Paras 16-18.

12 Further details are available at: <http://www.asean.org/archive/ADS-2004.pdf> (last accessed 2 September 2013).

13 Statement delivered by Tun Sri Musa Hitam, 5th Workshop on ASEAN Human Rights Mechanism, Kuala Lumpur, Malaysia, 29 June 2005.

14 Myanmar, the Philippines, Indonesia and Thailand in particular.

15 Samnøy, A, "The Origin of the Universal Declaration of Human Rights", in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, The Hague, 1999, pp. 3-22.

16 ASEAN Human Rights Declaration 2012, Article 6: "The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN member states to promote and protect all human rights and fundamental freedoms."

17 *Ibid.*, Article 7: "All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."

18 *Ibid.*, Article 8: "The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society."

- 19 International Commission of Jurists, *ICJ condemns fatally flawed ASEAN Human Rights Declaration*, 19 November 2012.
- 20 Article 6 of ICCPR states that “[e]very human being has inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. (International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966)
- 21 See above, note 16, Article 34: “Member states may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies.”
- 22 *Ibid.*, Article 12: “Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.”
- 23 *Ibid.*, Article 16: “Every person has the right to seek and receive asylum in another state in accordance with the laws of such State and applicable international agreements.”
- 24 *Ibid.*, Article 18: “Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.”
- 25 In terms of nationality and birth registration, language could be: (1) Everyone has the right to acquire and change their nationality. No one shall be arbitrarily deprived of their nationality (Article 15, UDHR); (2) Women shall have equal rights with men to acquire, change or retain their nationality, and to pass on nationality to their children (Article 9, CEDAW); (3) A child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents. Birth registration shall, in particular, be ensured for children who would otherwise be stateless (Article 7, CRC).
- 26 This part of the essay is based on the author’s paper: Petcharamesree, S., “The Human Rights Body: A Test for Democracy Building of ASEAN”, *International Idea for Development and Electoral Assistance*, February 2009.
- 27 Prof. Tommy Koh is Ambassador-at-Large and Director of the Institute of Policy Studies, Ministry of Foreign Affairs, Singapore. He gave a talk at the Seventh Workshop on an ASEAN Human Rights Mechanism, Singapore, 12-13 June 2008.
- 28 Tay, S. and Estanislao, J., “The Relevance of ASEAN: Crisis and Change”, in Tay, S., Estanislao, J. and Soesastro, H. (eds.), *A New ASEAN in a New Millennium*, CSIS, Jakarta, 2000, p. 14.
- 29 ASEAN 10 refers to ASEAN since 1998, composed of 10 members: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.
- 30 See above, note 27.
- 31 Hernandez, C., quoted in Sutthisunsanee, S., “Response of ASEAN to Human Rights Violations in Southeast Asia: Case Studies of Cambodia and East Timor”, *MA Thesis in Human Rights*, Mahidol University, 2006, p. 22.
- 32 See above, note 10.
- 33 Sen, A., *Human Rights and Asian Values*, 16th Morgenthau Memorial Lecture on Ethics & Foreign Policy, 1997, p. 9.
- 34 Statement by Prime Minister Hun Sen during the meeting with the Working Group, 26 September 2006, Siem Reap, Cambodia.
- 35 Bauer, J. and Bell, D., “The East Asian Challenge for Human Rights”, Cambridge University Press, 1999, p. 75.
- 36 Muntarbhorn, V., quoted in Sutthisunsanee, S., above note 31, p. 23.
- 37 Vatikiotis, M., *Political Change in Southeast Asia: Trimming the Banyan Tree*, London, Routledge, 1996, p. 96.
- 38 See Pitsuwan, S quoted in Sutthisunsanee, S., above note 31, p. 26.
- 39 Mr Termsak from Thailand has been special assistant to the ASEAN Secretary General and works full time at the ASEAN secretariat. See Chalermphanupap, T quoted in Sutthisunsanee, S., above note 31, p. 24.
- 40 See above, note 34.
- 41 The Nation, “We’ll help Rohingya as per humanitarian principles: FM”, 15 January 2013, available at: <http://www.nationmultimedia.com/national/Well-help-Rohingya-as-per-humanitarian-principles--30197972.html>.
- 42 *Ibid.*
- 43 See above, note 19.