

Reflection on the Winding Road to ASEAN Human Rights Mechanisms

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Abstract

This article is the author's reflections as to why and how the Association of Southeast Asian Nations (ASEAN), once dubbed a "club of dictators", began to accept human rights and develop regional human rights mechanisms in the period 1993–2012. It highlights the major milestones in this process and the factors which contributed to them. It examines the crucial role played by civil society, starting from people's uprisings that led to the collapse of authoritarian rule and the establishment of new democratic governments in several founding member states, to the engagement with ASEAN on the drafting of the ASEAN Charter and its regional human rights mechanisms. It argues that despite the success of civil society in utilizing the newly democratized member states in ASEAN and their national human rights institutions as interlocutors in dialogue and engagement with ASEAN, the human rights mechanisms that were eventually established by ASEAN are ineffective and not independent while the ASEAN Human Rights Declaration falls short of international human rights standards. It would seem that the principle of "non-interference" in ASEAN still remains intact and enjoys strong support from a majority of ASEAN member states.

Keywords

ASEAN, regional human rights mechanism, ASEAN Human Rights Declaration, Asian values, Vienna Declaration and Plan of Action, the principle of non-interference

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Introduction

When the Association of Southeast Asian Nations (ASEAN) was launched in 1967 in Bangkok with its five founding member states, namely Thailand, Malaysia, Singapore, Indonesia and the Philippines, its founding document—the Bangkok Declaration—stated that the aims and objectives of ASEAN were to promote regional cooperation in economic growth, social progress, cultural development and regional peace and stability. There was, however, no mention of human rights anywhere in the document.

For a long period from the 1970s to the 1990s, ASEAN was regarded as a “club of dictators” when the likes of people such as President Soeharto, President Marcos, Lee Kuan Yew, and Dr. Mahathir Mohamad were still in power in Indonesia, the Philippines, Singapore and Malaysia respectively. Human rights were viewed by ASEAN at best, as a set of western values that was not compatible with Asian societies, at worst, as an agenda of western powers to interfere with the domestic affairs of sovereign states in ASEAN. Hostility against human rights in ASEAN was further hardened with the entry of Brunei (1984), Vietnam (1995), Laos (1997), Burma (1997) and Cambodia (1999) as new member states of ASEAN.

However, in the last five years, there has been an acceleration of measures taken by ASEAN to institutionalize human rights within its structure and processes. This started with the adoption of the ASEAN Charter in 2007, which included the promotion and protection of human rights and fundamental freedoms as one of its purposes. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009. This was followed by the launch of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in 2010. In 2012, ASEAN officially adopted the ASEAN Human Rights Declaration (AHRD).

This makes Southeast Asia the first sub-region in Asia to have created a regional human rights mechanism for itself, filling the void in Asia that had long been the only region without a regional human rights mechanism in comparison with Europe, the Americas and Africa.

While this development is certainly something positive and in the right direction for human rights, and while civil society in the region should be credited for successfully pushing ASEAN since 1993 to establish regional human rights mechanisms, it is also a fact that the independence and

effectiveness of the ASEAN human rights mechanisms in promoting and protecting human rights are highly questionable. Meanwhile, this is made more complicated with the adoption of an ASEAN Human Rights Declaration that falls below international human rights standards.

The huge challenge ahead of civil society now is no doubt the question of how to make the AICHR independent and effective and what to do with the sub-standard declaration of human rights for the region. Hence, it is important and necessary for civil society to take stock of the past advocacy and campaigns aimed at creating a regional human rights mechanism for ASEAN and to learn lessons in order to chart out future strategies.

Winding road to the establishment of regional mechanisms

Looking back at the long journey to the establishment of ASEAN human rights mechanisms from 1993 to 2012, a period of 19 years, it would be useful for this discussion to highlight three important milestones where human rights made important breakthroughs in ASEAN during this period of time.

The first one took place in 1993. In the course of the two years of preparation for the United Nations World Conference, Asian governments put up the arguments of “Asian values” to counter the universality of human rights with leaders from ASEAN such as Lee Kuan Yew, Dr. Mahathir Mohamad and Soeharto leading the charge. This was reflected in the 1993 Bangkok Declaration adopted by the Asian regional group, in which, while they reaffirmed “the principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights”, they also emphasized “the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure”. They further asserted that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.¹

In countering this, more than 100 civil society organizations in the region

1 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, http://www.hurights.or.jp/archives/other_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html.

had a regional meeting in Bangkok and rebutted the “Asian values” argument by affirming the universality of human rights. They argued that the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty and stated that “international solidarity transcends the national order to refute claims of state sovereignty and non-interference in the internal affairs of a state”. They listed the establishment of a regional human rights mechanism as one of their recommendations.²

The World Conference on Human Rights in 1993 eventually adopted the Vienna Declaration and Plan of Action (VDPA), which affirms that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.³ Among the numerous recommendations made, this encouraged the establishment of a regional human rights mechanism and national human rights institutions where they have yet to exist.

The following month, after the end of the World Conference on Human Rights, ASEAN with its then six member states, first gave a positive signal to human rights in the form of the ASEAN joint communiqué as a response to the World Conference on Human Rights.

The joint communiqué “welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14–25 June 1993 and reaffirmed ASEAN’s commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regards for specific cultural, social, economic and political circumstances”. It further pledged that in support of

2 Bangkok NGO Declaration on Human Rights, <http://www.internationalhumanrightsexicon.org/hrdoc/docs/bangkokNGO.pdf>.

3 Vienna Declaration and Program of Action, <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>.

the Vienna Declaration and Program of Action, the ASEAN leaders “agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”.

However, there was practically very little follow-up action by ASEAN after the release of this joint communiqué. In fact, ASEAN governments worked even more closely to clamp down on human rights in defense of their principle of non-interference in the domestic affairs of other member states. This was illustrated in the issue of the ongoing military occupation of East Timor by Indonesia since 1975 and the admission of Burma into ASEAN in 1997 when human rights organizations in the region attempted to bring attention to gross human rights violations in ASEAN’s own backyard.

In 1994, the Philippines government tried to stop the first Asia Pacific Conference on East Timor from being held in Manila. A court order was issued to ban the meeting while the Philippines government denied visas to foreign participants. The organizers, however, managed to overturn the court decision and went ahead with the conference despite immense pressure. In 1996, the second Asia Pacific Conference was due to be held in Kuala Lumpur. The Mahathir regime issued stern warnings against the local organizers and threatened to arrest the organizers if the conference went ahead, citing interfering in the domestic affairs of Indonesia as posing a potential threat to national security. On the first day of the conference, the meeting was disrupted and stopped violently by thugs from the ruling parties of the Malaysian coalition government. The local organizers and participants were detained while foreign participants were all deported.

In 1997, ASEAN defended its decision to admit Burma as its latest member despite widespread protests from civil society in the region and criticism from the international community of the military dictatorship installed in Burma after a coup that denied the National League for Democracy, who won the 1988 general election, the right to form a government.

The second important milestone happened in 1998. At the 6th ASEAN Summit in Hanoi, ASEAN announced the adoption of the Hanoi Plan of Action 1999–2004 as part of its steps to achieve the ASEAN Vision 2020, which envisions ASEAN becoming “a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies”. However, human rights did not feature in this important vision document of

ASEAN, but the Hanoi Plan of Action 1999–2004 for the first time outlined action points related to human rights, although limited to only two. The two action points were, firstly, to “enhance the exchange of information in the field of human rights among ASEAN countries in order to promote and protect all human rights and fundamental freedoms of all peoples in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action”; and secondly, to “work towards the full implementation of the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination against Women and other international instruments concerning women and children”.⁴

When the Hanoi Plan of Action ended in 2004, it was succeeded by the Vientiane Action Program 2004–2010, which was adopted by ASEAN at the 10th ASEAN Summit. The Vientiane Action Program 2004–2010 has a much more systematic and elaborated articulation for the promotion of human rights as one of the strategies towards political development in ASEAN in comparison with the Hanoi Plan of Action. It outlines seven action points under the title of promotion of human rights: (a) completion of a stock-taking of existing human rights mechanisms and equivalent bodies, including sectoral bodies promoting the rights of women and children; (b) formulation and adoption of a memorandum of understanding among existing human rights mechanisms; (c) formulation of work program for the network; (d) promotion of education in and public awareness of human rights; (e) establishment of a network of cooperation among existing human rights mechanisms; (f) elaboration of an ASEAN instrument for the protection and promotion of the rights of migrant workers; and lastly (g) the establishment of an ASEAN commission for the promotion and protection of the rights of women and children.⁵

The Vientiane Action Program 2004–2010 eventually led to three very concrete and successful results, namely (a) the adoption of the Declaration of Cooperation for the protection and promotion of human rights in the Southeast Asia by the four national human rights institutions in the Philippines, Indonesia, Malaysia and Thailand, thereby establishing the Southeast Asia

4 Point 4.8 and 4.9 of the Hanoi Plan of Action 1999–2004, under section IV, Promote Social Development and Address the Social Impact of the Financial and Economic Crisis.

5 Annex 1, Vientiane Action Program 2004–2010.

National Human Rights Institutions Forum in 2007; (b) the adoption of the Declaration on the Protection and Promotion on the Rights of Migrant Workers with a committee established to oversee the implementation of this Declaration at the 13th ASEAN Summit in 2007—although the adoption of the instrument for the protection and promotion of the rights of migrant workers itself has been postponed to 2015 due to the failure of ASEAN Member States to reach common agreement; (c) the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children on 7 April 2010 at the 16th ASEAN Summit.

The third important milestone took place in 2007 when ASEAN finally recognized human rights and provided a legal basis for the establishment of a regional human rights mechanism for ASEAN in the ASEAN Charter, which was adopted at the 13th ASEAN Summit. This was then followed by an acceleration of a series of important developments to institutionalize human rights in ASEAN.

The ASEAN Charter outlines one of the purposes of ASEAN as “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regards to the rights and responsibilities of the Member States of ASEAN”. In the principles section, the Charter includes “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”. Article 14 of the Charter provides for the establishment of an ASEAN human rights body.

When the ASEAN Charter came into force in December 2008, ASEAN proceeded with the appointment of a High Level Panel to draft the terms of reference of the ASEAN human rights body. In July 2009, the 42nd ASEAN Ministerial Meeting adopted the Terms of Reference of the ASEAN human rights body, which named the body the ASEAN Intergovernmental Commission on Human Rights (AICHR). The Commission was officially inaugurated on 23 October 2009 at the 15th ASEAN Summit in Cha Am, Thailand.

In October 2009, the Terms of Reference of the ASEAN Commission on the Promotion and Protection on the Rights of Women and Children was finally endorsed by the ASEAN Ministers Meeting on Social Welfare and Development. The Commission was launched at the 16th ASEAN Summit in Hanoi on 7 April 2010.

The AICHR began operations in 2009, and started to draft the ASEAN Human Rights Declaration in 2011–2012. The final ASEAN Human Rights Declaration was promulgated by ASEAN on 18 November 2012.

From the development of these three important milestones between 1993–2012, one can deduce that there was indeed a trend of increased recognition of human rights by ASEAN that was taking shape, both in quantity and quality, from rhetorical recognition to more concrete actions in the form of norm-setting and institutional building to promoting and protecting human rights.

However, another trend that developed in parallel, less visible to many but probably equally important, was the total absence of human rights in other key documents that were adopted by ASEAN in the same period of time. For example, in the important ASEAN Vision 2020, that was adopted at the Second Informal ASEAN Summit in Kuala Lumpur in 1997, human rights did not feature at all. Another prominent example was the adoption of the Declaration of ASEAN Concord II (Bali Concord) at the 9th ASEAN Summit in early October 2003. In this Declaration, ASEAN agreed to establish an ASEAN Community through three communities, namely a Security Community, Economic Community and Socio-Cultural Community. However, one finds that human rights were again missing from this important declaration of ASEAN on community building.

Factors contributing to the integration of human rights by ASEAN

It is indeed interesting to see ASEAN, once dubbed a “club of dictators”, change its long-held position of outright rejection and hostility against human rights to one of final acceptance. What were the key factors which contributed to this change of attitude and perspective, especially in 1993, 1998 and 2007?

The changes of ASEAN towards human rights cannot be dissociated from the global context that it was operating in and the political developments at the national level of each and every member state of ASEAN. ASEAN’s changes of attitude and position on human rights may be analyzed accordingly in two ways by considering external factors and internal factors. The two were mutually linked in contributing to the three milestones in the advancement of human rights in ASEAN.

1. External factors

The first external factor was the fall of the Berlin Wall in Europe in 1989

and the dissolution of the Union of Soviet Socialist Republics (USSR) in 1991 that marked the end of the Cold War. ASEAN was born during the Cold War period and was supported by Western powers to insulate Southeast Asia from the spread of communism. The wave of reform in the communist bloc sparked off since the coming into power by reformer Mikhail Gorbachev in the Soviet Union in 1985, which eventually led to the end of the Cold War in 1991, provided a global climate that was more favorable for gross human rights violations to be addressed without becoming entangled in global ideological conflicts as in the case of the collapse of the Marcos dictatorship in the Philippines in 1986, the increased international criticism of President Soeharto and the military occupation of East Timor by Indonesia after the Dili massacre incident in 1991 and the military coup staged by General Suchinda Krapayoon in 1991 and his subsequent resignation in 1992. The global climate and the political changes in Philippines, Thailand and Indonesia at this time set the stage for the World Conference on Human Rights and eventually led to the release of the 1993 joint communiqué by ASEAN.

The second external factor was the Asian financial crisis, which hit Asia in May 1997 and caused massive capital outflow from the region. Among the ASEAN countries, Thailand, Malaysia, Indonesia and the Philippines were badly impacted with the collapse of share markets and property markets, high inflation, a drastic devaluation of currencies and the loss of millions of jobs. The growth rate in these countries contracted dramatically. Indonesia and Thailand were both forced to apply for loans from the International Monetary Fund (IMF) and implement Structural Adjustment Programs (SAP) as prescribed by the IMF so as to enhance transparency and accountability while Malaysia rejected this approach and instead opted for capital control measures. The financial crisis sparked off a further political crisis in Malaysia when Dr. Mahathir sacked and jailed his deputy, Anwar Ibrahim, in September 1998 on allegations of corruption and sodomy since he felt his power and position was being increasingly threatened. It was amidst this financial crisis that public anger and demonstrations intensified, calling for the end of massive corruption, cronyism and nepotism by the ruling elites in these countries.

As a result of the financial crisis that exposed the mismanagement of the economy and amidst public demands for accountability and transparency, the position of the ruling elite in Thailand, Indonesia and Malaysia became

vulnerable. The prime minister of Thailand, Chavalit Yongchaiyudh was forced to step down in November 1997 and was succeeded by Chuan Leekpai from the Democrat Party. President Soeharto resigned as president of Indonesia in May 1998 and was replaced by his deputy Habibie. This ended the thirty-one-year authoritarian rule of President Soeharto, the longest in the region. In 2001, the second wave of “People’s Power” in the Philippines removed President Estrada for reasons of corruption. In Malaysia, Dr. Mahathir also stepped down in 2003 as prime minister and was succeeded by Abdullah Badawi, widely seen as a clean and moderate politician, and an attempt was made by the corrupt ruling coalition to change its public image. The changes of government in these countries facilitated the passage of the Hanoi Plan of Action in 1998 and the Vientiane Program of Action in 2004, which saw the beginning of inclusion of human-rights-related action points in ASEAN work plans.

2. Internal factors

The first internal factor in ASEAN that made the establishment of the ASEAN regional human rights mechanism possible was the growing movement for democracy and human rights in the period of the 1980s to the 2000s in several ASEAN countries that eventually ended their long period of dictatorship and authoritarian rule. The new governments in the Philippines, Indonesia and Thailand that came through popular uprising after toppling dictatorship or authoritarian rule were relatively more open to human rights and projected themselves as reformers. This was illustrated in the case of President Corazon Aquino who immediately established the first national human rights institution in Southeast Asia—the Commission on Human Rights of the Philippines—in 1986 when she succeeded ousted President Marcos. In Thailand, a new progressive constitution, dubbed the “People’s Constitution”, was adopted in 1997 after General Suchinda Krapayoon was forced to resign in 1992. In Indonesia, President Habibie introduced a wide range of legal reforms in 1998–1999, including human rights protection and a referendum for East Timor, which limited the role of the military and paved the way for the independence of East Timor from Indonesia in 1999. When the 11th ASEAN Summit in 2005 was held in Malaysia under the premiership of Abdullah Badawi, who succeeded Dr. Mahathir, the Malaysian government started the first ASEAN Civil Society Conference parallel to the ASEAN Summit. This could be seen as a gesture to distance himself from Dr.

Mahathir's anti-human rights image. The change of attitudes and perspectives on human rights of these founding member states of ASEAN in turn contributed to breakthroughs of human rights in the negotiation of ASEAN documents with other ASEAN member states.

The second internal factor that aided the establishment of a regional human rights mechanism in ASEAN was the establishment of national human rights institutions in the region. Interestingly, all the national human rights institutions in the region were established as a concession by the respective governments following intense international criticism of their human rights record. The Commission on Human Rights of the Philippines was established in 1986 after President Ferdinand Marcos was ousted. The National Human Rights Commission of Indonesia was established by President Soeharto in 1993 after increased condemnation of the Dili massacre in East Timor in 1991 under Indonesia's military occupation. The National Human Rights Commission of Thailand was a result of the "People's Constitution" of 1997 that was adopted after General Suchinda Krapayoon was ousted. The National Human Rights Commission of Malaysia was established in 2000 during the premiership of Dr. Mahathir to appease international criticism over the treatment of Anwar Ibrahim and the violent crackdown of the reform movement. The Myanmar National Human Rights Commission was established in 2011 by a decree of President Thein Sein as part of a reform package to convince the international community to lift sanctions against Burma. Nevertheless, the existence of these national human rights institutions not only legitimized human rights in their respective countries, but also facilitated human rights discourse at the regional level in ASEAN when they started to work together on issues that cross national borders such as migrant workers and trafficking of women and children. Their support for the establishment of a regional human rights mechanism in ASEAN and their collaboration with civil society have aided advocacy by civil society within ASEAN member states.

The third internal factor, and probably the most important factor of all, was no doubt the crucial role Asian civil society organizations played before and during the period of 1993–2012 in advancing democracy and human rights in several ASEAN countries. They ended the dictatorship and authoritarian rule of President Marcos, President Soeharto, General Suchinda Krapayoon and Dr. Mahathir Mohamad. They countered the "Asian values" argument

and advocated the establishment of a regional human rights mechanism and national human rights institutions in Asian countries in the early 1990s. Clearly, without the contribution of civil society movements for democracy and human rights before and during 1993–2012, it would have been impossible to establish the regional human rights mechanism set out in the ASEAN joint communiqué of 1993 or to hold states accountable to their own commitments.

Civil society engagement with ASEAN in 1993–2012

Nevertheless, the engagement of civil society with ASEAN was not all smooth sailing in the period 1993–2012. It was mixed with gains as well as setbacks, characterized by the tensions of civil society's efforts to hold ASEAN accountable for human rights promotion and protection and ASEAN's resistance to this.

This was most instructive in ASEAN's rather prompt and seemingly positive response to the World Conference on Human Rights given the fact that Lee Kuan Yew and Dr. Mahathir were both leading challengers of the universality of human rights and ardent advocates of "Asian values". On closer examination of the ASEAN joint communiqué, one finds that ASEAN was still reluctant to accept and recognize human rights as affirmed at the World Conference on Human Rights.

The joint communiqué, after welcoming the consensus of the World Conference on Human Rights, continued painstakingly emphasizing "that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights." It actually held on to the "Asian values" discourse and created a back door for itself with the justification of promoting and protecting human rights with "due regard for specific cultural, social, economic and political circumstances" in comparison to what was stated in the Vienna Declaration and Program of Action that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

Hence, it is clear that ASEAN accepted the Vienna Declaration and Program of Action with conditions and the joint communiqué was perhaps a mere public relation exercise as a reconciliatory gesture with the United Nations after ASEAN leaders had so defiantly argued against the principle of the universality of human rights. ASEAN, clearly, had no real intention to follow-up its pronouncement, as was reflected in the fact that there was very little follow-up made by ASEAN after the release of the joint communiqué from 1993–1998.

This probably explains why the work of the Working Group for an ASEAN Human Rights Mechanism, which was launched in 1995 by the Human Rights Committee of LAWASIA to follow-up ASEAN on the establishment of a regional human rights mechanism as expressed in the 1993 joint communiqué, did not make much headway in 1995–2000. In 2000, the Working Group submitted a working document entitled Draft Agreement for the Establishment of the ASEAN Human Rights Commission for ASEAN consideration. It however did not go any further after it was passed on to the ASEAN Institute for Strategic and International Studies for comments and suggestions.⁶

Nevertheless, due to its low profile and lobby-behind-the-door approach, the Working Group was able to have meetings with ASEAN foreign ministers and its senior officials in the period of 1995–2000. In 1998, the Working Group was acknowledged by the ASEAN Foreign Ministers. The work of the Working Group started to create an impact on ASEAN when it organized a series of workshops on the ASEAN human rights mechanism from 2001–2009 in collaboration with the foreign ministries of Indonesia, Thailand, the Philippines and Malaysia and their national human rights institutions. This is evident in the fact that some of the human rights action points in the Vientiane Action Program 2004–2010 are taken verbatim from the recommendations of these workshops such as the “establishment of an ASEAN commission on the promotion and protection of the rights of women and children” and the “elaboration of an ASEAN instrument on the protection and promotion of the rights of migrant workers.”⁷

6 Ray Paolo J. Santiago, 2009, “Developments on the ASEAN Intergovernmental Commission on Human Rights,” <http://www.hurights.or.jp/archives/focus/section2/2009/12/developments-on-the-asean-intergovernmental-commission-on-human-rights.html>.

7 Ibid.

In 2005, ASEAN mandated the Working Group to implement the human rights-related action points in the Vientiane Action Program. The Working Group subsequently organized eight annual roundtable discussions among ASEAN governments, national human rights institutions and civil society groups, a roundtable discussion on engaging ASEAN government on human rights education, research on the elaboration of an ASEAN instrument on migrant workers, research on the establishment of an ASEAN commission on women and children, as well as an expert meeting and a regional consultation on the establishment of the ASEAN commission on women and children.

Another vehicle of civil society that came into the picture in the engagement with ASEAN was Solidarity for Asian People's Advocacy (SAPA). Solidarity was established in 2006 after the 11th ASEAN Summit discussed the drafting of a charter for ASEAN and the Eminent Persons Group was established to prepare a report. It was a loose network of more than 70 national and regional non-government organizations that sought to coordinate collective advocacy with inter-governmental bodies in general and on the ASEAN Charter drafting process in particular.

SAPA was instrumental in getting more civil society organizations working on a wide range of issues, such as refugees, migrant workers, people with disabilities, indigenous peoples, children, sexual orientation and gender identity, and environmental protection. It helped them to be informed of the development of a regional human rights mechanism in ASEAN and to learn about ASEAN and human rights through a series of national consultation meetings and training workshops. It also coordinated engagement and human rights advocacy with ASEAN, including the annual ASEAN Civil Society Conference parallel to the ASEAN Summit in 2006–2012, the submissions to the ASEAN Eminent Persons Group and the High Level Task Force on the ASEAN Charter and the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community in 2006–2007, the campaigns and advocacy on the terms of reference of the ASEAN human rights body with the ASEAN High Level Panel in 2008–2009 and the ASEAN Human Rights Declaration with the AICHR in 2011–2012.

In pushing for more transparency and accountability in the ASEAN decision making processes, SAPA encountered numerous challenges with ASEAN in the initial stage, including difficulties in finding information related to the agenda and decisions of ASEAN meetings, outright rejection

to meeting with civil society, refusal to disclose draft documents for public comments and arbitrary denial of the right of some civil society organizations to join consultation meetings.

As a result of lobbying, advocacy and public campaigns and the cooperation provided by Member States that were more open, the situation improved such that SAPA managed to have three official regional interface meetings with the ASEAN High Level Panel to present the input of civil society on the drafting on the terms of reference of the ASEAN human rights body, and two official regional consultation meetings with the ASEAN Intergovernmental Commission on Human Rights on the drafting of the ASEAN Human Rights Declaration. A number of national consultation meetings were also held in countries such as Indonesia, Thailand, the Philippines, Malaysia and Cambodia. Nevertheless, no draft documents were shared officially by ASEAN officials throughout the process from 2006 to 2012, although the Intergovernmental Commission members from Thailand, Philippines and Indonesia did share the essence of the draft Human Rights Declaration with civil society.

These processes experienced by civil society in the drafting of the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Human Rights Declaration point to the urgent need for a more transparent, accountable and inclusive processes to be established in ASEAN. The rights of civil society to express its views freely and without reprisals and the right to participate in consultation meetings without discrimination or arbitrary denial should be institutionalized.

The ASEAN human rights mechanisms

While civil society in the region has been successful in making the ASEAN human rights mechanisms a reality after 16 years of lobbying, advocacy and campaigns, yet, unfortunately, the regional mechanisms are not independent of ASEAN governments nor are they very effective in promoting and protecting human rights.

There are 10 members in the ASEAN Intergovernmental Commission on Human Rights with each member state getting to appoint one member as their representative. Except for the representatives from Indonesia and Thailand, most of the members of the ASEAN Intergovernmental Commission on

Human Rights in the first three-year term of 2009–2012 were not independent human rights experts but government officials or former civil servants.

The same is true for the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, in which each of the 10 member states of ASEAN is allowed to appoint two representatives to the commission with one for women's rights and another for children's rights. With the exception of the Indonesian representatives, most of the representatives appointed by other member states were government officials or former civil servants.

Although the Terms of Reference of both the commissions states that the members should act impartially, in actual fact, most of the representatives of the two commissions get instructions from their respective governments and toe the line of their government's position. And with a consensus-based decision-making mechanism, only the lowest common denominator will be reached by all. This greatly hampers the effectiveness of the two commissions to address human rights violations in the region.

Obviously, the two commissions cannot be considered as the same as their independent counterparts in the Americas and Africa, namely the Inter-American Commission on Human Rights and the African Commission on Human and People's Rights. It is perhaps more appropriate to look at the two commissions of ASEAN as similar to the United Nations Human Rights Council in terms of its make-up and operation.

The lack of independence of the two commissions has far reaching negative implications on norm setting and the protection of human rights in ASEAN. It has effectively rendered the two commissions, at best toothless tigers, at worst, a tool for ASEAN to conceal or justify its human rights violations.

The latter is most vividly reflected in the ASEAN Human Rights Declaration that was adopted in 2012 by ASEAN. The ASEAN Human Rights Declaration goes against the spirit and letter of the Vienna Declaration and Program of Action by reinstating the arguments of "Asian values" in the principles section of the Declaration. It provides a broad limitation on the enjoyment of human rights with the justification that they need to "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", and to "be considered in the regional and national context bearing

in mind different political, economic, legal, social, cultural, historical and religious backgrounds” and in accordance with national laws.⁸ With such broad overarching limitations on the enjoyment of human rights, practically many violations can be justified, including those of non-derogable rights.

As for the mandates and functions of the Intergovernmental Commission, only one mandate and function as outlined in its Terms of Reference is related to the protection of human rights. It states the goal “to develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community”. While this broad mandate and function may encompass developing a complaint-receiving mechanism, on-site visits, public inquiries, the appointment of special rapporteurs and other strategies in protecting human rights, the Commission has thus far failed to develop any of them. It even refused to accept any complaints of human rights violations when cases were sent by civil society organizations.

The Commission for the Rights of Women and Children has 16 mandates and functions outlined in its Terms of Reference, of which only three can be considered as a protection mandate. Fortunately, these are broadly framed and may include complaint-receiving mechanisms, on-site visits, public inquiries, the appointment of special rapporteurs and other protection mechanisms in the future. However, to date, no such protection mechanisms have been developed.

Conclusion

The ASEAN regional human rights mechanisms could not have been made possible without the role of civil society in ending dictatorship and authoritarian rule in some founding member states of ASEAN. These states then witnessed the coming into power of governments that were relatively more open and receptive to the idea of human rights.

Civil society organizations in the region have been successful in engaging such member states of ASEAN and their national human rights institutions as interlocutors between civil society and ASEAN to open up space for dialogue and engagement for the eventual establishment of the regional human rights

⁸ ASEAN Human Rights Declaration, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.

mechanisms in ASEAN. These spaces for civil society organizations should be expanded and institutionalized.

However, the ASEAN human rights mechanisms remain weak and not independent. The ASEAN Human Rights Declaration falls below international human rights standards. Civil society should seize the opportunity of the review of the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights in 2014 to push for greater reform of the AICHR and review of the AHRD.

Given the political situation in most ASEAN countries, which are still reluctant to recognize human rights fully, the ASEAN human rights mechanisms will most likely focus exclusively on the promotion of human rights for a long period before procedures on the protection of human rights can be developed. The change may only take place when there is a more fundamental political transformation at the national level among some of the member states of ASEAN. A more bottom-up approach in civil society's engagement with ASEAN will be able to assist in providing impetus for such changes.

反思建立東南亞國協人權機制的崎嶇之路

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摘要

一向被稱為「獨裁者俱樂部」的東南亞國協，於1993年至2012年間，開始接受人權觀念，並發展本身的區域性人權機制。在這篇文章中，作者試圖解釋國協為何有這樣的發展，以及這個發展是如何進行的。文中列舉幾個重要的里程碑，並指出促進這些進程的關鍵因素。另外，作者也檢視公民社會所扮演的重要角色，包括從幾個創始會員國的人民推翻專制統治，建立新的民主政府，乃至於公民社會在起草國協憲章以及建立人權機制過程中的倡議。作者認為，儘管公民社會成功地運用國協中新興民主國家本身的人權機制作為與國協對話的窗口，但國協建立的人權機制終究缺乏效率及獨立性。究其原因，實與《東南亞國協人權宣言》在多數會員國的堅持下保留了「不干預原則」，從而無法符合國際人權標準有密切關係。

關鍵字

東南亞國協、區域性人權機制、東南亞國協人權宣言、亞洲價值、維也納宣言暨行動計畫、不干涉原則