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## CHARTERING ASEAN HUMAN RIGHTS

**Abstract:** Human rights issues within the Association of Southeast Asian Nations pose a significant challenge as it seeks to remain relevant in an increasingly interconnected global system. On 20 July 2009, ASEAN members finally agreed to the Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights. This marks a significant step forward for ASEAN but the ASEAN Intergovernmental Commission on Human Rights' functions and mandate also illustrate its equally significant limitations. This alert tracks the negotiations, evaluates the major stakeholders, explains its functions and mandate, and provides an analysis of the prospects and challenges the ASEAN Intergovernmental Commission on Human Rights faces.

posing significant challenges to those outside government to raise issues of concern at the regional level. Within the human rights context, this was most notable in 1983, when the submission of a 'Declaration on the Basic Duties of ASEAN Peoples and Governments,' by the Regional Council for Human Rights in Asia (RCHRA), was initially rejected as an agenda item for ASEAN. This is not surprising given that ASEAN has traditionally focused on capacity-building, non-confrontation and preventative measures.

However, the ASEAN approach was not universal, and both local and international organisations pursued various alternative routes to promote human rights in Southeast Asia. The 1983 submission of the RCHRA Declaration came a decade after various United Nations Security Council resolutions called for regional groupings to establish and implement regional bodies for the promotion and protection of human rights. In advance of the 1993 United Nations (UN) World Conference on Human Rights in Vienna, ASEAN member states, alongside other Asian states,

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### The ASEAN Human Rights Conversation Begins

The establishment of the Association of Southeast Asian Nations (ASEAN) in 1967 was a reaction to the ongoing Cold War and a fear of communism, as well as a vehicle to promote economic development by its founding members – Indonesia, Malaysia, the Philippines, Singapore, and Thailand. It was founded on the norms of non-intervention and a consensus-building policymaking process. From its inception in 1967, ASEAN has evolved into the main forum for Southeast Asian states to voice regional concerns and has emerged as a significant regional player in the international system. The dynamics of the Association changed with the accession of Brunei Darussalam (1984), Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999). While ASEAN has been the regional forum, it has had adopted a distinctively state-centric approach to regional governance. As such, the influence of civil society has been informal and limited,

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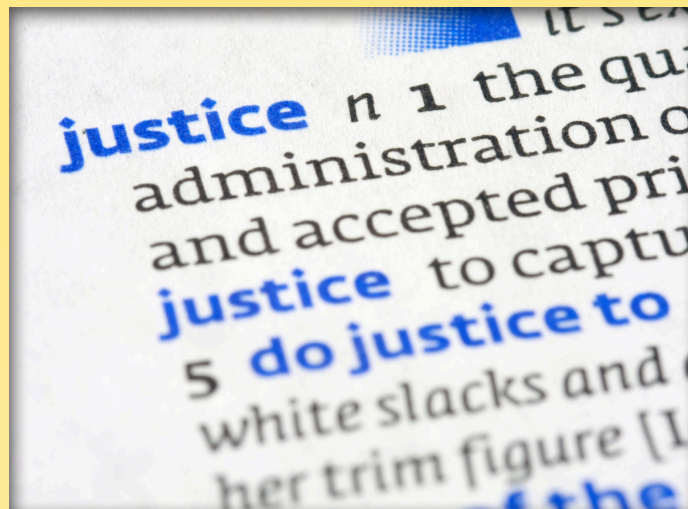
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formulated a different position on human rights to others in the international system, and so began the 'Asian Values' debate, promoting an alternative regional human rights regime. The 1993 Vienna Conference influenced ASEAN as it granted a measure of legitimacy to non-Western views on human rights, which was reflected in the Vienna Declaration and the



Programme of Action. The conference ensured that human rights was featured on the ASEAN agenda in a substantive way and thus began a conversation on human rights at the regional level. This conversation began during a time of significant regional economic development and an increasing level of transnational economic migration flows. ASEAN endorsed both the Vienna Declaration and the Programme of Action, which committed the Association to establish a regional human rights mechanism. This was shown in the Joint Communiqué of the 26th ASEAN Ministerial Meeting (AMM) in Singapore in 1993, where leaders considered 'the establishment of an appropriate regional mechanism on human rights.' Indeed, the development of the 'Asian Values' debate allowed for regional consolidation and the building of trusting relationships at the regional level.

In the same year, the regional association of parliaments - the ASEAN Inter-Parliamentary Organisation (AIPO) - passed a human rights resolution that called on ASEAN member states to recognise that 'it is [...] the task and responsibility of member states to establish an appropriate regional mechanism on human rights.' As a result of the increased interest in a regional human rights mechanism, many colloquia and conferences were held and a working group was established. By 1998, the ASEAN Human Rights Working Group was formally recognised as the regional informal network on human rights. Subsequently, the Working Group became frustrated with the lack of progress by ASEAN and began to look at other avenues in which to promote regional human rights; the most notable proposals to be investigated were an ASEAN Commission on Migrant Labour, an ASEAN Commission on Women and Children, and a regional training centre.

Between 1994 and 1997 illustrated the development of regional solutions to regional human rights issues. During this period, informal mechanisms to discuss regional human rights were established, namely the

annual ASEAN-Institutes of Strategic International Studies Colloquium on Human Rights and the annual Asia-Europe Meeting (ASEM) Informal Seminar on Human Rights. As a result of this regional level interaction, there was increasingly significant movement and advocacy at the regional policymaking level. The 1997 Asian financial crisis had a significant impact

on ASEAN and subsequently the conversation on human rights. The crisis undermined the notion of 'Asian Values', as it tested state-led development legitimacy upon which most regional authoritarian governments were based. Finally, the crisis showed Southeast Asia to be interconnected with other regions and equally vulnerable, which led to a push for further integration. This led to the launch of the 1997 ASEAN 2020 and 1998 Hanoi Plan of Action.

Between 1998 and 2004, human rights took an increasingly central role as ASEAN evolved into a regional community, as promoted in the 2003 Bali Concorde II and the 2004 Vientiane Programme of Action. At the 2000 ASEM in Seoul, human rights and democracy were accepted as discussion topics by Asian partners. During the inter-regional interactions including discussions on human rights, European partners pressured ASEAN not to let Myanmar become ASEAN Chair – a goal that was ultimately achieved. In 2005, the first ASEAN Civil Society meeting was held alongside the official meeting and representatives were able to present to the officials. In 2006, the Joint Communiqué of the ASEAN Foreign Ministers Meeting in Kuala Lumpur explicitly referred to the establishment of a human rights mechanism based on consultations with AIPO, as well as consultations between the latter and the ASEAN Senior Officials Meeting Troika.

The Eminent Persons Group report on the ASEAN Charter was presented and included a reference to the establishment of a regional human rights mechanism in 2006. The Charter was approved at the 13th ASEAN Summit in Singapore and provides for the establishment of an ASEAN human rights body. At the March 2007 Retreat, ASEAN Foreign Ministers discussed and approved the inclusion of a regional human rights mechanism. However, a consensus could not be reached at the Retreat and they deferred the decision and eventually endorsed the Terms of Reference (TOR) at the 42nd ASEAN Ministerial Meeting in July 2009.



## How Will the Regional Human Rights Mechanism Operate?

The TOR submitted by the High Level Panel (HLP) on the ASEAN Human Rights Body (AHRB) was endorsed by ASEAN Foreign Ministers at the 42nd ASEAN Ministerial Meeting in July 2009, amid disagreements over its final form. The TOR covers nine chapters that include purposes, principles, nature, mandate and functions, composition, modalities, secretarial support, work plan and funding as well as the amendment and review of the TOR. Based on the TOR, the purpose of an AHRB is to promote and protect human rights in the region. Its tasks include enhancing public awareness of human rights, engaging with other ASEAN bodies, including civil society organisations associated with ASEAN, obtaining information from member states on the promotion and protection of human rights, developing an ASEAN Human Rights Declaration, capacity building for member states, and consulting with relevant national, and regional institutions and entities.

It was also proposed in the TOR that the AHRB would be named ASEAN Inter-governmental Commission on Human Rights (AICHR). The Commission will comprise of one appointed representative from each ASEAN member state, who will serve a three-year term and may consecutively be re-appointed for one more term. The representatives should be impartial. Being an organ within ASEAN and as part of the ASEAN Charter, the AICHR is inter-governmental in nature and decisions are made based on the practice of consultation and consensus.

It is expected to respect the UN Charter and international law, differences in culture, languages and religions, principles of sovereignty, non-interference, the rule of law, good governance, democracy, fundamental freedoms, and social justice. Despite being inter-governmental in nature, in order to materialise a 'people-oriented' ASEAN, the AICHR is mandated to engage in dialogue and consultation with relevant stakeholders within and beyond ASEAN, including civil society organisations. In fact, the HLP has had a number of dialogues with representatives of ASEAN civil society to discuss the formulation of the draft TOR.

### Stakeholder Responses

Human rights groups have criticised the proposed

human rights body for its lack of power to enforce human rights protection to investigate and prosecute human rights violators, and can only insist that member nations provide an internal report on their rights situation. It is perceived as ASEAN's lack of commitment to uphold human rights in the region. Rafendi Djamin of the ASEAN Task Force on Human Rights, which is comprised of non-governmental organisations (NGOs) from the region, warned that the AICHR should not become a 'toothless' body. The executive director of the Asian Forum for Human Rights and Development (or Forum-Asia), Yap Swee Seng, also mentioned a need for the AICHR to have independent experts. In an open letter to the HLP, 200 civil society organisations conveyed three mandates that should be applied to the AICHR; namely to conduct country visits, to receive complaints and initiate investigations, and to conduct periodic reviews of human rights situations in the region.

Furthermore, the inclusion of the traditional non-interference principle in the TOR is seen to be contradictory. It will hinder the effectiveness of the AICHR to deal with problematic member states such as

Myanmar. Dr Edy Prasetyono from the University of Indonesia argued that cultural relativism could not be applied in human rights discourse and instead argued the AICHR should be based on universal principles. He further argued that it is contradictory to maintain the non-interference principle as ASEAN moves towards becoming a people-oriented institution. In a similar tone, NGOs also agreed that when states sign international agreements, they surrender some sovereignty and open themselves to observation by the international community.

The effort to bring a more rigorous approach to human rights in the region has been supported by ASEAN counterparts. Indonesian Foreign Minister, Dr Hassan Wirajuda, has fought for giving the AICHR more power at the recent AMM in Thailand in July 2009. Alongside Thailand, Indonesia had been pushing for the body to have the mandate to monitor and review human rights situations in every member state and to conduct country visits. The proposal has been rejected by other members such as Myanmar, which almost broke the TOR endorsement. Thailand's Foreign Minister, Kasit Piromya, admitted that there had been compromises to ensure that Myanmar endorsed the TOR. However, Dr Wirajuda further insisted that these views should be reflected in a

**The ASEAN Inter-governmental Commission on Human Rights (AICHR) is expected to respect the UN Charter and international law, differences in culture, languages and religions, principles of sovereignty, non-interference, the rule of law, good governance, democracy, fundamental freedoms, and social justice.**

political declaration at the next ASEAN Summit meeting in October.

Despite the shortcomings of the TOR, the UN High Commissioner for Human Rights, Navanethem Pillay, has acknowledged that ASEAN has made important progress towards promoting and protecting international human rights standards.

As similarly argued by the NGOs, she encouraged ASEAN to engage in multi-stakeholder participation and consultation in the activities of the AICHR. She also expressed hope that following the launch of the AICHR, a clear protection mandate will be established.

*Figure 1 Key dates of the development of the ASEAN human rights body*

Year	Dates	Events
<b>1993</b>	29 March-2 April	ASEAN member states took part in the Regional Meeting for Asia of the World Conference on Human Rights in Bangkok
	14-25 June	ASEAN member states took part in the World Conference on Human Rights in Vienna
	23-24 July (26 <sup>th</sup> AMM in Singapore)	ASEAN Foreign Ministers agreed to establish AHRB
	19-26 September (14 <sup>th</sup> General Assembly in Malaysia)	AIPO Declaration on Human Rights as a form of support from the ASEAN parliamentarians to the establishment of a human rights mechanism in the region
<b>1995</b>	July	The Working Group for an ASEAN Human Rights Mechanism was set up by the Human Rights Committee of the Law Association of the Asia and the Pacific Region or LAWASIA
<b>1998</b>	24-25 July 1998 (31st ASEAN Ministerial Meeting)	ASEAN formally acknowledged the Working Group for an ASEAN Human Rights Mechanism.
<b>2005</b>	12-14 December (11 <sup>th</sup> ASEAN Summit)	First ASEAN civil society meeting held alongside official meeting with presentations being given to officials by civil society organisations
<b>2006</b>	10-14 December (12 <sup>th</sup> ASEAN Summit)	High Level Task Force set up to draft ASEAN Charter
<b>2007</b>	29-30 July (40 <sup>th</sup> AMM in the Philippines)	ASEAN Foreign Ministers agreed to include the creation of AHRB in the draft of the ASEAN Charter
<b>2008</b>	15 December	ASEAN Charter entered into force, of which the creation of AHRB was stipulated in Article 14 of the Charter
	17-24 July (41 <sup>st</sup> AMM in Singapore)	A HLP was appointed to draft the TOR for AHRB
<b>2009</b>	13-15 January (7 <sup>th</sup> HLP on AHRB meeting)	First draft of TOR was completed
	27 February	Draft TOR was submitted to the ASEAN Foreign Ministers
	17-23 July (42 <sup>nd</sup> AMM in Thailand)	TOR was adopted by ASEAN Foreign Ministers AHRB was proposed to be named 'ASEAN Inter-governmental Commission on Human Rights'
	October (15 <sup>th</sup> ASEAN Summit)	ASEAN plan to launch AHRB

ASEAN responded to the criticism by arguing that the creation of the AICHR is a new beginning and not an end. Therefore, human rights promotion is a practical starting point for a region with a vast political diversity. The Prime Minister of Thailand, Abhisit Vejjajiva, argued that it is better to start somewhere than to have no progress at all. He further added that the AICHR will operate under three principles, namely credibility, realism and evolution. The AICHR should be a venue to develop a human rights mechanism and cooperation in the region which will be a gradual process. The principle of protection will be the next evolving step following the promotion of human rights.

While critics have expressed disappointment with the commission's lack of independence and powers to protect against rights abuses, the acceptance of the TOR is nonetheless significant because ASEAN has kept its promise to establish a regional human rights mechanism.

## Laudable or Underwhelming Achievement? An Inter-regional Comparison

Critics, like Pokpong Lawansiri, have noted that ASEAN has fallen far behind Europe, Africa and the Americas in the creation of a regional human rights mechanism. These regions have set up human rights commissions and established human rights courts. In ASEAN, even talk of creating an ASEAN Court for Human Rights in the future has been taboo among policymakers.

However, Suzannah Linton argues that the achievements in the Americas and Africa have transpired from a graduated approach. It took the Americas 30 years before it established the Inter-American Court of Human Rights after the Charter was signed in 1948. Similarly, the establishment of human rights in Africa took three decades to develop, beginning in 1963, and the African Court on Human

Figure 2 Significant stakeholders

Names	Description
HLP on AHRB <a href="http://www.aseansec.org/HLP-TOR.pdf">http://www.aseansec.org/HLP-TOR.pdf</a>	Draft the TOR of an AHRB
Working Group on ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (WG-ACWC) <a href="http://www.asean.org/TOR-WG-AGWC.pdf">http://www.asean.org/TOR-WG-AGWC.pdf</a>	Working towards the establishment of an ASEAN commission on the promotion and protection of the rights of women and children
ASEAN Inter-Parliamentary Assembly <a href="http://www.aipasecretariat.org">http://www.aipasecretariat.org</a>	Adopted a resolution on human rights in 1993 for a regional human rights mechanism.
RCHRA	Kick-started the conversation and presented the 'Declaration on the Basic Duties of ASEAN Peoples and Governments' to ASEAN in 1983
Working Group for an ASEAN Human Rights Mechanism	Informal coalition of national working groups from ASEAN member states which are composed of representatives of government institutions, parliamentary human rights committees, the academe, and NGOs; all of which worked to establish an intergovernmental human rights commission for ASEAN
The Network of Four National Human Rights Institutions (4 NHRIs)	Dialogue partner of the HLP on AHRB
The Solidarity for Asian People's Advocacy (SAPA)	Dialogue partner of the HLP on AHRB
The Women's Caucus for the ASEAN Human Rights Body	Dialogue partner of the HLP on AHRB
Asian Forum for Human Rights and Development <a href="http://www.forum-asia.org/index.php?option=com_frontpage&amp;Itemid=26">http://www.forum-asia.org/index.php?option=com_frontpage&amp;Itemid=26</a>	A regional human rights organisation with 42 member organisations across Asia.

and People's Rights was established in 1998, twelve years after the African Charter came into force. In comparison, Europe made faster progress as it established the European Court of Human Rights in 1959, six years after the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force. From the various regional experiences, ASEAN has made a good start but there are foreseeable challenges to future developments.

## **Challenges and Recommendations**

### *Coordination and resource mobilisation*

According to Termsak Chalermpananupap, the effectiveness of the AICHR and the implementation of the TOR will require strong coordination and collaboration with relevant ASEAN bodies, and will depend on the availability of resources and expertise for both the AICHR and the ASEAN Secretariat. It is essential that the AICHR is able to mobilise resources efficiently to support its activities. There would also be foreseeable operational challenges for the AICHR and other regional human rights mechanisms in the pipeline such as the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers.

### *Issues of compliance*

In an open letter to ASEAN ministers, civil society organisations have voiced concern over member states' compliance to the TOR, in particular Myanmar. Uppermost in everyone's minds is, in light of Aung San Suu Kyi's recent conviction by the military junta for breaching the terms of her house arrest, how ASEAN would respond to her continual confinement by the junta. Under the TOR, the AICHR and ASEAN are obliged to uphold international human rights standards which would presumably include securing the release of Aung San Suu Kyi and improving the plight of ethnic minorities in Myanmar. It remains to be seen whether the AICHR can move ASEAN beyond standard expressions of disapproval for the junta after its launch in October.

As Forum-Asia highlights, ASEAN member countries are beset with human rights violations ranging from extrajudicial executions and violation of women's rights through labour exploitation, trafficking and sexual exploitation. In order to address this, representatives of the AICHR should be competent in the field of human rights and able to propose suitable recommendations to the ASEAN Foreign Ministers. Hence, the regional development of human rights will depend largely on the Commission's ultimate

composition.

## **Future Developments: Protecting Women & Children, and Migrant Workers**

Apart from establishing an overall human rights body, ASEAN is moving towards the promotion and protection of the rights of women, children and migrant workers with a working group set up to draft the TOR for the ACWC. Representatives from the ASEAN Human Rights Mechanism working group and the national human rights commissions recommended at their 4th roundtable that the working group use the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) as benchmarks of common legal standards in drafting the TOR.

There is a clear role for a regional commission as CEDAW and CRC reporting processes reveal that ASEAN states require enormous assistance in meeting their treaty obligations, particularly in plugging the gaps that exist between reporting, monitoring, and implementation. It is also important to ensure the ACWC is designed in line with principal human rights treaties and prevent duplication of efforts with the existing treaty-monitoring bodies and the national human rights commissions, as Suzannah Linton argues. The ACWC could take the lead in the drafting and implementation of treaties that crystallise cooperation in, for example, the trafficking of women and children, sex tourism, child prostitution and pornography.

With regard to migrant workers, the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers is working to develop a regional protection mechanism, which is expected to include a clear definition of migrant workers. ASEAN member states would also be encouraged to review national laws and policies that affect migrant workers, and develop a cohesive strategy to address trans-border concerns. Over time, it is recommended that all ASEAN member states work towards the ratification of international conventions relevant to migrant workers' rights, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). Currently, only the Philippines has ratified the ICRMW; Cambodia and Indonesia have signed but have yet to ratify the convention.

## **Conclusion**

While the establishment of the AICHR is a new beginning for ASEAN, one should temper aspirations for an improved human rights situation with a dose of realism, bearing in mind that it took 3 decades before



human rights became established in the Americas and Africa. After its launch in October, the AICHR will provide a regional platform for member states to discuss human rights matters at the regional level, and in the longer term, take on more challenging functions, including human rights protection mechanisms.

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