



International Politics

South East and East Asia

A Decade of the ASEAN Human Rights Declaration

The AHRD in Disuse and
ASEAN's Inability to Take
Human Rights Seriously

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Executive Summary

Efforts to establish a human rights mechanism in Southeast Asia led to the establishing of a human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR). The AICHR drafted the ASEAN Human Rights Declaration 2012 (AHRD). The Declaration passed its tenth-year mark since its adoption by ten ASEAN member states. The AHRD drafting process was characterised by disagreements among governments, leading to a final document with diluted provisions falling well below international human rights standards. Thus far, the AHRD's impact has proven to be limited, highlighting ASEAN's ongoing challenges in prioritising and addressing human rights concerns. Although the AHRD has served as a common framework for discussing human rights and facilitated some engagement, its limitations, combined with the weaknesses of the AICHR, have undermined its effectiveness in providing meaningful human rights protection to those who need it most.

This brief, authored by Edmund Bon Tai Soon and Umavathni Vathanaganthan, traces the development of human rights institutionalism in Southeast Asia and how the AHRD has (or has not) helped human rights gain a foothold in the lives and psyche of the people of Southeast Asia.

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Introduction	2
Tracing Human Rights in ASEAN: The Early Years.....	2
The ASEAN Intergovernmental Commission on Human Rights (AICHR).....	4
Drafting of the AHRD.....	5
Critiques of the AHRD.....	6
Has the AHRD Made Any Difference?	6
Conclusion	7
Bibliography.....	10
About the authors	11
About the region	16
Imprint	17

Introduction

The Association of Southeast Asian Nations (ASEAN) was established through the Bangkok Declaration of 1967 to promote political stability and economic growth. It was also an attempt to contain the influence of communism that was spreading across countries in Southeast Asia during the Cold War (Council on Foreign Relations, 2022).

Over the years, the “ASEAN Way” of non-interference has paralysed progress on the human rights front. The ten ASEAN countries loathe to criticise each other’s human rights record. The governments justify inaction on human rights violations by emphasising consensus-building through the ASEAN Way. “Asian values” of communitarianism are also commonly used as a shield to fend off “Western” concepts that focus on individualism (Hoon, 2004).

The ASEAN Way is reinforced by numerous ASEAN instruments, such as the Treaty of Amity and Cooperation in Southeast Asia 1976 and the ASEAN Charter 2007. They have become central to the concept of ASEAN regionalism (Acharya, 1998; 2009; Sundrijo, 2021). The ASEAN Human Rights Declaration 2012 (AHRD) is not spared the same treatment. It does not contain any judicial or extra-judicial mechanism for its enforcement. Human rights are to be achieved through “cooperation with one another”, Article 39 states. Adherence to the principles of ASEAN, including non-interference as enshrined in the ASEAN Charter, is reaffirmed in the preamble to the AHRD. In this essay, we briefly trace the development of human rights institutionalism in Southeast Asia and how the AHRD has (or has not) helped human rights gain a foothold in the lives and psyche of our people.

Tracing Human Rights in ASEAN: The Early Years

The motivation that drove the ASEAN leaders to institutionalise human rights is unclear, but some view the move as part of a strategy to re-legitimise ASEAN (Narine, 2012). The 1993 United Nations World Conference on Human Rights that led to the adoption of the Vienna Declaration and Programme of Action (VDPA) called on states to “consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist”.

Not long after adopting the VDPA and substantially due to international pressure, the ASEAN foreign ministers at its 26th meeting decided to “coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights” (ASEAN, 1993, p. 4). ASEAN leaders said human rights should not be politicised and cannot be viewed as “added conditionality or protectionism” when linked to trade, investment and finance (ASEAN, 1991, p. 2; Wahyuningrum, 2021). It was stressed that “development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights” (ASEAN, 1993, p. 4).

Despite governments attempting to qualify human rights for Southeast Asians and pushing back on a full embrace of human rights, advocacy to establish a human rights mechanism continued by civil society actors, such as the Working Group for an ASEAN Human Rights Mechanism. The Working Group then comprised leaders from six countries: Thailand, Malaysia, Indonesia, Cambodia, Singapore and the Philippines. It was formed in 1995. Its norm entrepreneurial work that took years saw numerous engagements with key government actors to convince and sensitise them on what a human rights mechanism ought to, and can, look like (Davies, 2013).

The Working Group, which has for some time been supported by Germany's Friedrich Naumann Foundation for Freedom, conducted its advocacy from within ASEAN while maintaining ties with civil society organisations (CSOs). Progress was slow as steps were taken to socialise the foreign ministries of ASEAN states with the idea of a human rights body. At all material times, the Working Group espoused international human rights ideals even though it was alive to the realistic possibility that ASEAN would dilute these standards. In this sense, much of the Working Group's initiatives was to vernacularise human rights and translate the same for a regional audience.

When the ASEAN Charter was first proposed in 2005, it was essential that it should contain something about a human rights body. Tommy Koh (2009) recounts that establishing a human rights mechanism was most "contentious" and observed the division of member states into three camps. The CLMV (Cambodia, Lao PDR, Myanmar and Viet Nam) countries opposed the idea, while Indonesia and Thailand wanted a mechanism. Brunei Darussalam, Malaysia, Singapore and the Philippines stood in the middle.

The attempt to insert the enabling human rights mechanism clause in the ASEAN Charter was "delicate", "sensitive", and had the potential to be politicised, said those on the High-Level Task Force (HLTF) that drafted the ASEAN Charter (Koh, 2009). Much time was spent at the HLTF meetings debating the role, powers and mandate of the human rights body in question.

The ASEAN Charter came into force on 15 December 2008 as a legally binding treaty, and member states agreed to respect fundamental freedoms and promote and protect human rights. At the same time, ASEAN's core norms of sovereignty, territorial integrity and non-interference were maintained. The charter did not go further than to state in Article 14 that an ASEAN human rights body is to be established in conformity with the purposes and principles of the ASEAN Charter. Details of the body would be left for future negotiations. Note that the charter was not meant to be a human rights instrument, although it was considered a small breakthrough that human rights were formally recognised in a binding treaty between ASEAN member states.

At that juncture, there was still no appetite to have a Southeast Asian human rights instrument that spelt out the rights of Southeast Asians vis-à-vis the obligations of the state. Unlike the African Charter on Human and Peoples' Rights 1981, which had substantive human rights provisions and established the African Commission on Human and People's Rights with a solid mandate to protect those rights, Article 14 of the ASEAN Charter was devoid of particulars. It merely set the tone for

human rights by promising that a human rights body would be established, and this gave a way in civil society to pressure ASEAN to do more on human rights (Naldi & Magliveras, 2014).

The ASEAN Intergovernmental Commission on Human Rights (AICHR)

Article 14 was followed by the nomination of members to a High-Level Panel on an ASEAN Human Rights Body. The panel drew up the AICHR's terms of reference. When the terms were adopted in July 2009, it was considered a significant measure towards strengthening regional cooperation on human rights (ASEAN, 2009; Hanara & Bon, 2022).

The AICHR is a Charter-based human rights body. It is mandated to promote and protect human rights in the region. Interestingly, the AICHR was to take an "evolutionary approach" that would contribute to developing human rights norms and standards in ASEAN (paragraph 2.3 of the terms of reference). Whether this approach has been taken is a question that has not been answered.

Although "protection" appears in its terms of reference, the AICHR's role is overwhelmingly geared toward human rights promotion: it acts in consultation, provides advisory services, obtains information on human rights matters and conducts thematic studies, among others. Governments choose the representatives who can be removed at any time. There are no express powers to conduct investigations, inquiries, or to receive complaints. Even foreign funding for "protection" activities is banned.

Critics have described the AICHR as toothless. The main proponent of the AHRD is the AICHR which cannot hold member states accountable for their human rights violations. In light of this, the AICHR makes the argument that the promotion of human rights is also a form of protection:

" The AICHR works under the spirit of consultation and consensus. However, it is not an obstacle to the promotion and protection of human rights, especially on educating and raising awareness on human rights to the people of ASEAN. The promotion of human rights should be done in parallel with other developments, to ensure that strong protection mechanisms are created. "

(ASEAN Secretariat, 2017, p. 45)

Close to 15 years since the AICHR's establishment, its terms of reference have yet to be reviewed in contravention of paragraph 9.6 (five years after it entered into force, namely, 2014). The AHRD has yet to be given "life" because the AICHR has no real power to compel the AHRD's performance. Such a review is an opportunity for the AICHR to establish a new protection mandate, and some members are resisting this move through procrastination. They have yet to appoint their representatives to the review panel. Little has changed to this reluctance and avoidance of improved human rights accountability.

Recall that the drafters of the ASEAN Charter could do no more than settle for an AICHR that will not be a “finger-pointing” body but would “define human rights in the ASEAN context” (Koh, 2009). And matched with a weak set of human rights in the AHRD (as outlined below), compounds the present challenge in institutionalising human rights protection in the region.

Drafting of the AHRD

The AICHR’s first task was to draft the AHRD. The AHRD was developed in two stages.

First, the AICHR appointed an expert panel to come up with a proposed declaration. They met regularly and reported to the AICHR. Then, the AICHR representatives negotiated among themselves to decide on the language of the text. There were several drafts. Some AICHR representatives contested terms and standards matching international human rights law. There was no consensus to strengthen the text (Petcharamesree, 2013). Any changes to the draft text had to meet unanimous approval, and it came to a point where no draft could be agreed upon. Member states were split between the “liberal” and “conservative” camps, with Clarke (2012) noting that the “influence of the conservative faction was evident”. There were backroom dealings to persuade each other and compromise.

Throughout the drafting process, minimal consultations with civil society and non-governmental organisations were held, although Indonesia and Thailand consulted their organisations at the national level (Clarke, 2012; Aguirre & Pietropaoli, 2012; Asean NGOs, 2012). The process was highly secretive (Narine, 2012). Leaked drafts with government annotations that showed changes to weaken human rights found their way into the public domain. On the defensive, the AICHR had to respond. It increased its visibility through media statements to explain itself and hastily convened consultations with human rights groups.

Despite ASEAN having already adopted several documents on specific human rights matters such as women, children and migrant workers through the Declaration on the Elimination of Violence Against Women in the ASEAN Region 2004, ASEAN Declaration Against Trafficking in Persons Particularly Women and Children 2004, and ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007, the draft AHRD was well below par.

There was also contestation within the AICHR as three countries wanted a more robust document. They did not budge. They indicated that they would decline to inaugurate the declaration. As the deadline was nearing for the AHRD to be completed, internal pressure compelled ASEAN leaders to issue what is now known as the Phnom Penh Statement on the Adoption of the AHRD.

On 18 November 2012, almost two decades after the VDPA, the AHRD and Phnom Penh Statement were signed. The Phnom Penh Statement was to appease those seeking a stronger AHRD by reaffirming a commitment to ensure the AHRD will be implemented according to the Universal Declaration of Human Rights. It was a tacit acknowledgement that ASEAN knew what would come: that the AHRD was going to be maligned for falling below international human rights standards.

On a positive note, adopting the AHRD could be seen as progress towards legitimising human rights in ASEAN (Muntarbhorn, 2017). Some hoped the document could be the basis for legally binding human rights instruments in the future (AICHR, 2011; Clarke as cited in Duxbury & Tan, 2019). But at what cost in terms of defining human rights then?

Expectedly, human rights groups were disappointed with the final version of the AHRD. They considered the AHRD as continuing ASEAN's history of its cold reception for human rights (OHCHR, 2012; Sarwar, 2018; Renshaw, 2019). Given member states' bleak human rights records, it was clear to civil society that the AHRD was a political compromise to "show" that it was doing something for human rights but without much substance. The governments still feared institutionalising human rights in a more effective way, and relied on the ASEAN Way as an excuse for its approach to human rights (Pisanò, 2014), thus undermining their universality (Naldi & Magliveras, 2014) in the process. The International Commission of Jurists (2012) called the AHRD a "fatally flawed document", drawing the ire of AICHR representatives.

Critiques of the AHRD

There are five main criticisms of the AHRD.

First, Article 6 balances the enjoyment of people's human rights with the need for them to perform "corresponding duties" to others, community and society. This balancing exercise is an unwarranted fetter on human rights and empowers states to curtail human rights by imposing obligations on individuals. Human rights cannot be traded off in this way.

Second, in the realisation of human rights, national and regional particularities are given prominence, thereby underscoring social, cultural and economic relativism. Article 7 seems to allow ASEAN governments off the obligation to protect human rights if they can point to their national and regional contexts to carve out exceptions. Such exceptions appear to be limitless on the face of Article 7.

Third, Article 8 underpins the exceptional power of the state to limit human rights by national laws, further enabling human rights violations and abuses in the name of "national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society". Again, this provision contravenes international human rights law, for particular rights such as the right to life and freedom from torture are non-derogable.

Worryingly, Articles 6, 7 and 8 provide ASEAN with the basis to tout the AHRD as "uniquely ASEAN" (ASEAN, 2013). Its uniqueness stems not from a sense that the AHRD betters international human rights standards but provides a communitarian ethos reinforcing the essence of Asian values while legitimising cultural relativism.

Fourth, not only does the AHRD recognise a more diluted version of human rights than those recognised by the United Nations, but some rights are also absent from the AHRD. The right to self-determination and the right to freedom of association, for instance, are missing. Indigenous peoples are not recognised as distinct peoples with specific rights and who are vulnerable and marginalised, thus warranting special mention. This is a concern because all ASEAN member states have adopted the Declaration on the Rights of Indigenous Peoples (Renshaw, 2019).

Finally, in the reiteration of the principles of national sovereignty, non-interference, and “avoidance of double standards and the politicisation” in Article 9, the AHRD states that there should be no “confrontation”. One cannot talk about human rights accountability if one cannot confront the issue and the violators. The absence of any reporting, monitoring or enforcement mechanism in the AHRD can best be explained by the vaunted ASEAN approach not to meddle in the human rights affairs of countries. Similarly, the AICHR, as a body called to implement the AHRD, finds itself with no power to influence states to comply with the declaration.

Has The AHRD Made Any Difference?

A decade later, the answer to this question is yes, marginally; and no, by far.

First, the AHRD has allowed ASEAN member states to speak of “human rights” with a common baseline. It is now harder for detractors to argue that human rights are a Western imposition, although some continue to try. While the AHRD is a showpiece of compromises among the states agreeing to the “lowest common denominator” (Desker, 2008, p. 2), and weak as it may be, it was a home-grown regional effort that came about through the ASEAN Way.

Second, from the baseline, the AICHR is freer – than pre-AHRD years – to graft and craft activities to achieve human rights gains. Although there are no studies on the impact of these activities, the promotion of human rights at regional and domestic levels has increased.

The AICHR representatives will first propose and negotiate programmes to be included in its Five-Year Work Plan (FYWP). The FYWP provides details of the indicative activities and gives an insight into their human rights emphasis. In AICHR’s FYWP 2021–2025, the AHRD appears 27 times concerning its implementation, policy support for ASEAN member states and sectoral bodies, and stakeholder engagement. Among others, two programme objectives refer to upholding human rights by documenting common challenges, best practices and lessons learned. Work on accountability mechanisms is found in consultations to discuss access to remedies and grievance mechanisms to counter radicalism and violent extremism. These consultations are with senior officials on transnational crime. International human rights treaties are also mentioned in the FYWP 2021–2025 to the extent that their ratification will be promoted among ASEAN member states.

Once the activity is included in the FYWP, a detailed concept note with a budget for the programme will be presented for approval. For example, if an anti-torture workshop is to be organised, the AICHR must collectively agree on its modality, programme, funding and participants. Often too, questions are raised on the nature, interpretation and meaning of the human right in question. On

approval, representatives can creatively run the activity so that robust debate on the issue occurs. Nevertheless, we cannot overstate the utility of this exercise because AICHR programmes are held behind closed doors before a limited audience. How this translates to protecting human rights is uncertain.

Third, the AHRD provides an entry point to keep human rights at the forefront of ASEAN's regional agenda. Apart from human rights dialogues to exchange views among members states (see AICHR, 2022a) and to strengthen regional cooperation in ASEAN (see AICHR, 2022b), the AHRD is a lens through which the current state of human rights and peace in the region can be analysed (AICHR, 2023). Despite the AICHR's lack of protective power, it gives a reason for AICHR representatives to table human rights cases for discussion and issue statements of concern on pressing human rights matters.

The Rohingya humanitarian crisis saw several ASEAN member states intercepting boats carrying refugees, mostly children and women, fleeing Myanmar to avoid persecution. It was said that more than 700,000 Rohingyas fled the country since Myanmar launched a crackdown in 2018 that included mass killing and rape (The Borneo Post, 2018; Reuters, 2022; Latiff & Ananthalakshmi, 2022). While the AHRD was being violated by Myanmar and the countries returning the boats to sea, the AICHR was silent, and no measures were taken to address the issues.

As the AICHR representatives could not agree on making a statement, the Indonesian and Malaysian representatives issued a joint statement in 2018. They noted with disappointment that avenues within the AICHR had been exhausted and called on ASEAN to adopt a "whole-of-ASEAN approach" to translate the AHRD and other ASEAN commitments into action (Wisnu & Bon, 2018). The release of the statement that broke ranks with the AICHR was criticised. However, it set a precedent for AICHR representatives to make minority statements when the AICHR could not reach unanimity (Collins & Bon, 2023).

The Myanmar military coup against Aung San Suu Kyi and other leaders in 2021 saw grave human rights violations and violent, repressive action against protestors (BBC, 2021). International pressure on Myanmar multiplied. ASEAN expressed concern over the developments in Myanmar (ASEAN, 2021; 2022a; 2022b; 2022c; 2023). While the statements reiterated that ASEAN remained committed to the principles in the ASEAN Charter and called for "utmost restraint, patience and efforts to avoid escalating the situation" (ASEAN, 2022c), the AHRD was not able to provide ASEAN with further avenues to punish Myanmar.

Even when the AICHR representatives of Malaysia, Indonesia, Singapore, Thailand and the Philippines released a minority statement denouncing the executions of four activists in Myanmar in 2022 (Fernandez, 2022) – which was likely the best the AICHR could do considering the divisions in the organisation – they were unable to use the AHRD to do more.

ASEAN's approach to addressing the crisis has been "inadequate and ineffective" as the junta continues to commit serious human rights violations (FORUM-ASIA, 2023). The military knows that despite the ASEAN Charter and the AHRD, little else can be done by ASEAN or the AICHR to intervene and hold Min Aung Hlaing accountable for his conduct.

Fourth, the AHRD creates space, and a platform, for engagement on human rights matters with civil society. The AICHR has dialogued with regional stakeholders on emerging human rights issues of interest pertaining to promoting and protecting human rights based on the AHRD (ASEAN, 2017). The commission's guidelines on its relations with CSOs are utilised to grant CSOs consultative status with the AICHR (AICHR, 2015b). Thus far, 30 CSOs have been granted such status (AICHR, n.d.), and they can work with AICHR representatives on joint programmes.

Despite reservations by several AICHR representatives, CSOs with consultative status were invited to AHRD discussions with AICHR in 2017, 2018 and 2019. The 2019 activity was intended to strengthen the AICHR's commitment to engage with civil society and, at the same time, to seek inputs on defining Articles 9 (inclusivity and participation) and 39 (cooperation on human rights) of the AHRD (AICHR, 2019).

Given that the AHRD is not a legally binding instrument, it leaves a great deal of discretion to individual member states – largely based on their preferences – whether to respect and uphold human rights or not, and if so, which rights. Save for the points made above, the AHRD has made little difference to the practices of governments on the ground.

Conclusion

Taken at its highest, the AHRD provides an entry point for civil society to talk about human rights with states as if there is some core understanding of the same, rather than parties speaking at cross-purposes or from no baseline position. It has also allowed the AICHR to ground its promotional activities around “human rights” standards. For what the AHRD is worth, it has been used as a “backstop” by ASEAN governments and the AICHR in their statements as and when necessary, even though the impact from just reciting the AHRD provisions has been negligible. That is as far as we can say regarding the positives.

The AHRD continues ASEAN’s apathy and inability to take human rights seriously. The AICHR’s failure to agree to a more robust declaration meant that the AHRD is today devoid of an enforcement mechanism or at least protective measures that victims and survivors can turn to for remedies. The military coup in Myanmar is a case in point. The AHRD cannot be called on to hold the junta accountable even as the patience of nine ASEAN states has been tested to the extent that the junta is excluded from official ASEAN meetings.

The reality is that the AHRD has fallen into disuse and is hardly ever referred to or relied on, in any serious way, by civil society and governments. Its limited utility, coupled with a weak AICHR that does not effectively respond to critical human rights issues, exacerbates the risk that both the declaration and commission will sink further into irrelevance.

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