

# The Challenges on implementing AHRD



**Monument statue**

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**O**n 18<sup>th</sup> November 2012, the ASEAN Human Rights Declaration (AHRD) was adopted by ASEAN Heads of State at the twenty-first ASEAN Summit in Phnom Penh. However, the continuing silence on human rights abuses in ASEAN has led to loud criticisms from observers and activists. Looking back at ASEAN's history, it can be noted that the regional organisation began to embrace in the values and norms of human rights in the 1990s. The adoption of the ASEAN Charter which comprises to follow the principles of democracy, the rule of law and good governance, and respect for and protection of human rights and fundamental freedoms in its preamble<sup>1</sup> is one demonstration of this. Moreover, the ASEAN Intergovernmental Commission on Human Rights (AICHR), the first regional human rights institution in Asia, was also set up in 2009.

The most significant progress by ASEAN regarding the implementation of human rights norms was to adopt the AHRD. The emergence of the AHRD is important for two reasons for Southeast Asian countries. First, it was a precursor of a formal human right treaty for the region and was positively related to the universal values of human rights norms.<sup>2</sup> The AHRD comprised many of the international human rights standards: it supports freedom and equality in dignity and rights, and is opposed to discrimination; provides the protection of one's honour, family and property; and guarantees the individual rights to education, medical and social care and protection, and a clean environment.<sup>3</sup> Second, the AHRD clearly defines the mandate of the AICHR to enforce human rights in the region.

Alongside the emergence of the AHRD, it was highly expected that the human rights situation in the region would progress well initially. Nevertheless, ASEAN countries have struggled to address the protection of political rights and civil liberties, together with the low ratification rate of United Nations human rights status<sup>4</sup> (for e.g. Thailand military coup in 2014, extra-judicial killings as the

result of anti-drug campaign in Philippines in 2017 and the humanitarian crisis in Rakhine State in Myanmar until now<sup>5</sup>). Therefore, this paper will mainly explore why the protection of human rights has been continuously ignored in the region even though ASEAN has adopted the formal human rights treaty in the form of the AHRD since 2012. Consequently, the paper will discuss two main challenging issues for the implementation of the AHRD on the ground. In the final section, the paper will suggest a meaningful approach to bring real development to the human rights situation in Southeast Asia.

The first challenging issue is that the AHRD is a weak instrument for effective implementation on the ground because it includes the substantive limitations to deflect from universal human rights standards from a legal perspective<sup>6</sup>. In other words, it was created to merely get international legitimacy in human rights space<sup>7</sup> rather than enforcing the international values of human rights on member states<sup>8</sup>. From a legal perspective, there are four major weakness to the AHRD that prove its rejection of the universalist approach to human rights. Firstly, Article 7<sup>9</sup> limits universal values of human rights and freedom into the regional and national context<sup>10</sup>. It means that ASEAN practices international human rights norms only if it conforms with a member state's history, politics, religious or economic context.<sup>11</sup> Another weakness of the instrument is it balances rights with duties under Article 6<sup>12</sup> that undermines not only individual liberty but also the essence of international human rights' norms.<sup>13</sup> The balancing between individual rights and individual duty ensures the solidity and the security of state that would automatically suffer the individual rights and disregards international human rights law.<sup>14</sup>

Furthermore, another shortcoming of the AHRD, Article 8,<sup>15</sup> means that the national law, national security and morality would make stronger the power of the state rather than the universal human rights standard.<sup>16</sup> Eventually, Article 40<sup>17</sup> supposes to undercut the foregoing

39 articles because the clause means "the purposes and the principles of ASEAN", maintaining the traditional ASEAN way of non-intervention and state-centrism.<sup>18</sup> These four limitations clearly show that the AHRD does not support individual rights and freedom for their people in the region and fails to comply with universal values of human rights. As a result, Matthew Davies argues that, "All the rights enunciated in the Declaration are packaged within the traditional ASEAN norms of non-intervention and sovereign equality".<sup>19</sup> Therefore, it highlights that the AHRD was created so that ASEAN members were viewed as legitimate in the human rights space rather than protecting international human rights norms in the region.

Another challenging issue is that there is no competent regional human rights institution in the Southeast Asian region. To implement the AHRD in the region, an independent and effective regional human rights institution is necessary. However, AICHR which has been established in 2009 has a limited Term of References (TOR) to conform with traditional ASEAN norms rather than international human rights norms. Accordingly, AICHR has been a regional institution with the lack of independence (according to TOR article 9 and 5.2)<sup>20</sup> and weak protection mandates to protect the essential process of ASEAN human rights matters.<sup>21</sup> Due to the lack of independence, the functions of AICHR for promoting and protecting human rights has been controlled by the member states' political wills because the chair of ASEAN is also the chair of AICHR in the same year.<sup>22</sup> Therefore, the decision making of AICHR can be influenced by the political wills of the chairing state of ASEAN. It means that the effectiveness of AICHR's mechanisms highly depends on the decisions of the member states.<sup>23</sup>

Additionally, the mandate of AICHR with respect to the AHRD only concentrates on promotion and not on the protection of human rights. To achieve the complete protection work, the mandates consist of "receiving communications about violations of rights, communicating them to states and investigating the

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violations”<sup>24</sup> like the African Commission. However, although AICHR can perform the two functions of advisory services and technical assistance on human rights matters for promoting of regional human rights issues,<sup>25</sup> it has no power to investigate and enforce decisions regarding with the human rights violations in order to fulfil the protection mandates.<sup>26</sup> Consequently, according to its TOR, AICHR is a regional human rights body with a lack of institutional capacity and the possessing a weak protection mandate depending on the decisions of governments of member states. These two evidences show that AICHR is only rhetorical regional human right body which has continuously maintained the traditional ASEAN way.

In conclusion, the AHRD is created with some restrictions that prevent the implementation of meaningful human rights obligations of ASEAN membes in the region. Furthermore, according to its TOR, AICHR which has practically provided the declaration has been influenced by the member states’ decision. After reviewing those ASEAN human rights mechanisms, it has been argued that “much recent ASEAN activity amounts either to political rhetoric or has potential to fragment the human rights norms recognized by those ASEAN states which are committed to international

human rights treaties”.<sup>27</sup> Consequently, the AHRD should be a binding instrument to hold the international human rights obligations and the authority of AICHR should not be limited on state power. Especially, ASEAN member states should realize the differences between the Western colonization or the ideological influencing during the Cold War period and universal human rights norms and values. At the same time, ASEAN needs to consider whether its member states have manipulated traditional ASEAN way of non-intervention and sovereign equality to protect its regime security regarding with human rights matters. Nevertheless, ASEAN should be required to prove the development of human rights situation in terms of real action rather than “political rhetoric”.

#### Endnotes

1. ASEAN Charter – Preamble <https://asean.org/asean/asean-charter/>
2. Catherine S Renshaw, “The ASEAN Human Rights Declaration 2012?” *Human Rights Law Review* 13, no.3 (2013): 5”78-9, doi:10.1093/hrlr/ngt016.
3. Yuyun Wahyiningrum, The ASEAN Intergovernmental Commission on Human Rights: Origin, Evolution and the Way Forward, *International Institute*

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4. Yuyun Wahyiningrum, AICHR After Five Years: Progress, Challenges and Opportunities, *Asia-Pacific Human Rights Information Centre*, June 2014, Vol. 26, <https://www.hurights.or.jp/archives/focus/section3/2014/06/aicHR-after-five-years-progress-challenges-and-opportunities.html#n22>
5. Pavin Chachavalpongun, Is Promoting Human Rights in ASEAN an Impossible Task, <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>
6. Hien Bui, “The ASEAN Human Rights System: A Critical Analysis”, *Asian Journal of Comparative Law*, (2016): 2, doi:10.1017/asjcl.2016.9
7. Matthew Davies, “An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Reginal Identity in Southeast Asia”. *Journal of Current Southeast Asian Affairs* 33, no. 2(2014):1, <http://nbn-resolving.org/urn/resolver.pl?urn:nbn:de:gbv:18-4-8086>
8. Jaclyn L. Neo, “Religious Freedom and the ASEAN Human Rights Declaration: Prospects and Challenges”,

*The Review of Faith and International Affairs* 14, no. 4(2016): 8, <http://dx.doi.org/10.1080/15570274.2016.1248505>.

9. Article 7: All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds. ASEAN Human Rights Declaration [https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)
10. Hien Bui, "The ASEAN Human Rights System: A Critical Analysis", *Asian Journal of Comparative Law*, (2016):2, doi:10.1017/asjcl.2016.9
11. *Ibid*: 11-12.
12. Article 6: The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms. ASEAN Human Rights Declarations, [https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)
13. Catherine S Renshaw, "The ASEAN Human Rights Declaration 2012?" *Human Rights Law Review* 13, no.3 (2013): 9, doi:10.1093/hrlr/ngt016.
14. *Ibid*: 9.
15. Article 8: The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society. ASEAN Human Rights Declarations, [https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)
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17. Article 40: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN. ASEAN Human Rights Declarations, [https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)
18. Matthew Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia". *Journal of Current Southeast Asian Affairs* 33, no. 2(2014):114, <http://nbn-resolving.org/urn/resolver.pl?urn:nbn:de:gbv:18-4-8086>
19. *Ibid*:119.
20. Hien Bui, "The ASEAN Human Rights System: A Critical Analysis", *Asian Journal of Comparative Law*, (2016): 20, doi:10.1017/asjcl.2016.9
21. Yuyun Wahyiningrum, "The ASEAN Intergovernmental Commission on Human Rights: Origin, Evolution and the Way Forward", *International Institute for Democracy and Electoral Assistance*, 2014:14 <https://www.idea.int/es/publications/catalogue/asean-intergovernmental-commission-human-rights-origins-evolution-and-way>
22. Hien Bui, "The ASEAN Human Rights System: A Critical Analysis", *Asian Journal of Comparative Law*, (2016): 20, doi:10.1017/asjcl.2016.9
23. *Ibid*: 20
24. *Ibid*: 22
25. Jaclyn L. Neo, "Religious Freedom and the ASEAN Human Rights Declaration: Prospects and Challenges", *The Review of Faith and International Affairs* 14, no. 4(2016): 10, <http://dx.doi.org/10.1080/15570274.2016.1248505>.
26. *Ibid*: 10
27. Nicolas Doyle, "The ASEAN Human Rights Declaration and the Implication of Recent Southeast Asian Initiatives in Human Rights Institutional Building and Standard-Setting", *The Review of Faith and International Affairs* 14, no. 4(2016): 67, <http://dx.doi.org/10.1080/15570274.2016.1248505>.