

REGIONAL HUMAN RIGHTS MECHANISM AND CIVIL SOCIETY ADVOCACIES: A TRANSFORMATION OF REGIONALISM AND CIVIL SOCIETY IN THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)¹

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ABSTRACT

This paper focuses on the dynamics of civil society that the Association of Southeast Asian Nations (ASEAN) recently has activated at regional level by examining regional-level civil society organizations and network non-governmental organizations (NGOs), looking at the Law Association for Asia and the Pacific (LAWASIA) and the Asian Forum for Human Rights and Development (FORUM ASIA). The paper also uncovers how ASEAN has established, maintained, and changed the concepts of civil society and human rights. In addition, the paper investigates the relationship between regionalism and the institutionalization of human rights mechanisms. Discourses on civil society and human rights in ASEAN have been associated closely with political discourses, including regionalism and communitarianism; and the normative discourses in Asian civil society have unfolded, more or less, with the acceptance of these developments. While examining the human rights discourses of civil society organizations and network NGOs, and focusing on special and unique features of human rights discourses in Southeast Asia, the paper explores the dynamics of Asian civil society and human rights that might differ from western NGOs' practices.

Keywords: ASEAN, regionalism, human rights mechanism, civil society, LAWASIA, FORUM-ASIA

INTRODUCTION

Since the end of the Cold War, greater awareness of human rights throughout East Asia can be seen in the rapid growth and spread of democratization and transnational civil society movements. Intra-

and extra-regional factors have driven this tide. Intra-regional factors include increasing political, legal and social imperatives to improve recognition of human rights and ensure the observance of rule of law. These demands have been partly realised through the emergence of democratization movements. Among extra-regional factors are series of serious human rights crises, including the Tiananmen Square massacre and the political convulsions in East Timor and Myanmar during the 1990s, which resulted in strong demands from the international community, notably western governments, to improve human rights conditions.

Along with these domestic and international developments, researchers have scrutinized human rights conditions in East and Southeast Asia. Reviewing previous studies in this area can reveal how human rights issues have developed and evolved in Asia at the regional level and at the level of individual countries. A number of studies have examined and explored human rights norms and regimes within the Association of Southeast Asia Nations (ASEAN). These studies have clearly investigated the process and problems of building ASEAN human rights norms and regimes, but have not provided comprehensive analyses of human rights issues in the context of regionalism and regional integration, even when considering human rights conditions in the region as a whole. In other words, previous studies have analysed human rights as an issue either independent of other issues, or only in conjunction with related fields of human rights.

Yongwook and Ortuoste had explored the theoretical implications of regional human-rights mechanisms and how each member country came to support the ASEAN Intergovernmental Commission on Human Rights (AICHR). While the researchers had provided a brief explanation of human rights norms in building the ASEAN community, they had not included how logic of regionalism and human rights had been complemented (or could not be complemented).¹ Similarly, Petcharamesree reviewed the ASEAN human rights infrastructure and how ideas and institutions of human rights regimes had been developed in ASEAN. She also examined the drafting process and the major criticisms of the ASEAN Human Rights Declaration (AHRD) and touched upon ASEAN's relations with civil society.² Ramcharan made inter-regional and intra-regional comparisons of ASEAN's

human rights mechanisms, specifically comparing them with those in European, American, African, and Middle Eastern countries. He also compared other mechanisms within ASEAN, such as the ASEAN Machinery on Migrant Workers and on the Rights of Women and Children, ASEAN Regional Forum, and ASEAN Inter-Parliamentary Assembly.³ Southwick had analysed the drafting and adoption process of the ASEAN Human Rights Declaration (AHRD) of 2012 and concluded that the AICHR was insufficient to support constructive engagement with civil society.⁴ Turning to the formation of regional norms, Katsumata examined the conflicting views of whether ASEAN had introduced human rights norms in response to western pressure, or from a desire to emulate the western model. Although the former argument is conventionally supported, Katsumata preferred the latter, contending that ASEAN had voluntarily emulated western liberal norms of human rights, and he concluded that human rights norms were not necessarily incompatible with Asian culture and values.⁵

These studies have clearly explained how human rights norms and mechanisms are constructed and have presented some insightful examinations. However, it remains unclear as to how growing human rights awareness and on-going East Asian regionalism can be correlated at the levels of ASEAN and the East Asian region. This paper, therefore, focuses not only on the construction of regional human-rights mechanisms and the dynamics of human rights issues, but also on how human rights issues have been recognised as a regional problem beyond individual policy issues, and how human rights have influenced the on-going formation of ASEAN regionalism through activities and movements advanced by regional civil society.

For the purposes of this investigation, this paper focuses on the dynamics of civil society at the ASEAN regional level and explores how the norms of civil society and human rights have been established, accommodated and changed by civil society organizations and network non-governmental organizations (NGOs), including Law Association for Asia and the Pacific (LAWASIA) and Asian Forum for Human Rights and Development (FORUM-ASIA). ASEAN's discourses on civil society and human rights have strong connections with regional political discourses, such as regionalism and communitarianism, and under these influences, civil society and network NGOs have developed

normative discourses. As to be explained later, regional NGOs have positioned human rights over sovereignty and people over states, and thus, opposing the ASEAN's traditional position of human rights, which has aligned with, or been friendly to authoritarian regimes. At the same time, regional NGOs are, to a certain extent, suspicious of the rights-based approach of western liberalism. This could be seen by the moves in also promoting communitarian and community-based approaches to human rights. Regional NGOs have advocated dialogues and co-operation between regional civil societies to bridge the gap between regionalism and human rights.

For the purpose of examination, this paper is divided into three parts. The first examines the connection between human rights and regionalism during the 1990s and early 2000s. The Working Group for an ASEAN Human Rights Mechanism, established by LAWASIA, played a key role in this process, and the ASEAN Charter was enacted in 2007. However, human rights issues have not become part of the agenda of regional integration. The second section, therefore, examines the processes of constructing human rights mechanisms after the enactment of the ASEAN Charter. Finally, the third section explores civil society's responses to the ASEAN Charter and human rights mechanisms. The activities and movements of FORUM-ASIA, a network NGO that played a key role in this process, are reviewed, while the implications for the institutionalization of human rights mechanisms and on-going regional integration are investigated

HUMAN RIGHTS AND REGIONALISM

This section examines the connection between human rights and regionalism: it explores human rights discourses in the 1990s to examine detailed case studies later. It then examines the connection between the dynamics of ASEAN regionalism and the activities of LAWASIA in order to observe the relationship between human rights and regionalism.

Human Rights Discourses in the 1990s

Institutionalizing a human rights mechanism is recognized as an agenda for ASEAN since the end of the Cold War. However, human rights issues, at least at the beginning, had been strongly regarded as

political pressures from the West. Therefore, active policy measures had not been taken, and any steps taken had amounted to an exchange of political rhetoric to avoid pressure and criticism from the West.

Political strategies that stress Asian ‘specific’ human right discourses, such as Asian values, as a countermeasure to the western ‘universal’ human rights concept, have been taken in the 1990s. The best example of the strategies is the Bangkok Declaration of 1993. Between 29 March and 2 April 1993, the Asian regional meeting was held in Bangkok. It was a preparatory meeting for the World Conference on Human Rights held in Vienna immediately after. At the conclusion of the Asian regional meeting, the Bangkok Declaration was adopted. The Bangkok Declaration confirms equality of sovereignty and non-interference in domestic affairs, the right to development, and emphasizes the non-use of human rights as tools for political pressure. The declaration goes further, maintaining that “while human rights are universal in nature, they must be considered in the context of 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.”⁶

The changing nature of human rights can be regarded as a normative discourse. That is to say, the signatories did not regard individual rights as originating from individual liberty as with human rights in western countries, but rather, as collective and vital rights. These include ‘the right to development’ as a human right that combines with their fundamental demands: the expansion of human rights discourses in Asia.⁷ However, it does not mean that Asia has rejected the western notion of human rights. On the one hand, Asian countries challenge what they perceive as an over simplification of the western discourses on human rights, while, on the other, they are committed to the institutional design of human rights mechanisms. For instance, at the ASEAN foreign ministers’ meeting, held on June 25, 1993, in Singapore, immediately after the Bangkok Declaration, member countries reached consensus on “the establishment of an appropriate regional mechanism on human rights” in support of the Vienna Declaration.⁸ However, initiatives on human rights in this period generally tended to lack concreteness. The establishment of a regional mechanism on human rights as a policy agenda has stagnated since the foreign ministers’ meeting of 1993. In other words, since

the mid-1990s, notably in the aftermath of the Asian financial crisis of 1997-98, East Asian regionalism and regional integration centred on the ASEAN+3 have accelerated, whereas the establishment of a regional mechanism on human rights has not been given a high priority as a policy agenda, and has been left out in the cold.

Interplay of Regionalism and Human Rights

Whereas the previous part reviewed human rights discourses before the acceleration of regionalism, this part examines human rights discourses during the development and evolution of ASEAN regionalism in the aftermath of the Asian financial crisis. This section reviews ASEAN Vision 2020, Vision 2020: The People's ASEAN, and the Report of the Eminent Persons Group (EPG) on the ASEAN Charter.

Since the late 1990s, ASEAN's formal discourses have begun to stress dialogues with civil society to a substantial extent. ASEAN Vision 2020, proposed at the ASEAN informal summit of 1996 in Jakarta, and adopted at the informal summit of 1997 at Kuala Lumpur, has aimed at constructing a peaceful and stable ASEAN community, and submitted the notion of "a Community of Caring Societies." The "caring society" has connotations of solving basic social problems, including hunger, malnutrition, deprivation, and poverty, paying special attention to the disadvantaged, the disabled and marginalized people, and advocating social justice and the rule of law. It generally emphasizes the empowerment of civil society in order to solve social problems and achieve social justice.⁹

In addition, the ASEAN summit at Hanoi in December 1997, adopted the Hanoi Plan of Action¹⁰ as the first mid-term plan based on ASEAN Vision 2020. However, neither ASEAN Vision 2020 nor the Hanoi plan of action made positive mention of human rights mechanisms. The former did not mention human rights, and the latter only referred to it superficially, as follows: "[e]nhance 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."¹¹

Following these events, the ASEAN EPG – consisting of ex-prime ministers and ex-ministers – was formed in 2000, and the Eminent Persons Group on the ASEAN Charter was formed in 2006 (based on the Kuala Lumpur Declaration of 2005) and a report was finally submitted at the end of that year. Likewise, the Cebu Declaration of 2007 maintained and stressed that “an ASEAN Charter will serve as a firm foundation in achieving one ASEAN Community.”¹²

Vision 2020, initiated by the ASEAN EPG, proposed “The People’s ASEAN” as the subtitle, and confirmed ASEAN as an effective force for peace, justice, and moderation in the region. Further, they advocated ASEAN as socially cohesive and “a community of caring societies with a common regional identity.”¹³ The “community of caring societies,” as with ASEAN Vision 2020, adopted in 1997, purported to solve socio-economic problems.

Likewise, the report focused on the common interests of the region, emphasizing on human security and developments as the means to protect the lives of ASEAN people. It is possibly a logical consequence of the caring society, as mentioned above, that various security fields, including political, economic, and civic security, do not independently exist but are unified by the concepts of human security and development.¹⁴ Here, the empowerment of civil society is much stressed, and, with regard to human security and development, the role of civil society toward poverty alleviation is expected.¹⁵ That is to say, the report noted that “[c]ultivation of a common regional identity is not possible without a slew of measures to take the concept to the people,”¹⁶ and attempted to combine the discourses of regional identity and that of a people-based caring society.

In addition, the report enumerated supranational and national interests, and proposed the harmonization of both. This means that ASEAN regionalism does not contradict the norm of a non-intervention policy toward sovereignty, while a non-intervention policy does not hurt deepening and enlarging regionalism.¹⁷ In other words, ASEAN regionalism stresses the harmony between a supranational framework of regionalism and a national framework of non-intervention policy. By the same token, it focuses on the harmony between national and regional identity, and proposes the notion of “Ten Cultures, One ASEAN.”¹⁸

Although Vision 2020 proposed numerous suggestions for ASEAN community building, nothing was mentioned about human rights. While emphasizing human security, interest in human rights was generally low. As an enactment of the ASEAN Charter was not assumed at the time of Vision 2020, the establishment of a human rights mechanism was not in a list of agenda policies until the process of establishing the ASEAN Charter began.

The Kuala Lumpur Declaration of 2005 marked the beginning of the creation of an ASEAN Charter. The declaration confirmed that it would establish an ASEAN Charter which would serve as a firm foundation for the ASEAN community, and that an EPG would be established to provide practical recommendations on the direction and nature of the ASEAN Charter's relevance to the ASEAN Community. The declaration repeatedly confirmed traditional ASEAN norms, such as the Bangkok Declaration (the ASEAN Declaration) of 1967 and the Treaty of Amity and Cooperation in Southeast Asia (TAC), while emphasizing the 'caring society' referred to in ASEAN Vision 2020.¹⁹ However, the declaration did not mention the empowerment of civil society, as emphasized in Vision 2020.

Following the Kuala Lumpur Declaration, the EPG on the ASEAN Charter was established, and the final report was proposed for the end of 2006. The report was finally submitted to the ASEAN Summit of 2007, where the Cebu Declaration was adopted. With reflections on the Asian financial crisis, Severe Acute Respiratory Syndrome (SARS), and the Asian tsunami disaster (2004), the report, on the one hand, proposed a constructive reform of ASEAN policies, based on a non-intervention policy and consensus decision making. On the other hand, it also emphasized the importance of democratic values, good governance, human rights, and the rule of law.²⁰ More remarkably, it attempted to propose a reform of the decision-making process. While it maintained the consensus measures for conflicting issues such as opposing interests, it suggested the possibility of a majority vote for less conflicting and less tense issues.²¹ Likewise, the report argued that ASEAN should be a "people-centred organization" from the perspective of the empowerment of civil society.²² While it stressed the "caring society" and the "sharing community" principles, it still maintained its non-intervention policy.²³ Contrary to Vision 2020, the report increasingly mentioned human rights, and linked the

establishment of a human rights mechanism with strong references to the rule of law.²⁴

The Cebu Declaration which was adopted in the ASEAN Summit of 2007, was quite similar to the Kuala Lumpur Declaration, in that it repeatedly maintained that the ASEAN Charter should be a firm foundation for the ASEAN community, and championed the notion of the 'caring society' initiated by ASEAN 2020. However, no mention was made of the empowerment of civil society. It only referred to civil society organizations as being the key components of the ASEAN Charter, as well as businessmen, academics, and parliamentarians.²⁵ It should be noted that mentions about human rights and human rights mechanisms failed to appear in the Cebu Declaration.

This section reviews the process from ASEAN Vision 2020 to the drafting phase of the ASEAN Charter. The changing nature of regionalism norms, with an emphasis on cohesion of regional identity, such as a people-centred ASEAN or people-oriented ASEAN,²⁶ are evident and these were not previously present in ASEAN. However, consideration of human rights and the human rights mechanisms is limited. Comparing the proposals of the Eminent Persons Group and the formal statements of ASEAN, there is a gap in terms of the empowerment of civil society and human rights mechanisms to a certain extent. Although the EPG maintains the significance of human rights and its mechanisms, the ASEAN formal statements seemed to have downplayed human rights and human rights mechanisms.

The previous section shows that from the 1990s to the mid-2000s, only limited attention was paid to human right issues as the common agenda of regionalism, even though human rights norms were recognized to some extent. In this period, the Working Group for an ASEAN Human Rights Mechanism, established by the human rights committee of LAWASIA in July, 1995, played a key role in making human rights issues part of the common agenda of the ASEAN regional community.

The working group was admitted to the ASEAN foreign ministers' meeting in June 1998, after which it submitted the 'Synopsis of a Policy Initiative for the Establishment of an ASEAN Human Rights Mechanism'. The synopsis refers to the ASEAN foreign ministers' meeting and their joint communiqué of 1993, in which it was

agreed that ASEAN should consider the establishment of a regional human rights mechanism, and maintained that although ASEAN had been much monitored for its human rights developments, especially from outside of the region, there were few opportunities for the region to take stock of human rights developments from the standpoint of ASEAN. Accordingly, the establishment of the ASEAN human rights mechanism with governmental support should help to redress this situation so that the ASEAN perspective would be better understood by outsiders. This should complement the need to promote international human rights standards in the region.²⁷

It was also agreed at the ASEAN foreign ministers' meeting in June 2000 that a consultation between ASEAN senior officials and the working group should be established. The working group then submitted the "Agreement for the Establishment of the ASEAN Human Rights Commission" to the ASEAN Human Rights Commission.

According to the agreement, Article 1 commits to establishing a regional human rights mechanism to promote and protect human rights.²⁸ Meanwhile, Article 2 emphasizes that inspiration shall be drawn from international law on human rights, universally recognized human rights standards and principles, and regional and national laws, policies, and practices consistent with international law.²⁹ In turn, Article 3 proposes to establish the ASEAN Human Rights Commission as a permanent human rights commission in the region.³⁰

Article 7 provides for the election of members of the commission. According to Clause 1 of the Article, the ministers of foreign affairs of the member states were to elect the committee from a list of candidates proposed by their governments. In the process of election, members of civil society, including non-governmental organizations, shall be consulted in the choice of the candidates.³¹ The function of the committee includes developing an awareness of human rights among the peoples of the region; requesting the governments of member states to provide it with information on the measures adopted by them in relation to human rights; and investigating violations of human rights by a member state on its own initiatives.³²

The first workshop of the ASEAN Human Rights Mechanism was held in Jakarta in June 2001 with participation from government representatives, human rights institutions of the member states,

and civil society organizations. Following this, similar workshops were held in Manila (2002), Bangkok (2003), Jakarta (2004), Kuala Lumpur (2006), and Manila (2007). Each workshop was co-hosted by the working group and the ASEAN member state and the human rights commission of the venue country. Likewise, in 2005, ASEAN requested the cooperation of the working group in implementing the Vientiane Action Programme.

The Vientiane Action Programme (VAP) was adopted at the ASEAN Summit in November 2004. The VAP was the second mid-term plan (2004-2010), following the first mid-term Hanoi Plan of Action (1999-2004). The necessity and significance of protecting human rights were also stressed in the VAP. That is, it advocated the promotion and protection of human rights, and, at the same time, aimed for the establishment of human rights mechanisms.³³

As mentioned above, while an opportunity gradually developed for regional institutional building of human rights mechanisms in the ASEAN region throughout the 1990s, the establishment of the regional mechanism as a concrete agenda only began to take form from the late 1990s to the early 2000s by the Working Group for an ASEAN Human Rights Mechanism under the initiatives of LAWASIA. The working group not only advocated for the establishment of a human rights mechanism as the formal ASEAN agenda, but it also strongly proposed the participation of civil society in the process of establishing human rights mechanisms. As each beginning phase developed, it was not until the establishment of the ASEAN Charter of 2007 that human rights mechanisms began developing fully with the participation of civil society. The next part of the paper, therefore, examines the institutional designs of the human rights mechanisms following the enactment of the ASEAN Charter.

THE ASEAN CHARTER AND HUMAN RIGHTS MECHANISMS

The establishment of human rights mechanisms in the ASEAN region progressed at full tilt following the drafting of the ASEAN Charter. In January 2007, the EPG proposed that a mention about human rights mechanisms should be included in the ASEAN Charter. Furthermore, at the ASEAN foreign ministers' meeting in March 2007, it was

argued that the establishment of a human rights commission as one of the ASEAN bodies should be prescribed in the ASEAN Charter. Likewise, at the ASEAN foreign ministers' meeting of June 30, 2007, it was determined that an ASEAN Human Rights Body (AHRB) should be established as part of the ASEAN Charter, in accordance with the report of the high-level task force.

The ASEAN Charter went on to be adopted at the ASEAN Singapore Summit of November 2007, and officially established the following January.³⁴ The basic tone of the charter is the promotion of regional cooperation based on the formation of a regional identity, with a strong reference to 'one vision, one identity and one caring and sharing community'.³⁵

Regarding human right norms, the preamble of the ASEAN Charter commits to adherence to the principles of democracy, the rule of law, and good governance, and respect for and protection of human rights and fundamental freedoms. More clearly, Article 14 prescribes the establishment of an AHRB.³⁶ Article 1 commits to "strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms."³⁷ At the same time, it proposes a *people-oriented* ASEAN that encourages all sectors of society to participate in, and benefit from, the process of ASEAN integration and community building.³⁸

Article 35 underlines the significance of the ASEAN identity, and maintains "a sense of belonging among its peoples in order to achieve its shared destiny, goals and values."³⁹ While the Charter affirms traditional norms such as sovereignty, territorial integrity and non-interference in domestic affairs, it also affirms the significance of democratic values, the rule of law, and good governance, including respecting and protecting human rights and fundamental freedoms.⁴⁰ On the other hand, the Charter also insists on the ASEAN way of decision-making, based on consultation and consensus.⁴¹ These developments can be seen as a new departure, fostering norms such as democratic values, human rights, and the rule of law, and, not least, a people-oriented ASEAN, even while the charter does not abandon state-centric order and the non-intervention policy of the ASEAN management.

The ASEAN Charter prescribes that the AHRB be managed by the terms of reference proposed at the ASEAN foreign ministers' meeting.⁴² However, it did not mention any concrete content of the AHRB, and was ambiguous as to how it was to function and when it was to be established.

In February 2008, it was confirmed at the ASEAN foreign ministers' meeting that a high-level panel should be established to draft the terms of reference for the AHRB. This high-level panel was to consist of senior officials of member states, and on June 21, 2008, an interim term of reference document on the AHRB was admitted to the ASEAN ministerial meeting. The interim terms of reference confirmed that, in accordance with Article 14 of the ASEAN Charter, the ASEAN foreign ministers should determine the terms of reference of the ASEAN Human Rights Body. At the ASEAN foreign ministers' retreat in Singapore on 20 February 2008, the establishment of a high-level panel to draft the terms of reference of the ASEAN Human Rights Body was agreed.⁴³ The terms of reference, which would be set out, should be in accordance with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms.⁴⁴ Furthermore, the high-level panel would address the mandate, membership, and functions of the ASEAN Human Rights Body, as well as its relationship with other relevant human rights bodies in ASEAN. The high-level panel would also undertake consultations with the appropriate stakeholders in ASEAN.⁴⁵

In February 2009, the draft of the terms of reference for the AHRB was submitted. This human rights mechanism was renamed as the AICHR, and the draft of the terms of reference was admitted in July 2009. The following passages firstly examine the draft of the terms of reference in the ASEAN Human Rights Body (hereafter, the Body ToR), and then the terms of reference in the AICHR (hereafter, the Commission ToR).

The Body ToR seeks to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN,” and emphasizes to uphold the right of the peoples of ASEAN to live in peace, dignity, and prosperity.⁴⁶ On the other hand, it re-stated the “regional particularities” stressed by the Bangkok Declaration of 1993. That is to say, it signifies, “[t]o promote human rights within the regional

context.” More precisely, it indicates and emphasizes, “bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.”⁴⁷

It should be noted that the protection and promotion of human rights, in the contexts of ASEAN, has to be understood as a part of ASEAN regionalism and regional cooperation.⁴⁸ In relation to the ASEAN Charter, specifically Article 2: although state sovereignty, state equality, and non-intervention norms are confirmed, the article also stresses democratic principles, such as the rule of law and good governance.⁴⁹ It also mentions dialogue and consultation that include civil society organizations and other appropriate stakeholders, as prescribed by Chapter 5 of the Charter: entities associated with ASEAN.⁵⁰ However, decision-making procedures are conducted by the conventional ASEAN way of consultation and consensus.⁵¹

The Commission ToR was approved in July 2009 with little or only minor differences with the Body ToR, except for the ASEAN Human Rights Body being renamed as the AICHR. The following passages examine the minor changes between the Body ToR and the Commission ToR.

Regarding the relation between human rights and the rule of law, the Body ToR maintains that the promotion and protection of human rights have to coincide with the rule of law. This does not appear in the Commission ToR,⁵² However, certain prescriptive issues, such as advisory services and the provision of technical assistance on human rights, and developing common approaches and positions on human rights matters of interest to ASEAN, are included in the Commission ToR.⁵³ Furthermore, AICHR is defined as the overarching human rights institution in ASEAN, with overall responsibility for the promotion and protection of human rights (apart from that, prescriptions on venue and budget were amended).⁵⁴

Both the Body ToR and the Commission ToR are based on the purport of the ASEAN Charter, and are much improved in terms of the promotion and protection of human rights, while, at the same time, they follow conventional ASEAN norms, such as state equality and mutual respect of sovereignty, and confirmed regional or specific understandings of human rights, as appeared in the

Bangkok Declaration of 1993. Overall, it is regarded as a significant improvement when human rights issues have been added to the agenda of ASEAN regionalism.

The Working Group for an ASEAN Human Rights Mechanism, as mentioned in the previous part of the paper, positively evaluates such perspectives of ASEAN on human rights. However, it plays no significant role in building regional human rights mechanisms. In January 2007, the working group encouraged ASEAN to include the ASEAN human rights mechanism in the ASEAN Charter, and in November of the same year, they emphasised democratic principles, the rule of law, good governance, respect for and protection of human rights and fundamental freedoms.⁵⁵ After the terms of reference were adopted, the working group further stressed the importance of two very necessary processes which are manifested by people's participation – the selection process for the AICHR's composition and the review process of the terms of reference.⁵⁶

After the AICHR was organised in 2009, the AHRD was adopted by ASEAN member states at the Phnom Penh Summit of 2012. Although the AHRD clearly listed universal principles of human rights such as freedom, equality and dignities of civil, political, economic, social and cultural rights, at the same time, it maintains the same tone as the Bangkok Declaration of 1993 that balanced human rights with the political order. On the one hand, Article 7 states, “the realization 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.”⁵⁷ This is exactly the same phrase as the Bangkok Declaration, stressing the regional particularities arguments in that human rights are universal but their realization should be considered according to regional particularities.

On the other hand, Article 8 mentions that “[t]he exercise of human rights and fundamental freedoms” should 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.”⁵⁸ These phrases have somehow evoked the Asian values tone that restrained the full enjoyment of human rights practices.

By the same token, human rights practices should be balanced by political and public orders; therefore, the enjoyments of universal principles of human rights have to be restrained by governments. Thus, human rights practices have been highly controlled by governments and subjected to the ASEAN frameworks of cooperation whereby policies and principles of human rights do not hold high priority in ASEAN's decision making.

The AHRD also mentions the "right to development" and "right to peace." The former implies that the right to development is strongly linked with the ASEAN frameworks of community building, and the latter means security, stability, neutrality and freedom connected with ASEAN's framework of cooperation.⁵⁹ That is, rights to development and peace are not rights which individuals can enjoy, but they comprise a state of order with ASEAN's cooperation.

This part of the paper had examined the drafting and building process of the human rights mechanism following the drafting of the ASEAN Charter. In summary, the human rights mechanism in ASEAN, on the one hand, is fundamentally balanced between sovereignty (or political orders) and the human rights of the Charter. On the other hand, it can be seen that by resisting the oversimplification of the Western approach to human rights, it promotes the ASEAN way of human rights with a strong emphasis on 'regional particularities'. The Charter focuses on including notions of human rights as long as it does not hurt the traditionally maintained ASEAN ways of consensus-based decision-making and non-intervention policies. The next part of the paper examines the dynamism of civil society for establishing human rights mechanisms, with reference to the activities of networked NGOs.

REACTION FROM CIVIL SOCIETY

The previous section reviewed the regional efforts that went into establishing a human rights mechanism following the declaration of the ASEAN Charter. This section will look at the reactions from civil society to these efforts, namely of FORUM-ASIA.

FORUM-ASIA has been highly critical of the establishment of a human rights mechanism in ASEAN. FORUM-ASIA stands for the Asian Forum for Human Rights and Development, and the networked NGO has 46 member NGOs throughout Asia. FORUM-ASIA was

established after NGOs held a consultation on human rights and development in Manila in December 1991, and the Secretariat has been based in Bangkok since 1994. FORUM-ASIA has carried out active campaigns on human rights mechanisms after the establishment of the ASEAN Charter.

Between February 20 and 22, 2009, the ASEAN People's Forum (APF) was held in Bangkok, and over 1,000 civil activists gathered from all over Southeast Asia. After the forum, a declaration called 'Advancing a People's ASEAN' was adopted. The declaration was composed of three sections addressing namely, matters relating to: political-security, socio-culture, and the economy.

Firstly, the political-security section argued that the APF should ensure a transparent and inclusive process in the establishment of the AHRB by confirming the widest representation of organizations in the drafting, adoption, and implementation of its terms of reference. Likewise, it proposed human rights principles of non-discrimination, self-determination, substantive equality, interdependence, inter-relatedness, universality, and indivisibility of human rights standards. The section also called for the high-level panel to make public the draft of the terms of reference on the AHRB to ensure the process to be transparent and participatory.⁶⁰ More importantly, the terms of reference of the AHRB, according to the section, should be explicit in its mandate to actively protect, and not just promote, human rights in ASEAN.

The section also proposed for the International Labour Organization (ILO) core labour standards and key UN human rights conventions to be ratified and implemented, and also be reflected in national laws. Based on the UN Declaration on Human Rights Defenders, ASEAN or the AHRB should establish and develop a special mechanism of protection for defenders of human rights.⁶¹

Additionally, the section acknowledged that the release of all of Myanmar's political prisoners to be a condition for the country to proceed towards national reconciliation and a democratization process. It called for the legitimacy of the then upcoming 2010 election, which would entrench military rule in Myanmar, to not be accepted, and urged the Myanmar's military junta to instead review the 2008

Constitution with the involvement of key stakeholders, such as leaders of pro-democracy forces and ethnic groups.⁶²

Secondly, the socio-cultural section emphasized the reinforcement of education, health, heritage, culture, and disaster management, the six goals of Education for All (EFA),⁶³ and national and regional plans in ensuring their success.⁶⁴

Finally, the economic section suggested reversing the current unsustainable development trajectory by upholding a rights-based approach to development and providing communities with the rights to access and manage natural resources based on participation and local knowledge, balancing pro-poor economic policies with ecological sustainability, ensuring that economic integration in the ASEAN region is built on respect for human rights and people's welfare, and promoting "community-based," "people-centred," and "small-holder" economic initiatives.⁶⁵ The section also argued for compelling large corporations, including transnational corporations, to follow international human rights and environmental standards and conventions.⁶⁶

Such concepts mentioned above, briefly show the regionalism and communitarianism thinking of FORUM-ASIA. Although it respects the ideas of the international standards of human rights, it is in practice understanding it in regional contexts.

Meanwhile, advancing a People's ASEAN recommends facilitating and recognizing all forms of civil society organizations and institutionalizing mechanisms for people's participation in ASEAN processes and policies. It emphasizes a "people-centred ASEAN," which means all policies would be decided by the people, so that an ASEAN community based on human rights, human dignity, participation and social dialogue, social and economic justice, cultural and ecological diversity, environmentally sustainable development, and gender equality could be achieved.⁶⁷ Accordingly, while ASEAN member states approved the terms of reference for the AHRB, it is just 'toothless' from the point of view of civil society. The campaigns initiated by FORUM-ASIA have sought more feasible and workable human rights mechanisms.

On June 22, 2009, before the approval of the Commission ToR, as mentioned above, FORUM-ASIA sent a letter stating '[t]he

Terms of Reference of the AHRB should include protection mandates and the appointment of independent experts' to the chairman of the high-level panel. This was an open letter, which was signed by 240 NGOs and 38 individuals, including from outside of the region. According to the letter, the AHRB should a) regularly visit member states, b) independently investigate the requests of individuals and organizations, and interview them, and c) regularly review the human rights conditions of all member states as part of protecting human rights. It also called for independent experts to be selected and recruited to guarantee autonomy from member states. This recruiting process would guarantee transparency and proceed through consulting civil society and the general publics.⁶⁸

On August 28, 2009, FORUM-ASIA and another networked NGO, Solidarity for Asian People's Advocacy (SAPA), jointly wrote a letter to the ASEAN host country, requesting improvements in selecting members of the AICHR. SAPA's taskforce on ASEAN and human rights was organized by 70 civil society organizations. In the letter, FORUM-ASIA and SAPA emphasized the accountability of the selecting committee, and went further in arguing for the participation of civil society in all selection processes.⁶⁹ More concretely, they argued that a selection of candidates should come under the broad participation of governments, civil society and NGOs, universities and research institutions, domestic human rights institutions, other human rights institutions, legislative bodies, and the media.⁷⁰ In addition to that, they argued that human rights experts of international institutions, such as the United Nations, should participate in this process.⁷¹ They strongly argued that the participation of civil society was absolutely necessary in order to realize 'a people-oriented ASEAN', the principle prescribed by the ASEAN Charter.⁷² In relation to that, FORUM-ASIA has pursued the activities of protecting defenders of human rights and recruiting independent experts.

This section had examined the reactions of civil society toward the establishment of the ASEAN human rights mechanism after the enactment of the ASEAN Charter. The human rights discourses initiated by FORUM-ASIA not only promote, but arguably, also protect human rights, and clearly criticize the ASEAN traditional approach to human rights. In cases of serious human rights violations, such as in Myanmar, ASEAN's active intervention in a member state should be

assumed, according to FORUM-ASIA. By the same token, FORUM-ASIA also focuses on transparency and the participation of civil society. Therefore, it stresses human rights rather than sovereignty, and people rather than states.

On the other hand, FORUM-ASIA does not necessarily accept the western discourse on human rights. That is, it is critical of the ASEAN way, which maintains authoritarian regimes, but it is suspicious of the rights-based approach of western liberalism. Instead, communitarian discourses on human rights are encouraged, based on participation and local knowledge. In other words, by introducing notions of community and people-centredness, they focus on dialogues and cooperation between regional civil societies on building broader notions of human rights. They are, thus, bridging the gap between regionalism and human rights. Although this negates the ASEAN ways of human rights that tend to maintain authoritarian regimes, the communitarian logic, such as participation and local knowledge, is a buffer to the western discourse of human rights following a rights-based approach: this suggests that the human rights discourse is friendly to regionalism.⁷³ Regarding the perspectives on bridging the gap between regionalism and human rights, the human rights mechanism initiated by ASEAN is biased by the traditional ASEAN emphasis on regionalism. Therefore, it requires the construction of a human rights mechanism more in tune with international standards.

CONCLUSION

This paper explores the establishment of the ASEAN human rights mechanism, including the ASEAN institutional reforms and the roles that civil society and networked NGOs have played. From the 1990s to the early 2000s, LAWASIA played a key role in building regional human rights mechanisms. The Working Group of LAWASIA sought to initiate human rights issues to be part of ASEAN's agenda at a time when human rights were not necessarily a focal issue in ASEAN's policy agenda.

These activities had led to the establishment of the human rights mechanism in the ASEAN Charter, and FORUM-ASIA actively campaigned (while being critical of ASEAN) for transparency in the human rights mechanism after the declaration of the establishment

of the ASEAN Charter. The chief characteristics of the human rights discourses FORUM-ASIA initiated have, on the one hand, criticized the ASEAN approach to human rights represented in the Asian values debates and argued for a human rights mechanism that accords with international standards. On the other hand, the Western view of human rights based on rights-based approaches was not seen as a solution.⁷⁴ FORUM-ASIA has also suggested the communitarian logic, such as a community-based approach, as well as people-centred understandings of human rights. In other words, by satisfying international human rights standards, human rights discourses can be in harmony with regionalism and communitarianism.

When one observes human rights issues from the logic of regionalism, these not only cover issues of individual rights, but also a political project on the way institutions and communities have been constituted by the key notions of human rights. Human rights issues in ASEAN are inseparable from the logic of regionalism that pursues stable social order in the relationship between the state and civil society. In this sense, human rights are not only an issue of rights; they encapsulate the tension between the State and civil society.

This paper has examined the ASEAN approach to human rights discourses, which differs from that of its western counterparts: human rights discourses, even from the civil society side, harmonize with regionalism. This paper focuses on civil society practices and explores how the logics of human rights and regionalism have been harmonized.

NOTES

¹ An early version of this paper was presented at the Asian Society of International Law in 2013 (Delhi, India) and the Asian Law Institute Conference in 2012 (Singapore). I thank the participants there and anonymous reviewers for helpful comments and suggestions on the earlier draft. The author bears full responsibility for the views and errors in this work.

² Yongwook Ryu and Maria Ortuoste, "Democratization, Regional Integration, and Human Rights: The Case of the ASEAN Intergovernmental Commission on Human Rights," *The Pacific Review*, Vol. 27, No. 3, 2014, pp. 257–382.

- 3 Sriprapha Petcharamesree, "The ASEAN Human Rights Architecture: Its Development and Challenges," *The Equal Rights Review*, Vol. 11, 2013, pp. 46–60.
- 4 Robin Ramcharan, "ASEAN's Human Rights Commission: Policy Considerations for Enhancing Its Capacity to Protect Human Rights," *UCL Human Rights Review*, Vol. 3, 2010, pp. 199–235.
- 5 Katherine Southwick, "Bumpy Road to the ASEAN Human Rights Declaration," *Asia Pacific Bulletin*, Vol. 197, January 22, 2013.
- 6 Hiro Katsumata, "ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?," *The Pacific Review*, Vol. 22, No. 5, 2009, pp. 619–637.
- 7 "Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights," *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, UN Doc. A/CONF.157/ASRM/8 - A/CONF.157/PC/59 (1993), p.5.
- 8 Yasuaki Onuma *Jinken, Kokka, Bunmei* [Human Rights, the State, and Civilization], Tokyo: Chikuma Shobo, 1998, p. 187.
- 9 Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993, paras. 16-17.
- 10 "ASEAN Vision 2020," Kuala Lumpur, 15 December 1997.
- 11 "Hanoi Plan of Action", Ha Noi, 15-16 December 1998.
- 12 *Ibid.*, para. 4.8.
- 13 "Cebu Declaration on the Blueprint of the ASEAN Charter," Cebu, Philippines, 13 January 2007.
- 14 "Report of the ASEAN Eminent Persons Group (EPG) on Vision 2020: The People's ASEAN," the Fourth ASEAN Informal Summit, Singapore, 22-25 November 2000, p. 7.
- 15 *Ibid.*, pp. 7-8.
- 16 *Ibid.*, pp. 9, 10-11, 23.
- 17 *Ibid.*, p. 21.
- 18 *Ibid.*, pp. 8-10.
- 19 *Ibid.*, pp. 14, 20.
- 20 "Kuala Lumpur Declaration on the Establishment of the ASEAN Charter," Kuala Lumpur, 12 December 2005.
- 21 "Report of the Eminent Persons Group on the ASEAN Charter," December 2006, pp. 13, 16, 22.
- 22 *Ibid.*, p. 17.

- ²³ Ibid., p. 27.
- ²⁴ Ibid., pp. 28, 45.
- ²⁵ Ibid., p. 22.
- ²⁶ “Cebu Declaration on the Blueprint of the ASEAN Charter”.
- ²⁷ For a difference between people-centred and people-oriented ASEAN, see Toru Oga, “Is ASEAN People-Oriented or People-Centred,” in Hyun-Chin Lim, Wolf Schäfer and Suk-Man Hwang (eds.), *Global Challenges in Asia: New Development Models and Regional Community Building*, Seoul: Seoul University Press, 2014, pp. 147-176.
- ²⁸ “Synopsis of a Policy Initiative for the Establishment of an ASEAN Human Rights Mechanism”, Paras. 2, 6.
- ²⁹ “Agreement for the Establishment of the ASEAN Human Rights Commission,” Art. 1.
- ³⁰ Ibid., Art. 2.
- ³¹ Ibid. Art. 3.
- ³² According to Clause 2, each of those governments may propose up to three candidates, while at least one of the candidates shall be a national of a member country. Ibid. Art. 7.
- ³³ Ibid., Art. 11, Secs. 1, 4, 5.
- ³⁴ “Vientiane Action Programme,” Vientiane, 29 November 2004, pp. 6, 29.
- ³⁵ *The ASEAN Charter*, Jakarta: ASEAN Secretariat, December 2007.
- ³⁶ Ibid., pp.2, 29. cf. Art. 36.
- ³⁷ Ibid., pp. 2, 18.
- ³⁸ Ibid., p.4.
- ³⁹ Ibid., p.5. My emphasis.
- ⁴⁰ Ibid., p.29.
- ⁴¹ Ibid., p.2.
- ⁴² See Art. 20, Ibid., p.22.
- ⁴³ Ibid., Art. 14.
- ⁴⁴ “Terms of Reference for the High Level Panel on an ASEAN Human Right Body,” ASEAN Ministerial Meeting, 21 July 2008, paras. 2, 3.
- ⁴⁵ Ibid., para. 4.
- ⁴⁶ Ibid., paras. 5, 6.
- ⁴⁷ “Draft. Terms of Reference of [an ASEAN Human Rights Body],” Draft TOR – HLP 8, As of 13 Feb 2009, paras. 1.1, 1.2.
- ⁴⁸ Ibid., para. 1.4.

- ⁴⁹ Cf. *Ibid.*, paras. 1.3, 1.5.
- ⁵⁰ *Ibid.*, para. 2.1.
- ⁵¹ *Ibid.*, para. 4.7.
- ⁵² *Ibid.*, para. 6.1.
- ⁵³ *Ibid.*, para. 2.4.
- ⁵⁴ “Terms of Reference of ASEAN Intergovernmental Commission on Human Rights,” July 2009, paras. 4.7, 4.11.
- ⁵⁵ *Ibid.*, para. 6.8.
- ⁵⁶ “Working Group for an ASEAN Human Rights Mechanism Statement on the ASEAN Charter,” 21 November 2007.
- ⁵⁷ “Working Group for an ASEAN Human Rights Mechanism Welcomes the Imminent Creation of the ASEAN Intergovernmental Commission on Human Rights,” Manila, 27 July 2009.
- ⁵⁸ ASEAN Secretariat, *ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD*, Jakarta: ASEAN Secretariat, July 2013. p. 2.
- ⁵⁹ *Ibid.*, p.2.
- ⁶⁰ *Ibid.*, pp.7–8.
- ⁶¹ “Advancing a People’s ASEAN: Statement of the ASEAN Peoples’ Forum,” Fourth ASEAN Civil Society Conference, 20-22 February, 2009, Bangkok, Thailand, p.1.
- ⁶² *Ibid.*, pp. 1-2.
- ⁶³ *Ibid.*, p. 2.
- ⁶⁴ The following six goals were proposed in the Dakar Framework for Action, adopted at the World Education Forum in Dakar, Senegal: expand early childhood care and education; provide free and compulsory primary education for all; promote learning and life skills for young people and adults; increase adult literacy by 50 per cent; achieve gender parity by 2005 and gender equality by 2015; and improve the quality of education.
- ⁶⁵ *Advancing a People’s ASEAN*, p. 3.
- ⁶⁶ *Ibid.*, p. 4.
- ⁶⁷ *Ibid.*, pp. 4-5.
- ⁶⁸ *Ibid.*, pp. 5-6.
- ⁶⁹ “The Terms of Reference of the ASEAN human rights body should include protection mandates and the appointment of independent experts,” the open letter to H. E. Sihasak Phuanketkeow, Chairperson, High Level

Panel on the establishment of the ASEAN Human Rights Body, 22 June 2009.

⁷⁰ “Civil Society’s Recommendations on the National Process of Selecting Representatives of the ASEAN Intergovernmental Commission on Human Rights (AICHR),” Letter to H. E. Abhisit Vejjajiva, Prime Minister of the Kingdom of Thailand, ASEAN Chair, 28 August 2009, paras. 6, 10.

⁷¹ Ibid., para. 16.

⁷² Ibid., para. 17.

⁷³ Ibid., conclusion.

⁷⁴ FORUM-ASIA does not dichotomize between western and Asian understandings of human rights. Although a part of the human rights discourse initiated by FORUM-ASIA has strongly criticized western rights-based approaches, it also abandoned the cultural relativism that justifies authoritarian regimes. Rather, FORUM-ASIA proposed a discourse bridging the universal principles of human rights and cultural relativism. It is within this perspective that the universal principles of human rights should be understood in the contexts of regionalism and communitarianism.