

— THE EVOLUTION OF THE —

# ASEAN

## HUMAN RIGHTS MECHANISM

Institutional & Thematic Issues Within

**Edited by**

Randy Wirasta Nandyatama,  
Dio Herdiawan Tobing, and  
Shah Suraj Bharat

**ASEAN Studies Center UGM** is a leading research institution on ASEAN integration based at the Faculty of Social and Political Sciences, Universitas Gadjah Mada, Indonesia.

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**The Evolution of The ASEAN  
Human Rights Mechanism**

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Randy Wirasta Nandyatama  
Dio Herdiawan Tobing  
Shah Suraj Bharat

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FACULTY OF SOCIAL AND POLITICAL SCIENCES  
UNIVERSITAS GADJAH MADA

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# Foreword

Dafri Agussalim

Executive Director of ASEAN Studies Center

Universitas Gadjah Mada

On 23 October 2019, we celebrate the 10th Anniversary of the ASEAN Intergovernmental Commission on Human Rights (AICHR). It was a historic milestone, when ASEAN agrees to establish a Commission that carries the mandate of human rights promotion and the protection of fundamental freedoms, in conformity with the objectives and purposes of the ASEAN Charter. The AICHR's role in setting the stage for human rights cooperation in ASEAN was, is, and will always be vital. Notably, the Commission was successful in lending its expertise throughout the process of the adoption of the ASEAN Human Rights Declaration in 2012. Moreover, through the work of its Commissioners, the process of human rights standard setting continues to be an important endeavour for the region.

Indonesia continues to encourage for strengthening of the AICHR's role in safeguarding human rights and fundamental freedoms in the region. Indonesia's commitment to human rights in ASEAN is demonstrated primarily through the open and transparent selection of the country's representative to the AICHR. Commissioned by

the Ministry of Foreign Affairs, the government selects the most credible person to represent Indonesia in advancing human rights promotion in ASEAN. In the international fora, Indonesia also contributes to the promotion and protection of human rights through the United Nations Human Rights Council.

Indonesia will continue to work innovatively with other ASEAN Member States and its partners to spearhead the region in moving forward towards a fully people-oriented and people-centered ASEAN. This book is one of the many pieces of evidence that the Indonesia is supportive in working together with the academia in informing the public to enhance regional human rights cooperation, which is vital in strengthening the ASEAN Community.

Finally, I thank the Permanent Mission of the Republic of Indonesia to ASEAN, and the Representative of Indonesia to the AICHR, the Editors; Dr Randy, Mas Dio, and Shah, and all Contributors for having been an excellent partner throughout the drafting of this book. I wish all of you more successes in all your future endeavours.

Jakarta, 30 October 2019

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*On the occasion of the 10th Anniversary*

*of*

*ASEAN Intergovernmental  
Commission on Human Rights*

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**The Evolution of The ASEAN  
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*ASEAN Studies Center  
Universitas Gadjah Mada*



## CHAPTER 1

# Introduction: The Human Rights Body of ASEAN

DIO HERDIAWAN TOBING

## 1 Introduction

This special issue brings together a group of scholars from leading universities in Indonesia and Southeast Asia to respond to and celebrate the 10th anniversary of the human rights body of ASEAN: The ASEAN Intergovernmental Commission on Human Rights (AICHR). The overall objective of this book is not only to bring forward an overarching view of how this human rights body has developed, but also look at the criticisms and thematic issues that the AICHR needs to take into account for its further development. This edition focuses on two goals. The first is to analyze the development, limits and progress of the Commission from the perspective of politics, governance, law and international relations. The second discusses selected human rights issues that fall within the AICHR's mandate, ranging from migration and refugees, persons with disabilities, and business and human rights.

Regarding the origins of this book, the ASEAN Studies Center Universitas Gadjah Mada (ASC UGM) found the occasion of the 10th anniversary of the AICHR as the right opportunity to pursue academic work that

contributes to the narrative of human rights and the human rights mechanism in Southeast Asia and ASEAN. The idea was communicated with the Representative of Indonesia to the AICHR, Yuyun Wahyuningrum, in early 2019, just after she was appointed by the Ministry of Foreign Affairs to represent “Indonesia” in the ASEAN human rights body. The word “Indonesia” is intentionally put in inverted commas because she actually represents the interests of all and importantly the people of the country, not the government (Wahyuningrum, 2019).<sup>1</sup> The Indonesian representative has gone through the layers of the open selection process to be appointed the country’s envoy (Setnas ASEAN, 2019).

ASEAN has always been a cornerstone of Indonesia’s foreign policy (The Jakarta Post, 2019). That, of course, includes the strengthening of ASEAN’s human rights mechanism (Marsudi, 2018; Kalla, 2019). Noting from history, Indonesia, under the leadership of the then-foreign minister Hassan Wirajuda, was the strongest supporter of a fully functional human rights body, an institution that not only promotes but also protects human rights (Anya and Salim, 2018).

This book notes the importance of scholarly involvement and the aspirations to strengthen human rights and the system in ASEAN. The call for chapters for this book was published through the institute’s social media channels from Feb. 5 to 25, 2019 (ASEAN Studies Center UGM, 2019). Not all abstracts submitted were selected. ASC UGM tried to find the right balance of issues to give color to the book. In the end, six chapters were selected. Also equally important is the dissemination of the work of these scholars. The authors express hope

1 When an Indonesian journalist was arrested by the police in the allegation of hate speech, AICHR Indonesia openly condemned the government’s act in Facebook. Such an act shows the independence of the Indonesian representative to the AICHR.

that through this process of open discussion attended by multiple stakeholders that have an interest with the AICHR, the protection and promotion of human rights in Southeast Asia and ASEAN can be strengthened.

## 2 Themes of the Book

The authors of this special issue underwent rigorous editing to strengthen their drafts after the abstracts were selected by the Committee. They had to submit a full draft within three months of the announcement of the abstract selection, and engaged in up to two revision stages and language editing. Finally, all contributions were ready to be featured in early October 2019. All contributions have a similar objective: to review and assess the AICHR from an academic point of view. The first chapter provides an introductory explanation on the AICHR and a “manual” on how to read this book, which is grounded in the idea of offering “a view from within”. Chapter 2 by Saidatul Nadia Binti Abd Aziz and Salawati Mat Basir looks at the challenges of the AICHR and human rights violations in Southeast Asia in light of the realization of the ASEAN Community Vision 2025. Aziz and Basir recognize the importance of the human rights agenda as an integral part of the Community Vision 2025, emphasizing the need to fully advance the “people-oriented-ness” of ASEAN and making ASEAN an inclusive community for all.

In Chapter 3, Kadek Wiwik Indrayanti and Nanda Saraswati criticize the limitations of the AICHR because ASEAN governments continue to value human rights based on cultural relativism, such as from history, culture and religion. Both argue that to accomplish the quest of upholding human rights in the region, there is a

need for human rights standard-setting that is agreed on by ASEAN member states to fully realize human rights. A human rights court of ASEAN is deemed necessary to complement the work of the AICHR .

Chapter 4 and 5 observe thematic human rights issues in ASEAN. Muhammad Ammar Hidayatulloh in Chapter 4 explains the paradigm shift in disability from a medical to a human rights approach, arguing that the rights of persons with disabilities are an inalienable, integral and indivisible part of human rights and fundamental freedoms. In responding to this changing paradigm, the AICHR has played an important role as a catalyst and human rights standard-setter by embracing disability rights, leading to the adoption of the ASEAN Enabling Masterplan 2025. In Chapter 5, Annisa D. Amalia seeks greater attention for refugees in ASEAN. She explores the possibilities of refugee protection in times of transit in ASEAN member states by taking into account local contexts and community-driven approaches, given the limitations of the AICHR to respond to this issue.

Chapters 6 and 7 discuss emerging human rights issues in ASEAN. Ni Ketut Divya Karyza Putri explores online human rights violations in ASEAN. In the era of the digital revolution, technology also intersects with human rights, as she outlines online criminalization cases that threaten freedom of expression. In the chapter, she calls for the greater involvement of a human rights approach in the development of an ASEAN strategy on information and communications technology. In Chapter 7, Shah Suraj Bharat argues that to promote economic and developmental rights in ASEAN we must focus not on regionalism but regionalization. He argues that we should rely less on the political process of conscious design, and look instead to business and civil society in offering a way forward for advancing such rights.

In Chapter 8, Randy Wirasta Nandyatama closes the discussion by looking back and forward on the institutionalization of human rights in ASEAN. Randy takes an in-depth look at the overall process of human rights agenda setting in ASEAN and highlights possible action to be taken through collaboration among political actors in pushing for greater institutionalization of human rights in ASEAN.

To ensure a smooth transition to the following chapters and the delivery of the overall message of this book, I will briefly outline the context of human rights in ASEAN and the role of the AICHR.

### 3 The inception of ASEAN's Human Rights Body

Human rights were not a central issue for the Association of Southeast Asian Nations (ASEAN) and its founding members during the organization's formation in the late 1960s. The Bangkok Declaration of 1967 on the establishment of ASEAN clearly states that the initial purpose was to “accelerate economic growth, social progress and cultural development” and “promote regional peace and stability through abiding respect for justice and the rule of law”. None of the items included in the declaration explicitly reference human rights terminology. This is the same for the 1976 Treaty of Amity and Cooperation (TAC). The treaty, considered foundational in outlining the theoretical underpinnings of inter-state relations within ASEAN, lacked human rights considerations. It was not until the early 1990s that explicit mention of human rights terms appeared in an official ASEAN document. The 24th ASEAN Ministerial Meeting (AMM) Joint Communique adopted in Kuala

Lumpur in 1991 mentions that the Foreign Ministers “exchanged views on the issue of human rights and noted with concern its tendentious application in inter-state relations”. The character of human rights norms accepted by ASEAN member states was made in coherence with the core values of ASEAN: non-interference and strong emphasis on sovereignty. This is logical because almost all of the founding members of ASEAN were overshadowed by the tyranny of colonialism. This is why having agreed that “while human rights are universal in character”, ASEAN members emphasized that “implementation in the national context should remain within the competence and responsibility of each country” and “the international application of human rights be narrow and selective, nor should it violate the sovereignty of nations”. The translation of the previously accepted human rights narrative was then made clear at the 26th AMM Joint Communique adopted in Singapore. At the end of the Communique’s human rights section, the Foreign Ministers agreed that “ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”.

Over a decade and a half later, the ASEAN vision of a regional human rights mechanism became a reality.<sup>2</sup> Article 14 of the ASEAN Charter, adopted in 2007 at the 13th ASEAN Summit held in Singapore, stipulates that “ASEAN shall establish an ASEAN human rights body” that will operate in accordance with the Terms of Reference (TOR) decided by the Foreign Ministers Meeting. Grounded in this mandate, the Foreign Ministers Meeting organized a High-Level Panel to draft the TOR of an ASEAN human rights body. The draft TOR was submitted to the Foreign Ministers at the 42nd AMM

<sup>2</sup> It is not within the scope of this chapter for an in depth discussion on the ASEAN Commission on Women and Children (ACWC). The chapter studies in welcoming the tenth anniversary of the AICHR in 2019.

in Phuket, Thailand, in 2009. Subsequently, the Foreign Ministers approved the TOR and named the human rights body: the ASEAN Intergovernmental Commission on Human Rights (AICHR). The AICHR was then officially inaugurated at the 15th ASEAN Summit in Cha-am, Thailand, also in 2009, with the 10 member states appointing their representatives to the Commission. The initial meeting of the Commission was also convened on the sidelines of the Summit consisting of an introductory session, meeting with members of the High-Level Panel, and discussion on their working procedures as well as their prospective meetings and activities.

This year marks the 10th anniversary of the AICHR, a decade since the Commission came into operation. Many criticisms, constructive inputs, as well as frustrations have been directed at the human rights body. For some, the AICHR has failed to meet an “internationally” accepted human rights standard (Collins, 2013). However, at the other pole, some also say that perhaps the failure to understand the AICHR from the right angle prevents one from seeing how the AICHR has been moving forward.

It is thus the purpose of this special issue to comment on the performance of the AICHR with a “view from within”. In previous “ASEAN-ist” literature that one of the authors of this chapter contributes to, it was pointed out clearly that the common tradition of academic practice in assessing ASEAN and Southeast Asia, which discredits ASEAN’s preference of cooperation, has blinded us from seeing that regionalism has been progressing (Tobing, 2017), including that related to human rights. The evolution of the human rights mechanism and its processes in ASEAN should be understood from the context of the region and individual member states. Therefore, this chapter demonstrates that the extent to which we assess the achievements or failures of the AICHR depends on the

lense that we use.

This book offers an alternative view to the long-standing arguments that describe the AICHR as failing to address human rights issues, in which it is a “toothless tiger” due to its non-interference and consensus building tradition, as well as the imbalanced mandate between protection and promotion. Alternatively, this book suggests that the described failures not necessarily be regarded as “failure” but rather “limitations”. Only by acknowledging them as limitations of the AICHR can one understand the extent to which such a human rights body evolves and makes progress. A nonconventional “ASEAN-ist” approach to understanding some contributions of the AICHR to the human rights situation in Southeast Asia is, therefore, employed to examine the performance of the body.

## 4 A Brief Yet Closer Look

Article 14 of the ASEAN Charter stipulates:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

It is within this mandate of the Charter that the AICHR was founded and formally inaugurated at the 15th ASEAN Summit in Cha-am, Thailand. The Charter does not lay out any substantive or procedural requirements, except that the AICHR should operate “in accordance with the terms of reference”. Indeed, its norms are contained in the TOR, which were presented together with the inauguration of the AICHR (Mewengkang, 2012).

The TOR acknowledges the universality of human

rights but simultaneously recognize the need to maintain “the ASEAN Way” of paying respect to non-interference in the internal affairs of other ASEAN member states (Mewengkang, 2012). The urgency to promote and protect human rights in ASEAN, therefore, should pay attention and adjust to historical, cultural and religious differences in Southeast Asia. As such, although Article 14(1) of the Charter recognizes the importance of human rights “promotion” and “protection”, the AICHR was launched as only a promotional body. No investigative power was granted to the AICHR from ASEAN’s members states. It was already a struggle to set the body up, and if ASEAN member states were forceful in giving protection power to the AICHR, they would have ended up acquiring nothing at all, as ASEAN governments like Myanmar, Laos or Vietnam would not have been able to reach the comfort levels of Malaysia, Singapore and others to grant such power (Cumaraswamy, 2009).

The inception of the AICHR was both needed and should be celebrated, but we must also remember there is still work to do as it is not the end of the struggle. The limitations of the AICHR can be seen as a failure or opportunity to push for further evolutionary work. For instance, given its limitations, the AICHR successfully led the drafting of the ASEAN Human Rights Declaration (AHRD) that was adopted in 2012, despite the controversies in the process because the responsibility rested with the AICHR as a whole (Renshaw, 2013). Still, it was a considerable achievement because the creation of the AHRD reaffirmed the commitment of ASEAN member states to the international human rights instruments to which they had signed, such as the Universal Declaration of Human Rights, the Charter of the United Nations, and the Vienna Declaration and Programme of Action (Soon, 2016). Yet, whether the AICHR will keep on progressing

is up to the representatives' quality, character and personality (Cumaraswamy, 2009) and ASEAN member states to decide the way forward. For instance, although the organizations is "intergovernmental" by nature, at least three representatives are independent from their governments.

Furthermore, the openness of the representatives' selection process has also improved gradually. While it was only Indonesia and Thailand that called for open selection in the appointment of their representatives, Malaysia has now followed the trend. The advertisement to fill the position as Malaysian Representative to the AICHR term 2019-2021 was publicized by the Ministry of Communications and Media of Malaysia with the deadline to apply of Oct. 14, 2018 (Ministry of Foreign Affairs of Malaysia, 2018). Seven shortlisted candidates were named by the Ministry of Foreign Affairs (Ismail, 2018), which in the end appointed Eric Paulsen, the former legal director of Fortify Rights, as the new representative for 2019-2021 (Su-Lyn, 2019).

As for Indonesia and Thailand, the established openness in selection did not perish. The Thai government called for the open selection of its representative between Sept. 15 and Dec. 15 2018, which resulted in the appointment of Amara Pongsapich, the former chair of the Thai National Human Rights Commission, as Thai Representative to the AICHR term 2019-2021 (Ministry of Foreign Affairs of Thailand, 2019). The appointment of the Human Rights Working Group's senior advisor, Yuyun Wahyuningrum, as Indonesian Representative to the AICHR term 2019-2021, was also done openly through a series of selection processes starting from July 27, 2019. The Indonesian Ministry of Foreign Affairs opened the call for the selection on its website with a list of requirements (Ministry of Foreign Affairs of Indonesia, 2018):

The current Indonesian Representative, among other representatives, is in favour of institutional change in the AICHR. Aware of the limitations of the AICHR, yet still believing that the institution is capable of evolving, Indonesia introduced an alternative method to enhance the AICHR's protection power aside from the TOR review, which has yet to come into realization after a decade, through “instituted practices related to human rights protection”.

ASEAN Member States	Persona
Brunei Darussalam	Civil Servant
Cambodia	Civil Servant
Indonesia	CSO
Laos	Civil Servant
Malaysia	CSO
Myanmar	Civil Servant
The Philippines	Civil Servant
Singapore	Civil Servant
Thailand	CSO
Vietnam	Civil Servant

*Source: Dinna Wisnu (2018)*

Figure 1.1. [List of ASEAN Member States and the Persona of Their Representatives to AICHR 2016-2018]

The programme of the 2019-2021 term will try to initiate and explore possible protection mechanisms or practices in the AICHR to respond to the human rights situation and address the rights of victim. Such a method will enable the AICHR to activate its protection mandate through established practices. Other goals of the Indonesian Representative's 2019-2021 term are to realise advanced human rights principles of non-discrimination, indivisibility, interrelatedness and gender equality, mainstreaming human rights through development, democracy and peace measures, and improved civil society

participation and engagement.

## 5 Conclusion

On the way forward, of course there are challenges and hurdles, yet hope remains. The AICHR is an evolutionary body and therefore it is unfair to expect a sudden institutional breakthrough. What is important is to ensure that the sense of hope still lies among human rights-friendly ASEAN governments, their representatives, the coalition of civil society organizations, as well as the academia to keep sounding out the need for greater human rights protection in the region. While it is important to pressure for change, it is urgent to maintain the spirit of reform. Perhaps, it is not to our benefit to enjoy the AICHR's institutional changes but for our successors, children and grandchildren to witness that the AICHR has grown its teeth.

1. Having high levels of integrity, competence and dedication in the promotion and protection of human rights;
2. Comprehension in human rights issues and actively contributing to human rights enforcement in Indonesia
3. Possess broad networks at the national and international level;
4. Sound Command of the English language;
5. Comprehension on the development and dynamics of ASEAN.

Figure 1.2. [Requirements to apply for the position of the Indonesian Representative to ASEAN]

Ten years have passed, many more will come. Some progress, mentioned above, has been accomplished, yet to keep mainstreaming the spirit of human rights “protection”, the “independence of representatives”, and “openness” will be central in the agenda until the rest of ASEAN's member states follow the positive investment of

the, still in a minority, progressive states. The journey still and must continue.

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## CHAPTER 2

# Unlocking the ASEAN Human Rights Mechanism in Achieving a Regional Human Rights System

SAIDATUL NADIA ABD AZIZ  
SALAWATI MAT BASIR

## 1 Introduction

*Article 4 of the ASEAN Vision 2025 states “We resolve to consolidate our Community, building upon and deepening the integration process to realize a rules-based, people-oriented, people-centered ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter.” The intention of the ASEAN Community vision 2025 is to provide a better life for its citizens. Human Rights was one of the elements emphasized in the ASEAN Community Vision 2025, as seen in Article 8.2 and Article 12.2 that mentions the protection of human rights.*

The term “human rights” is not alien in society at large. For about 60 years, the “ideal” human rights system was set out by a nascent United Nations after the horrors of World War II and the holocaust, Thus, human rights are often regarded as Western values. Though human rights are painted as a Western conceit, it is not necessarily true. In fact, it is historically inaccurate. The history of modern human rights started with the involvement of representatives from China, the Soviet Union and Lebanon in addition to the United States, Australia and Canada as the 1948 Drafting Committee for the “International Bill of Rights”. The Universal Declaration of Human Rights

(UDHR) was the first major attempt from the international community to codify human rights in the modern era. The declaration received attention and support from all over the world. For instance, Pakistan claimed “it was imperative that the peoples of the world should recognize the existence of a code of civilized behavior which would apply not only in international relations but also domestic affairs”. The UDHR was then adopted with 48 votes in favor and remained as an aspirational document that carries a great deal of moral, but not legal, authority (Stauffer, 2011).

Nevertheless, human rights have always had a unique notion in Asia. Comprising various forms of states and cultures, Asia often views a certain norms with different meanings. Indeed, assuming the existence of an Asian monolithic view of human rights is a misnomer. There are various factors that can influence these different meanings, including how changing regimes often regard and emphasize norms differently. Specifically, we can see the longstanding debate among Asian countries on how human rights are understood as universal or relative values (FIDH,2015).

Southeast Asia is one of the world’s most diverse regions with almost half a billion people, unparalleled cultural richness and a range of assorted economic and political structures, however it is also a region of uneven capacities and resources (Numnak, Romandy & Trapp, 2009). The ASEAN Charter recognizes human rights as among its values, principles and purposes, along with democracy, rule of law and good governance. Furthermore, Article 14 of the Charter stipulates ASEAN’s commitment to institutionalizing human rights through a regional human rights mechanism: the ASEAN Intergovernmental Commission on Human Rights (AICHR), which was created in October 2009. This was followed by the launch

of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in April 2010. These measures symbolize the commitment of ASEAN leaders to recognizing human rights as an integral part of ASEAN's path toward a cohesive regional community (Wahyuningrum, 2014).

The ASEAN Human Rights body is still in its infancy and efforts have focused more on promotion rather than protection of human rights. However, gaining consensus to openly discuss such a sensitive topic since 2008 has been promising (Stauffer, 2011). It is known that human rights sensitivity varies throughout the region, making it difficult to find consensus on certain issues between all member states. Nevertheless, ASEAN member states have continued to spread awareness on human rights to its citizens. ASEAN member states took the first step to creating the first formal regional Asian human rights system with the publication of the ASEAN Charter. The Charter entered into force on Dec. 15 2008 and notably contains language that specifically supports human rights and lays the groundwork for the establishment of an ASEAN human rights body (Stauffer, 2011).

Southeast Asia has faced frequent human rights violations and abuses, ranging from the worst crimes against the Rohingnya and other religious and ethnic minorities in Myanmar, to numerous enforced disappearances across the region, to extrajudicial killings in the Philippines, attacks on the independent media, dissolution of the legal opposition, and the shrinking of civic space and freedom of expression in the region. The human rights situation in the region is deteriorating, but all of the issues remain unaddressed by AICHR (Kurmala, 2019). Ten years since its establishment, the AICHR has yet to fully function as a regional human rights mechanism that meets the expectations of civil society. The High level Dialogue on

Human Rights in ASEAN, organized by the Asian Forum for Human Rights and Development (FORUM-ASIA), ASEAN Parliamentarians for Human Rights (APHR) and Centre for Strategic and International Studies (CSIS) expressed grave concern about the ineffectiveness of the AICHR to provide protection for the human rights of the people of Southeast Asia (APHR, 2019).

Although the AICHR may be conceived as a step forward for human rights in the region, criticism that the body has limited enforcement functions is stridently voiced. (Numnak, Romandy & Trapp, 2009). If the AICHR would like to be relevant to the struggle of the peoples of Southeast Asia and warrant its status as a human rights commission, it needs to make major institutional changes and take genuine steps to the promise behind its creation (APHR, 2019).

This paper discusses the establishment and challenges of the AICHR in the first section. Though the AICHR seems toothless, it is argued that the AICHR is on the right track but faces many challenges to ensure its effectiveness. With that, part two of this chapter will discuss the ASEAN human rights mechanism and look at each of the ASEAN member states to see the current situation, part three looks at the challenges faced regarding human rights violations in achieving the ASEAN Community Vision 2025, while part four provides recommendations for the AICHR and ASEAN.

## 2 Establishment and Challenges of the AICHR to ASEAN

ASEAN's founding document—the 1967 Bangkok Declaration—did not mention human rights, and the term itself had been met with deep hesitation by the

participating governments at that time (Muntarbhorn, 1997). Member states were more concerned with national security than the implementation of human rights. Nevertheless, 17 years later, ASEAN secured consensus from its member states to institutionalize human rights; the term first appeared in the 1993 Joint Communiqué of the 26th ASEAN Ministers Meeting. ASEAN foreign ministers reiterated their commitment in Paragraph 16 to “respect for human rights and fundamental freedoms as set out in the Vienna Declaration of June 25, 1993” and in Paragraph 18 “agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”. Two years after the adoption of the Joint Communiqué, a group of lawyers from the Human Rights Committee of the Law Association of Asia and the Pacific set up a working group to advocate for the establishment of an ASEAN human rights mechanism through seminars, roundtable discussions and workshops (Wahyuningrum, 2014).

In 1997, ASEAN leaders adopted the ASEAN Vision 2020, which describes the broad vision of creating an ASEAN caring and sharing community (ASEAN, 1997a). Following this commitment, ASEAN adopted the Hanoi Plan of Action in 1997 to translate ASEAN Vision 2020 into action, including the exchange of information on human rights among ASEAN member states (ASEAN, 1997b).

Since then, the debate on human rights has intensified in a number of official ASEAN documents, such as the 2003 Bali Concord II, the 2004 Vientiane Action Program, the 2007 Political Security Blueprint and the Social-Cultural Blueprint. In 2008, ASEAN leaders ratified the ASEAN Charter, including Article 14, which stipulates the establishment of a human rights body that shall operate in accordance with the Terms of Reference

(TOR) to be determined by the ASEAN Foreign Ministers Meeting (Wahyuningrum, 2014).

The AICHR was created in 2009, when its TOR were adopted at the 42nd ASEAN Ministerial Meeting. It is responsible for promoting and protecting human rights in ASEAN, and is comprised of representatives selected by each member state's leader or Ministry of Foreign Affairs either through direct appointment or open election. Representatives are guided by 14 specific mandates as set out in the TOR. Each ASEAN member state elects one representative to the AICHR. The body works under the ASEAN Political Security Pillar and reports to the ASEAN Foreign Ministers Meeting (AFMM) (Forum-Asia & SAPA, 2018).

Article 5.1 of the TOR stipulates that the AICHR comprises the member states of ASEAN. Furthermore, Article 5.4 states that member states "should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their representative to the AICHR. Each representative serves a term of three years and may be consecutively reappointed for only one or more terms as according to Article 5.5," (AICHR, 2008). AICHR representatives come from different backgrounds. The first batch of representatives (2009–12) were professionals from the judiciary (Singapore and Brunei Darussalam), law (Malaysia), diplomacy (Myanmar and Philippines), civil society (Indonesia), academia (Thailand) and government officials working at the Ministry of Foreign Affairs (Laos, Cambodia and Vietnam). In 2009, only Indonesia and Thailand conducted a participatory selection process at the national level as suggested by Article 5.4 of the TOR (Wahyuningrum, 2014).

The word is not defined in the TOR, under the ASEAN way one may not expect the AICHR to make

complaints. Nevertheless, what is not prohibited is not forbidden (Muntarbhorn, 2009).

The independence, impartiality and professionalism of the representatives and, by extension, the commission as a whole can be questioned. To date, only three member states have held a democratic selection for the positions, namely Thailand, Indonesia and the Philippines. The Philippines no longer uses this process. The involvement of civil society organizations (CSOs) in the selection is very limited across the region, which creates a tendency for AICHR representatives to be more aligned to the government than to the people, and to subjugate their human rights work to national political considerations (Forum-Asia & SAPA, 2018). Most AICHR representatives are either state officials, or appointed by the state, or both, which poses a serious challenge (Bitana, 2018). For example, the representatives of Cambodia, Laos, Myanmar and Vietnam in particular avoid conversations regarding human rights in their respective countries because they are selected by and aligned to the state. It is widely perceived that they see their task as preventing criticism of their respective governments on human rights issues, and more generally opposing any active protective role for the AICHR (Stothard, 2018).

The AICHR was established to implement the mandates and functions embodied in its TOR. Nevertheless, CSOs have stated that both the ToR and mandate are limited, because both fall in line with the ASEAN way, rather than international human rights law and standards. The TOR calls for the development of strategies to promote and protect human rights and fundamental freedoms, however the AICHR's mandates were formulated with a "promotion first, protection later" approach. The TOR does not include the powers of investigation, monitoring or enforcement, though it

provides that the commission is ‘to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member states are party to (Forum-Asia & SAPA, 2018).

The human rights situation in the region is reportedly deteriorating, but all the issues remain unaddressed by the AICHR. Despite having protection-related provisions in its TOR, the AICHR tends to succumb to the political will of ASEAN member states. The human rights commission adheres to the noninterference principle of ASEAN and sidelines the rule of law, democracy and respect for fundamental freedoms. This has resulted in the neglect of human rights on the ground and resulted in the irrelevance of AICHR and ASEAN. Individually and collectively, the AICHR, ASEAN member states and ASEAN have failed to create or develop a viable human rights mechanism. The AICHR should work in line with three principles, the first being that the commission should work single-handedly to oversee all stakeholders, including the government, for the promotion and protection of human rights in Southeast Asia. Second, there should be an open and transparent mechanism in the selection of the AICHR membership. Third, the AICHR should be the best in the Southeast Asian region in the protection of human rights. The AICHR’s works must mirror the aspects and dimensions of human rights. The AICHR also has the opportunity to utilize its potential to forge cooperation with other stakeholders (Kurmala, 2019).

### 3 The ASEAN Human Rights Mechanism

Regional human rights systems vary, based on

geography and culture. To name one, the oldest and often considered best established is the mechanism developed around the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR) that came into force in 1953. The Convention— inspired by the UDHR —protects a broad range of civil and political rights, and has been amended by various protocols since 1953 (COE, 1950). On the other hand, Latin America has its own regional system, the Inter-American Commission on Human Rights (IACHR), which is an organ of the Organization of American States (OAS). The IACHR takes its authority from the 1969 American Convention of Human Rights and has the principle function of “promoting the observance and the defense of human rights,” (OAS,2006).

Asia has lagged behind its European and Latin American peers in the establishment of a regional human rights mechanism. It is highly unlikely that any Asian system will contain either binding court judgments like the European system or sanctions for “failure to prevent” like the Latin American system (Stauffer, 2011). When ASEAN was first established, human rights was not its concern. In the context of rivalry between two superpowers in the region in addition to rising disputes among Southeast Asia countries, creating an organization that could manage the political tensions was the priority. The effort worked as ASEAN survived the Cold War and boosted economic cooperation among its members. After the Cold War ended, however, ASEAN faced new challenges that had a significant impact on the foundation of the organization. One of the challenges is human rights (Olivia, 2014).

In 1993, the international community gathered in Austria to attend the World Conference on Human Rights. The main purpose of the conference was to produce

“a common plan for strengthening human rights work around the world,” (OHCHR, 2013).

ASEAN leaders showed their reluctance to the idea of giving power to United Nations human rights bodies (McCarthy, 2009) and on the idea of human rights universality (Olivia,2012). The unwillingness was demonstrated in a regional meeting before the conference took place. In the Bangkok Declaration, Asian countries, including ASEAN member states, stated that while they “welcomed the increased attention paid to human rights in the international community” and reaffirming the commitment to “principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights”, they rejected the universality of human rights by emphasizing that human rights “must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds,” (UNHCR, 2013).

Even though ASEAN showed doubt to the universality of human rights norms, however, in July 1993 ASEAN assented to the Vienna Declaration and Programme of Action and agreed to establish a regional human rights mechanism. Nevertheless, it took ASEAN more than a decade to take the next step in establishing the mechanism. In 2004 ASEAN member states signed the Vientiane Action Programme (VAP), a plan to further regional integration. Under the VAP, ASEAN gave assurances that it would form a human rights system for the region. This was realized when the ASEAN Charter was adopted in 2008. (Olivia, 2014).

Article 14 of the ASEAN Charter states:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

Though ASEAN does not have a specific legal documents on human rights, the term has been mentioned from time to time in a range of nonlegally binding documents such as joint communiqués and joint declarations or statements both among its members and with dialogue partners. In the 1990s there were some references to human rights in a number of official statements. In 1991, ASEAN affirmed its original position with regard to human rights in its Joint Communiqué stating that: “[W]hile human rights are universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regard for the complex variety of economic, social and cultural realities”. They emphasized that neither the international application of human rights be narrow and selective nor should it violate the sovereignty of nations (Joint communiqués, 1991).

The authors argue the efforts and initiatives made by the working group for an ASEAN human rights mechanism must be given recognition. Many of the human rights elements included in the VAP were proposed by the working group through different engagements with ASEAN. The accelerated progress made by ASEAN member states in human rights has arguably been remarkable and the VAP is one of the most concrete examples of such progress. Human rights issues and the establishment of an ASEAN human rights mechanism, as well as the commitment to allow greater participation of civil society in the development process, are still very challenging matters in ASEAN. ASEAN’s inclusion of human rights and fundamental freedoms in both its principles and purposes was not without challenges. Consensus was reached with compromises including:

first, the principles of respect for fundamental freedoms, the promotion and protection of human rights, while the promotion of social justice were (counter) balanced by the principles of noninterference in the internal affairs of ASEAN member states; and second, the prescription for the establishment of an ASEAN human rights body in Article 14 was arguably not as specific as it should have been as it was subject to the TOR that were determined at an ASEAN foreign ministers meeting and were accordingly the result of negotiations and compromises ( Petcharamesree, 2013).

In the wake of the 1993 Vienna World Conference on Human Rights, in the 26th Joint Communiqué of the Annual Ministerial Meeting, ASEAN member states promised to “consider the establishment of an appropriate regional mechanism on human rights,” (ASEAN, 1993). The path between this promise and its ultimate realization in 2009 with the creation of the AICHR was neither linear nor inexorable. The Asian Financial Crisis of 1997–98, sparked by currency volatility in the wake of premature financial liberalization (Rüland, 2000), led to a loss of legitimacy for the authoritarian structures of many regional governments and of ASEAN (Kraft, 2001). This loss of legitimacy did not result immediately in a commitment to human rights; instead, it sparked a process of community-building and reform that was gradual and incremental (Davies, 2014).

Ten ASEAN member states have highly divergent positions on human rights generally. ASEAN member states can be broadly split into three groups in their relationship with human rights, although it should be noted that each of these categories contains significant variation. The first, the progressives, comprises Indonesia and the Philippines, which to varying degrees have embraced democratic liberal norms domestically and the political systems of which are defined by political pluralism. The second,

termed the cautious, includes Singapore, Malaysia and Thailand that, while ensuring the rule of law, consistently show considerably more reluctance to embrace global standards, especially of the civil and political variety. The third, the recalcitrant, comprises the four newer members, Cambodia, Laos, Myanmar and Vietnam, along with Brunei (Davies, 2014a). The principles on unanimity and equal participation have a long history within ASEAN, resting on consultative and consensual diplomacy as the driving force for any forward movement (Acharya, 1997).

In order to understand the way the ASEAN human rights architecture (which includes both human rights institutions and standards) was designed and crafted, it is important to examine how ASEAN governments perceive human rights. According to Tommy Koh, “[there was no] issue that took up more of our time, [no issue] as controversial and which divided the ASEAN family so deeply as human rights,” (Koh, 2008). Besides that, Toy and Estanislao stated that “[M]uch of ASEAN’s credibility and attraction to the outside world was built on the economic success of many of its members [...] ASEAN’s other strong points were stability in the region and a good measure of cohesion among its members,” (Tay and Estanislao, 2000).

These comments are still relevant today and most understand that such success and cohesion are based on at least two pillars, which include the written norms of noninterference and the principle of consensus. These founding principles were stated in the 1976 Treaty of Amity and Cooperation in South East Asia and are repeated in the ASEAN Charter. Three of the principles stipulated in Article 2(2) emphasize: respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; noninterference in their national affairs; and respect for the right of every member state to lead its national existence free from

external interference, subversion and coercion. ASEAN has long emphasized that the promotion and protection of human rights by the international community must recognize national sovereignty, national borders and noninterference in one another's affairs. ASEAN views human rights as an internal affair. Nevertheless, events since the early 1990s, especially since the advent of the ASEAN 10, have posed difficulties for ASEAN in dealing with new challenges. ASEAN is still divided on the issue of human rights. It is hard to imagine how these differences can be bridged, especially while the concept of "Asian values" is still alive. Including human rights clauses in the Charter has not helped ASEAN develop a human rights discourse or change its perception of human rights (Petcharamesree, 2013).

The Declaration, released after almost three years of high-level negotiations, consists of 40 articles and outlines a list of general principles, civil and political rights, economic, cultural and social rights, the right to development and the right to peace (Renshaw, 2013). Article 7 starts off with a traditional restatement of the universality of human rights: "All human rights are universal, indivisible, interdependent and interrelated". However, further on in the same article comes the provision stating that at the same time, 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. This is nothing less than the reawakening of the Asian values debate of the early 1990s (Bauer and Bell, 1999). At the 1993 Bangkok Meeting of Asian States, a preparatory meeting for the Vienna Conference, Asian states asserted that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind

the significance of national and regional particularities and various historical, cultural and religious backgrounds (United Nations, 1993).

Most surprising for a human rights document is the content of the very last article. Article 40 states: “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”. This article effectively undercuts every one of the foregoing 39 articles, as the “purposes and principles” referred to are the traditional state-centric ones that have served ASEAN since its creation in 1967. The ASEAN Charter states these clearly. Article 2.2(h) of the Charter notes that one of the principles of ASEAN is “adherence to the rule of law, good governance [and] the principles of democracy”, and Article 2.2(i) states that “respect for fundamental freedoms, the promotion and protection of human rights” are also principles of the association. However, Article 2.2(a) of the Charter calls for the “respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States”. Moreover, Article 2.2(e) of the Charter relates to “noninterference in the internal affairs” of other members, and 2.2(f) states the “respect for the right of every member state to lead its national existence free from external interference, subversion and coercion”. Article 40, therefore, can be understood as a self-limiting clause; the preceding 39 articles are explicitly made subordinate to the dominant understandings of nonintervention and sovereign equality upon which ASEAN rests (Davies, 2014).

ASEAN governments thus believe that human rights are not universal. While ASEAN leaders accept the concept of the universality of human rights, they argue that there are differences between international human

rights standards and practices in the region. For ASEAN, human rights are shaped by each society's specific history, traditions, cultures and religions. Second, one category of rights is prioritized over another. Some ASEAN governments are not comfortable with the concept of the indivisibility of human rights. Many prefer advocating for economic, social and cultural rights rather than civil and political rights. ASEAN claims that political rights and civil liberties could be a hindrance to economic development and social or public order. Third, in most ASEAN countries there has been more concern with order and discipline, and more concern with duties than with rights. A citizen has responsibilities toward his or her society. Many ASEAN governments believe that individual rights must give way to the demands of national security and economic growth. They believe that duties or responsibilities to the state and to other citizens come before the need to respect individual human rights. Fourth, as noted above, since its inception, the working principles within ASEAN have been based on nonintervention and freedom "from external interference in any form or manifestation in order to preserve their national identities" (Petcharamesree, 2013).

Thus, it is clear that though the AICHR was intended to be a mechanism that could deal with human rights matters all over ASEAN, we can see it has faced a lot of challenges clearly due to the protection of interest of certain states. ASEAN is well known for its noninterference principle and the ASEAN way makes it impossible to impose a human right mechanism on all of the member states, as the member states do not regard human rights as universal in nature and regard sensitivity as something crucial to be considered in dealing human rights. The AICHR is not equipped with monitoring and/or investigative powers and is unable to reconcile the principle of noninterference in internal affairs with that

of protection of rights. It upholds ASEAN's traditional principle, stressing the need to take into consideration different histories and circumstances of its member states. Implementation of the AHRD may be realized but how it is monitored remains a question.

#### 4 Challenges of Human Rights Violations in Achieving the ASEAN Community Vision 2025

The starting point for any discussion of human rights in Asia is frequently the “Asian values” discourse that had its heyday in the 1990s, in the run-up to the 1993 World Conference on Human Rights (the Vienna Conference). The concept was used strategically to defend the role of state sovereignty as a wall against the international system of human rights and to challenge the universality of human rights. Although the “Asian values” discourse has lost some of its credibility it is still occasionally used to rekindle a cultural relativist approach to human rights or at least to certain civil and political rights; the hard-line variant seems destined to remain side-lined. The term “Asian values” used by its champions is specious; first, because the debate is just as much about how society is organised and how power is exercised as it is about values; and second, even at the height of its popularity, “Asian values” was the object of theorization in only a handful of countries in Southeast Asia and China, albeit in different ways. It would be illusory to assume that the term reflected a common position in Asia. The “Asian values” discourse simply posits that there are cultural traits that are incompatible with certain internationally recognised rights and freedoms. (FIDH, 2015).

Central to the Asian Values debate is the deconstruction of universalist Western values by creating hierarchy/prioritizing rights (namely economic over political and social) and creating a façade built around cultural relativism. Cultural relativism as espoused by Boas is the understanding that “civilization [culture] is not absolute, but that it is relative, and that our ideas and conceptions are true only so far as our civilization goes... subordinate [to the prior], is to show how far each and every civilization is the outcome of its geographical and historical surroundings. (Boas 1887).” Conceptualizing the aforementioned is critical to AV as it stipulates that any [sic] civilization [culture in contemporary parlance] can only be understood in the time and space with which it develops/occurs and more importantly, by those who are part of and fully understand the previous (Fettner, 2002). In this equation a “Westerner” could never understand, thus, critique nor criticize such discourse as they have neither the cultural nor civilization capacity nor tools to do so. Conversely, the same applies to any geographic space thus the only universalism is reductivism as to each their own and to each cultural specificity and essentialism holds sway as there cannot be absolute values or principles in guidance or for standard bearing (Goodhart, 2003).

The “ASEAN way” denotes a dual faceted *modus operandi* and constitutive norms that inform members as well as third party states regarding intergovernmental relations in ASEAN’s regimes (Jones 2011). ASEAN’s constitutive norms are composed of regulative norms consisting of integrity of state sovereignty and independence, no external interference or subversion (TAC Article 10), noninterference in internal affairs and peaceful settlement of disputes (TAC Article 2, 11, 13) and procedural norms of consultation and consensus in decision-making (Sebastian and Lanti, 2010).

From the perspective of human rights and governance, the region is one of major contrasts. Several of its member countries are nondemocratic while some democratic proponents walk a political tightrope. It hosts one of the world's biggest democracies with a majority Muslim population. Despite the tranquil haven found in this setting, violence and opacity still pervade parts of the region (Muntarbhorn, 2016). In its origins, ASEAN was not a human rights organization but a political entity. Neither human rights and democracy nor good governance (a possible euphemism for democracy and accountable exercise of power, aka lack of corruption) were mentioned in the 1967 Bangkok Declaration that established ASEAN. Therefore, expectations for human rights and governance through ASEAN as a regional organization have been very modest. From the 1990s, the entity has grown rapidly into a free trade area of extensive economic cooperation and has developed into an ASEAN Community, consisting of three communities that are the ASEAN Political–Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community (ASEAN, 2009a; 2009b; 2009c; Severino, 2006).

Nevertheless, human rights, democracy and good governance have become increasingly part and parcel of the ASEAN narrative. In form, these notions have become legitimized and, in a sense, institutionalized in the region. The ASEAN Charter refers explicitly to human rights, democracy, rule of law and good governance as key principles of ASEAN, and calls for the establishment of an ASEAN human rights body (ASEAN, 2008). This has been coupled with various blueprints and plans of action. The current projection is to direct the region with the ASEAN Economic Community Blueprint 2025 (ASEAN, 2015), after the realization of the ASEAN Community in 2015, as underlined by the Kuala Lumpur Declaration on ASEAN

2025: Forging Ahead Together (ASEAN, 2016).

Apart from the ASEAN Charter, ASEAN has begun to adopt instruments that have direct bearing on human rights in the region. In 2007, ASEAN adopted the Declaration on the Rights of Migrant Workers. In 2012, it adopted the AHRD (ASEAN, 2014). The AHRD provides a list of rights to be promoted and protected, ranging from civil and political rights to economic, social and cultural rights, with additional emphases on the right to development, the right to peace and cooperation on human rights matters (Muntarhorn, 2016).

In 2015, ASEAN finalized the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) (ASEAN, 2015). The ACTIP was the first substantive treaty of ASEAN on a specific issue with human rights implications. While it is an anticrime instrument, the elements of protection and recovery offered to victims invite a human rights-oriented approach. The provisions of this regional convention parallel the multilateral UN Convention Against Transnational Organized Crime and its Protocol against human trafficking (The Palermo Protocol) (UNODC, 2004), underlining a broad definition of human trafficking based on “exploitation”, the need for the criminalization of trafficking, criminalization of related money-laundering/obstruction of justice and corruption, possible universal jurisdiction, prevention measures, cross-border cooperation, protection of victims such as on victim identification, medical and other assistance, safety of return, effective law enforcement, confiscation of assets of culprits, and mutual legal assistance and cooperation. An action plan accompanies the ACTIP and is complemented by a number of statements and declarations, especially the Kuala Lumpur Declaration on a People-Oriented, People-Centered ASEAN (2015), that highlights ASEAN as a rules-based, people-centered,

people-oriented region (ASEAN, 2016a). This declaration lays down a programmatic approach that sees ASEAN as people-oriented and people-centered, the former description implying a top-down approach and the latter implying a bottom-up one. Regarding the ASEAN Political–Security Community, it advocates promotion of democracy, rule of law, good governance, and human rights promotion and protection, together with support for the AICHR, paralleled by the enhancement of judicial systems, and integrity in the public sector.

Yet, the legitimization of human rights and good governance in the region are qualified. The AHRD is a key example of human rights being instituted in the region in a limited manner. While it contains some innovative elements, such as the call to protect persons with HIV/AIDS, and advocacy for the right to development and peace, the AHRD has been heavily criticized as not being congruent with international standards (AHRD, 2014). The stumbling blocks include the appearance of regional particularities that have the effect of undermining universally recognized human rights. These include the overt mention of duties/obligations (of persons) instead of paramount emphasis on human rights; reference to ‘national and regional context’ that might override universal standards, with components of cultural relativism; omission of various internationally guaranteed rights, particularly the right to freedom of association; broad limitations on human rights in the guise of “morality”; emphasis on ‘nonconfrontation’ that interplays with the ASEAN official attachment to national sovereignty and the claim that human rights-related action should not interfere in the internal affairs of states; and subjecting human rights, particularly the right to seek asylum, to national laws (bearing in mind that most ASEAN member states are not party to international refugee agreements) (Muntarbhorn, 2016).

Above all, the AHRD faces challenges in its implementation. First, while the notion of human rights is anchored internationally in the concept of human rights' universality, premised on universal/international standards as the minimum standards below which no country should stoop, the declaration implies that if there is a conflict between international standards and regional or national policies or practices, the latter should prevail. The difficulty is exemplified by the wording of the AHRD: "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 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" .

Second, while internationally the principle that human rights are indivisible, in the sense that civil, political, economic, social and cultural rights should be promoted and protected in tandem (without selectivity), many ASEAN countries aim to promote and protect economic, social and cultural rights, such as the right to an adequate standard of living and the right to education, rather than civil and political rights, such as freedom of expression and peaceful assembly that are at the heart of democracy and good governance (Steiner, Alston and Goodman, 2008).

Due to this, it is relevant to take a look at the present situation in each ASEAN member state regarding this matter. This part will discuss the situation and challenges in ASEAN in terms of human rights. This information is taken from a Human Rights Watch report (2018), however the report excluded Laos and Brunei.

## 4.1 Cambodia

The civil and political rights environment in Cambodia markedly deteriorated over the past year as the government arrested the leader of Cambodia's political opposition on dubious charges of treason; dissolved the main opposition party and banned over 100 members from political activity; intensified the misuse of the justice system to prosecute political opposition and human rights activists; and forced several independent media outlets to close. The ruling Cambodia People's Party (CPP), which controls the country's security services and courts, has led the crackdown that began in 2016 and is likely motivated by Prime Minister Hun Sen's anxiety about national elections scheduled for July 29, 2018. The arbitrary arrests and other abuses appear aimed at preventing a victory by the opposition Cambodia National Rescue Party (CNRP), which made electoral gains during the 2013 national elections and the 2017 commune elections. Because of the dissolution of the CNRP in November, there will be no major opposition party to contest the CPP in the 2018 elections. Cambodia's General Department of Taxation, on the pretext of an unpaid tax bill, forced the independent Cambodia Daily newspaper to close on Sept. 4, and brought tax related criminal charges against its owners. The government also cracked down heavily on independent radio in September, revoking the license of Mohanokor Radio and its affiliates, which broadcast Voice of America and Radio Free Asia and closing the independent radio station Voice of Democracy. For most of 2017, the government detained four senior staff members of the Cambodian Human Rights and Development Association (ADHOC) and a former ADHOC staff member serving as deputy

secretary-general of the National Election Committee. The group, commonly referred to as the “ADHOC Five” were arrested in 2016 on politically motivated charges and held in pretrial detention for 427 days until their release in June. Each faces five to 10 years in prison if convicted. The authorities carried out questionable legal investigations into trade unions under Cambodia’s Trade Union Law, which has prevented some unions from legally registering and excluded them from collective bargaining and formally advocating for rights and improved working conditions (HRW, 2018).

## 4.2 Indonesia

Indonesian President Joko “Jokowi” Widodo’s government took small steps in 2017 to protect the rights of some of Indonesia’s most vulnerable people. In September, the Attorney General’s Office announced that it had rescinded a job notice that not only barred lesbian, gay, bisexual and transgender (LGBT) applicants, but suggested homosexuality was a “mental illness”. The government also quietly reduced its population of Papuan political prisoners from 37 in August 2016 to between one and five in August 2017. But the Jokowi government has consistently failed to translate the President’s rhetorical support for human rights into meaningful policy initiatives. Religious minorities continue to face harassment, intimidation from government authorities and threats of violence from militant Islamists. The authorities continue to arrest, prosecute and imprison people under Indonesia’s abusive Blasphemy Law. Papuan and Moluccan political prisoners remain behind bars for nonviolent expression. Indonesian security forces continue to pay little price

for committing abuses, including unlawful killings of Papuans. On April 5, the Constitutional Court ruled that the central government could no longer repeal local Sharia (Islamic law) ordinances adopted by local governments in Indonesia. It deprived the Home Ministry of the power to abolish ordinances that threaten universal rights to freedom of expression and association and violate the rights of women and LGBT people. On July 12, President Jokowi issued a decree amending the law that regulates nongovernmental organizations, enabling the government to fast-track the banning of groups it considers “against Pancasila or promoting communism or advocating separatism”. Pancasila, or “five principles”, is Indonesia’s official state philosophy. Days later the government used the decree to ban Hizbut ut-Tahrir, a conservative Islamist group that supports the creation of a Sharia-based Islamic caliphate (HRW, 2018).

### 4.3 Malaysia

Human rights defenders continue to face legal attacks and arbitrary restrictions on their rights. In March, the authorities investigated three members of the Citizen Action Group on Enforced Disappearances (CAGED) under section 505(b) of the Penal Code for making statements with “intent to cause fear and alarm in to the public” after they used the phrase “enforced disappearances” to refer to the unsolved abduction of Pastor Raymond Koh and the disappearance of several other individuals connected to the Christian church. In the same month, a court sentenced Lena Hendry to pay a fine of RM10,000 (US\$2,062) or face one year in prison for her role in arranging a showing of the

documentary film *No Fire Zone*. In June, lawyer Siti Kassim was charged with “obstructing a public servant” for her actions in challenging the authority of officials conducting a raid on a transgender beauty pageant in April 2016. The government also regularly takes action to block foreign human rights activists from attending events in Malaysia. In June, immigration authorities detained Singaporean activist Han Hui Hui when she attempted to enter the country to attend a human rights event and sent her back to Singapore. In July, government officials detained Adilur Rahman Khan, head of the prominent Bangladesh human rights NGO Odhikar, when he arrived to attend a conference on the death penalty. The authorities held him for more than 15 hours at the airport before putting him on a plane back to Dhaka. Malaysia is not party to the 1951 Refugee Convention, and refugees and asylum seekers have no legal rights or status in the country. Over 150,000 refugees and asylum seekers, most of whom come from Myanmar, are registered with the UN Refugee Agency, UNHCR, in Malaysia but are unable to work, travel or enroll in government schools. Asylum seekers arrested by the authorities are treated as “illegal migrants” and locked up in overcrowded and unhealthy immigration detention centers. No Malaysians have been held responsible for their role in the deaths of over 100 ethnic Rohingya trafficking victims whose bodies were found in 2015 in remote jungle detention camps on the Thai-Malaysian border. The 12 policemen initially charged in the case were all exonerated and released in March 2017 (HRW, 2018).

## 4.4 Myanmar

On Aug. 25, in response to coordinated attacks on security force outposts in northern Rakhine State by militants from the Arakan Rohingya Salvation Army (ARSA), security forces launched a large-scale military operation against the Rohingya Muslim population. Military units, assisted by ethnic Rakhine militias, attacked Rohingya villages and committed massacres, widespread rape, arbitrary detention and mass arson. Some Rohingya who fled were killed or maimed by landmines laid by soldiers on paths near the Bangladesh-Myanmar border. Satellite imagery showed that more than 362 primarily Rohingya villages were either substantially or completely destroyed. Since late 2017, the Myanmar government has cleared at least 55 villages of all structures and vegetation using heavy machinery, many of which were scenes of atrocities against the Rohingya. Prior to Aug. 25, the total Rohingya population in Myanmar was estimated to be more than 1 million, though precise figures do not exist as the Rohingya were excluded from the 2014 census. An estimated 128,000 Rohingya remain internally displaced in central Rakhine State from waves of violence in 2012. The military and government have denied that the Rohingya are a distinct ethnic group, effectively denying them citizenship, and calling them “Bengali” instead of “Rohingya” to label them as foreigners. The military and government appointed multiple investigative commissions on the 2016- 2017 violence, but each engaged in whitewashing, denying any unlawful killings. Contradicting earlier military findings and following the discovery of a mass grave in the village of Inn Din in late December, the military admitted that security force personnel and Rakhine

villagers had unlawfully killed 10 men and violated the “rules of engagement”. The government arrested 13 security force members and three others in connection with the massacre, and says it will “take action according to the law”. The Myanmar government repeatedly stated it would not grant access to members of a United Nations Fact-Finding Mission, created by the UN Human Rights Council in March 2017 following attacks on the Rohingya in late 2016 (HRW, 2018).

#### 4.5 The Philippines

In March, unidentified gunmen killed newspaper columnist Joaquin Briones in the Masbate province town of Milagros. In August, an unidentified gunman killed radio journalists Rudy Alicaway and Leo Diaz in separate incidents on the southern island of Mindanao. The National Union of Journalists estimates that 177 Filipino reporters and media workers have been killed since 1986. Duterte has publicly vilified media outlets whose reporters have exposed police culpability in extrajudicial killings. In April, he threatened to block the renewal of the broadcasting franchise of ABS-CBN network. In July, Duterte publicly threatened the Philippine Daily Inquirer with tax evasion charges and falsely accused the media platform Rappler of being US-owned in an apparent effort to undermine its credibility. In January 2018, the Securities and Exchange Commission canceled Rappler’s license to operate, alleging that foreign investors in the company exercised control over it, violating the constitution. Rappler denied the charges and is appealing the decision. In February 2018, Duterte prevented Rappler’s journalists from entering the Presidential Palace to

cover his activities. Journalists who report critically on the Duterte administration are also subjected to harassment and threats online. In December 2016, the Foreign Correspondents Association of the Philippines issued a statement denouncing such attacks (HRW, 2018).

#### 4.6 Singapore

The government maintains strict restrictions on the right to freedom of peaceful assembly through the Public Order Act, which requires a police permit for any “cause-related” assembly if it is held in a public place, or if members of the general public are invited. Permits are routinely denied for events addressing political topics. The law was amended in 2017 to tighten the restrictions, and now provides the police commissioner with specific authorization to reject any permit application for an assembly or procession “directed toward a political end” if any foreigner is involved. The definition of what is treated as an assembly is extremely broad, and includes one person acting alone. In August, a man who held repeated solo protests in Singapore’s central financial district calling for the resignation of the prime minister was sentenced to three weeks in prison and a fine of S\$20,000 (US\$14,850). In early September, the police summoned for questioning the participants in a July 2017 vigil outside Changi prison to support the family of a man scheduled to hang, and banned them from leaving the country. In November, the police filed criminal charges against one of the participants in this event, Jolovan Wham, and indicated that the others involved remained under investigation. Wham was also charged with two other counts of violating the Public

Order Act—one relating to an indoor forum at which Joshua Wong spoke from Hong Kong via Skype, and the other a silent protest to commemorate the 1987 arrests of activists under the Internal Security Act (HRW, 2018).

#### 4.7 Thailand

Thailand's National Council for Peace and Order (NCPO) junta failed in 2017 to keep its repeated promises made at the United Nations and elsewhere to respect human rights and restore democratic rule. The government announced the national human rights agenda in November, but did not end repression of civil and political liberties, imprisonment of dissidents and impunity for torture and other abuses. Section 44 of the 2014 interim constitution allows Prime Minister Gen. Prayut Chan-ocha, in his concurrent position as NCPO chairman, to wield absolute power without oversight or accountability. The 2017 constitution, promulgated in March, endorses the continuance of this power, thereby guaranteeing that both the NCPO and officials operating under its orders cannot be held accountable for their rights violations. An unelected Senate and other elements of the new constitution lay the foundations for prolonged military control even if the junta fulfills its promise to hold elections in November 2018. Under NCPO Orders 3/2015 and 13/2016, military authorities can secretly detain people for a wide range of offenses, and hold them for up to seven days without charge, access to lawyers, or any safeguards against mistreatment. The government also regularly uses military detention, in which abuses during interrogation occur with impunity, in its counterinsurgency operations against suspected separatist insurgents in the southern border provinces

of Pattani, Yala and Naradhiwat. The NCPO in 2017 rejected calls by human rights groups to disclose information about persons held in secret military detention, and summarily dismissed all allegations that soldiers tortured detainees. The junta did not move 369 cases (involving the prosecution of approximately 1,800 civilians) out of military courts and into civilian courts as required by international law. The NCPO continued to summon members of the opposition Pheu Thai Party and the United Front for Democracy Against Dictatorship, as well as anyone accused of opposing military rule, for “attitude adjustment”. Failure to report to the junta’s summons is considered a criminal offense (HRW, 2018).

#### 4.8 Vietnam

The government monitors, harasses and sometimes violently cracks down on religious groups operating outside government-controlled institutions. Unrecognized branches of the Cao Dai church, Hoa Hao Buddhist church, independent Protestant and Catholic house churches, Khmer Krom Buddhist temples and the Unified Buddhist Church of Vietnam face constant surveillance. In June, An Giang province authorities set up a barrier to block people from Quang Minh Pagoda celebrations on the founding day of Hoa Hao Buddhism. Ethnic Montagnards face surveillance, intimidation, arbitrary arrest, and mistreatment by security forces. Authorities compelled members of independent Christian Montagnard religious groups to publicly denounce their faith. Government repression caused hundreds of Montagnards to flee to Cambodia and Thailand. Vietnam responded to the flight of

Montagnards into Cambodia by pressuring Cambodian authorities to prevent border crossings and deny the asylum claims of those who arrive in Cambodia. According to the United Nations Refugee Agency, UNHCR, Vietnam pressured the UN and refugee resettlement countries to not accept Montagnards. In April, the People's Court of Gia Lai province sentenced at least five Montagnards to eight to 10 years in prison for the so-called crime of participating in independent religious groups not approved by the government. (HRW, 2018).

Now, in referring to achieving an ASEAN community, all the positions on human rights in ASEAN member states must be taken into consideration. Integrating a region with so many backgrounds itself is a challenge. On the other hand, integrating human rights and good governance into the ASEAN setting is taking place to some extent, but it remains work in progress that is still distant from effective implementation and people-based centrality geared to substantive institutionalization. One angle of integration is the establishment of various regional human rights mechanisms (Muntarbhorn, 2013). The AICHR, the offspring of the ASEAN Charter, has two siblings: the ASEAN Commission on the Rights of Women and Children and the ASEAN Committee on the Rights of Migrant Workers. The AICHR's mandate is to promote and protect human rights and fundamental freedoms to complement the building of the ASEAN Community (AICHR, 2019). Many meetings and seminars have been held for this. A study on corporate social responsibility was completed under the auspices of the AICHR in 2015, in addition to an earlier interest to study the right to peace. It has also agreed on a new thematic study on women affected by natural disasters. At its meeting in

February 2016 in Vientiane, the AICHR singled out various issues on which to focus: right to health; right to education; right to employment for persons with disabilities; seminars on the promotion of corporate social responsibility; and annual consultation on a human rights-based approach in the implementation of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children and the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children, the ASEAN Forum on Media and Human Rights and the ASEAN Youth Debates on human rights (ASEAN, 2016).

A key transversal issue is how to mainstream human rights across all pillars of ASEAN. Its latest action plan (2016–2020) targets the following issues for study: migration, trafficking particularly of women and children, women and children in conflicts and disasters, juvenile justice, right to information in criminal justice, right to health, right to life, right to education, right to peace, legal aid and freedom of religion and belief (AICHR, 2019).

In the meantime, the ASEAN Commission on the Rights of Women and Children's mandate is to concentrate on the promotion and protection of the rights of women and children. Its recent emphasis has been to counter violence against women and children, and it has evolved a plan of action on this front. It has also cooperated with the UN on this issue. The ASEAN Committee on the Rights of Migrant Workers' mandate is even more modest (Muntarbhorn, 2013). It is more of a bureaucratic committee represented by members from the labor ministries of the respective ASEAN states, principally to draft a new instrument on the rights of migrant workers. In reality, this is a difficult challenge as several countries are hesitant to guarantee rights

for migrant workers and their families. While these mechanisms help to some extent to integrate human rights into the ASEAN region, their mandates and functions are currently more geared to the promotion of human rights (e.g. seminars, education, and research studies) than the protection of human rights. These mechanisms do not have the power to receive complaints, address country situations, offer redress or call for accountability. The 2015 review of their mandates delved into formal (bureaucratic) matters by setting up a human rights unit to service the AICHR at the ASEAN Secretariat in Jakarta and did not expand the mandates substantively to strengthen human rights protection. The trend of these mechanisms is to concentrate in cooperative programming on the promotion of rights pertaining to various groups, such as women, children, persons with disabilities and victims of natural disasters (Muntarhorn, 2016).

From the perspective of space for the people, while groundwork was provided to some extent by ASEAN instruments such as the Kuala Lumpur Declaration on a People-Oriented, People-Centred ASEAN, the reality as advocated by civil society suggests the contrary. Precisely because the latter felt that the space for the people in the region was shrinking, in 2016 the AICHR opted to organize the annual ASEAN civil society forum in Timor-Leste rather than in an ASEAN member state as done previously (APF, 2016).

The real test of integration of human rights as well as good governance is through the quality of implementation measures, including human rights and governance sensitive laws, policies, practices, mechanisms, resources, information monitoring and data, education and capacity-building, provision of remedies and accountability measures, and an open

process for public participation and reform. As the answer at the regional level at present is both nascent and incremental, the quest for channels of complaint, investigations, remedies and accountability has to be explored at the national level, and where there is no remedy yet at that level, the search has to reach higher to the international/multilateral level, such as the UN. Importantly, in five ASEAN member states today (Indonesia, Malaysia, Myanmar, the Philippines and Thailand) are mechanisms in the form of national human rights commissions that can receive complaints, undertake investigations, and call for remedies and accountability (Muntarbhorn, 2013).

Also, all ASEAN member states have courts and other channels for receiving grievances, although access and quality of decision-making vary. Yet, there remains a degree of opacity that counters the quest for good governance, compounded by extensive corruption in some circles. Therefore, where the national setting is unable or unwilling to protect human rights and ensure good governance, it is important to access also the international system available to fill in gaps. (OHCHR, 2019). This includes human rights treaties, all of which have monitoring mechanisms in the form of human rights committees, universal period reviews, and the variety of international monitors set up by the UN known as special procedures, such as the Special Rapporteurs on Myanmar and on Cambodia, together with UN presences in the region. In this context, intriguingly, the most challenging mechanism for good governance and human rights in the ASEAN region is possibly the Khmer Rouge tribunal, which establishes standards against the more egregious forms of human rights violations such as genocide and crimes against humanity (ECCC, 2019) Its mandate, however, is based

on a compromise between the UN and Cambodia, and is limited to a single country and a particular period of history. However, its very presence impels others to at least ask the question: whether action against impunity if serious violations exist in the region, especially in the absence of a national remedy? From the perspective of human rights and good governance, the challenge to the region is to identify and/or establish a variety of checks-and-balances against abuse of power as well as to promote good governance together with human rights protection at national, regional, and international levels. There is more room for human rights institutions and participatory processes at the national level such as good courts, human rights commissions and a vigilant civil society. The regional mechanisms need to have more proactive mandates that can receive complaints, address country situations, initiate investigations, and advocate remedies and accountability (Muntarbhorn, 2016).

## 5 Recommendations and the Way Forward

Human dimensions should firmly placed at the center of the agenda, with the ultimate objective being to provide shared prosperity and wellbeing. The ASEAN Vision emphasizes a “people-oriented, people-centered ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity” (ASEAN, 2015).

What about an ASEAN parliament and an ASEAN court of justice in the future? Where there are protection gaps nationally and regionally, there needs to be recourse

to the international setting. This can be improved by means of more ratification and implementation of the core human rights treaties, more access to the Statute of the International Criminal Court, (ICC, 2019) more leverage through a universal period review as well as more access to the UN Special Procedures, related complaints mechanisms and UN presences in the region and beyond. Finally, it should not be forgotten that some of the preferred next steps have already been laid out in the ASEAN Community Vision 2025 (ASEAN, 2015), and they invite effective implementation.

These include human rights-sensitive domestic laws and related enforcement, ratification of more human rights treaties, fuller use of the universal period review, strengthening of ASEAN's human rights mechanisms and human rights education. To these can be added the need to reform substandard laws, policies and practices such as the overuse of national security laws to curb dissent, as well as discrimination against various ethnic groups. Meanwhile, the blueprints open the door to more action on good governance, including education, skills development, corporate social responsibility, e-services to open up the government and the adoption of benchmarks for performance. These need to be coupled with the advent of more democracy in the region, together with free and fair elections, a multi-party system and respect for the totality of human rights, not least political rights such as freedom of expression and lawful assembly.

As a way forward, the AICHR could provide timely and adequate responses to key human rights issues in the region, including timely public statements on human rights violations by member states and be ready to share publicly its process of formulating work plans, annual budgets, thematic studies and deliberating other important issues. Besides that, it should conduct

frequent, regular, broad-based and inclusive meetings on human rights issues and institution-building with a range of stakeholders including CSOs, national human rights institutions, affected communities, human rights defenders, and victims and survivors of human rights violations at both the regional and national level in every ASEAN member state. In addition, the AICHR needs to monitor, investigate, comment on and recommend solutions for human rights violations in the ASEAN region, such as extrajudicial killings, crimes against humanity, the treatment of minorities and indigenous peoples, the rights of LGBTIQ people, torture and other ill treatment, land rights, the right to education, attacks against human rights defenders and more.

It is about time that the AICHR fulfills its protection mandate by implementing, innovatively and progressively, the provisions within its TOR, including to obtain information from ASEAN member states on the protection of human rights, including information on human rights violations; and to develop common approaches and positions on human rights matters of interest to ASEAN based on international law and standards. There is also a need to establish a monitoring and evaluation system to measure the progress and implementation of submitted complaints either based on the AICHR's own assessment or on feedback from stakeholders, with clear and measurable indicators that are formulated to measure performance not only through the completion of activities but through outcomes and impact on the protection and promotion of human rights, as well as establish a complaint and correspondence mechanisms that would receive complaints from individuals, groups and states, request information from the relevant member state(s), conduct its own investigations, make recommendations to the state(s) concerned and report publicly on the cases it

has reviewed.

## 6 Conclusion

Southeast Asia is the crossroads of the world. It is one of the world's richest regions in terms of cultural, religious, linguistic and ethnic diversity. In a relatively small geographical space, there are 240 million Muslims, 130 million Christians, 140 million Buddhists and 7 million Hindus (Mahbubani and Sng, 2017). This remarkable diversity has often been seen as a challenge for the people-to-people relationships in ASEAN. However, this diversity is increasingly viewed as an asset that forms the basis of "unity in diversity". Fifty years after its formation, ASEAN can be lauded for personifying a regional order based on peace among its member states. However, the challenge is to advance further as a caring community and a community of caring communities, less in form and more in substance. Only when the pillar of people's participation and people based centrality anchored in human rights and good governance, alias democracy, is truly embedded in the region can ASEAN claim to have founded a dynamic regional architecture beyond the pedestals of an intergovernmental framework (Muntarbhorn, 2016).

The ASEAN Community Vision 2025 connotes that the ASEAN Community should by any way be built upon and deepening the integration process to realize a rules-based, people-oriented, people-centered ASEAN Community, where the people of ASEAN enjoy human rights and fundamental freedoms, higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter.

Based on the discussion, it can be argued that

ASEAN is moving toward becoming a community. It is impossible to get there, if human rights are not taken into consideration in every possible decision made, be it at the level of the head of government or from the people themselves. ASEAN is now no longer looking at just its vision 2025 after the realization of the ASEAN Economic Community in 2015.

ASEAN member states aim to live in a strong community with the shared values of welfare and dignity. Leaving no one behind means that ASEAN member states will embrace the spirit of inclusiveness in their strategies, programs and actions in both the nations as well as the region to reduce inequalities, balance and ensure the effort is a success.

The vision 2025 also aims at people centrality and inclusiveness making the AICHR's role more important to ensure that the effort made before this and the vision 2025 will not be wasted. The AICHR should buckle up and work closer with the people of ASEAN as well as with all the ASEAN governments and make human rights an integral element in the ASEAN Community.

It is relevant for ASEAN to have a human rights mechanism in its community by now. ASEAN should no longer just be held to its nation's interest and start looking at a broader perspective and accept the fact that the region is growing and it will not continue growing if it fails to get the support it needs from its member states.

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## CHAPTER 3

# A Legal Analysis of Cultural Necessity to Complete the Human Rights System in ASEAN

KADEK WIWIK INDRAYANTI  
NANDA SARASWATI

## 1 Introduction

The opinion that a group of states that share history, geography, political views, tradition and culture are more likely to enjoy a shared understanding of human rights was initiated by the United Nations General Assembly to call upon states to establish “regional arrangements” to promote and protect human rights.<sup>1</sup> The goal was to provide remedies in the absence of ones at the national level or where such national mechanisms are inadequate or do not provide the necessary redress. One of the regions attempting to make such efforts is the Association of Southeast Asian Nations (ASEAN) through the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, which aims to promote and protect human rights and fundamental freedoms in the ASEAN region.<sup>2</sup>

1 Resolution 41/153, 1986 on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region.

2 Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Article 6.8.

While regional human rights regimes have been in operation for some time in Europe, the Americas and Africa, in Southeast Asia such a regime has been absent. Despite setting a new stage for rights development in the region (Nugroho, 2013) since its establishment in 2009, the AICHR has not fully functioned as a regional human rights mechanism that meets civil society's expectations.

The AICHR itself has been seen to focus only on promotion and not on actively protecting individuals whose rights have been violated or on addressing past wrongs (Mathew, 2014). One of the reasons is that the Term of References (TOR) of the AICHR provides no explanation on how exactly the AICHR protects human rights in ASEAN. The dialogue on human rights in ASEAN<sup>3</sup> expresses the ineffectiveness of the AICHR to provide protection to the people of Southeast Asia.<sup>4</sup> The AICHR and ASEAN member states are thus called on to significantly improve the human rights commission in order to strengthen its protection mandate to benefit all people in the region.

As a normative study using a statute and conceptual approach, the analysis of this chapter is divided into three parts. Part I will address the ineffectiveness of the AICHR by providing evidence on ASEAN's failure in addressing human rights violations and abuses committed by state parties, such as crimes against the Rohingya and other religious and ethnic minorities in Myanmar, enforced disappearances, extra-judicial killings in the Philippines attacks on the independent media, dissolution of the legal

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3 The high level dialogue was organised by Asian Forum for Human Rights and Development (FORUM-ASIA), ASEAN Parliamentarians for Human Rights (APHR) and Centre for Strategic and International Studies (CSIS).

4 Report from Asian Forum for Human Rights and Development, ASEAN Parliamentarians for Human Rights, Joint Statement: ASEAN needs a stronger Human Rights Mechanism, May 10 2019.

opposition and the shrinking of the civic space and freedom of expression in the region. The situation is deteriorating, but all issues remain unaddressed by the AICHR. The question is why? Therefore, Part II analyzes the view of human rights in the region where the universality of human rights is denied, prioritizing the national interest of each member state through different interpretations of the limitations of human rights. Such differences may weaken the establishment of the mechanism, however in Part III, it is argued that a cultural perspective could help complete the system through a method of interpretation.

## 2 The Ineffectiveness of the System

From 2010 to 2019, there were no significant improvements in human rights made through the activities of the AICHR to protect the people of ASEAN. The human rights situation in the region has been deteriorating, but all the issues remain unaddressed by the AICHR. To describe the physiognomy of human rights in Southeast Asia, the term ambivalence has been used (Muntarbhorn, 2002). There are many factors that contribute to this, such as substantive and procedural factors. There are three factors regarding the limitations of the substantive factors.

First is the the narrow interpretation of the principle of sovereignty and nonintervention (Jati, 2017). In Southeast Asia, human rights and international supervision by human rights mechanisms have always been viewed as a threat to the sovereignty of the state and therefore considered a domestic issue (Caballero-Anthony, 1995). AICHR representatives strongly adhere to the principle of noninterference (Hsien-Li, 2012) where there is a high degree of respect for the right of every member state to lead its national existence free from

external interference, subversion and coercion. According to many Southeast Asian states, no one can dictate or make judgments on others about human rights, and the international community has no right to intervene, including the AICHR. Indeed, the deeper regional integration is, the more vulnerable ASEAN member states are to exposing their domestic affairs to each other and the world. Being open is a constitutive implication of regional integration. This, however, scares some countries in ASEAN as they will be the subject of international criticism (Wahyuningrum, 2014). In relation to this, ASEAN member states have been reluctant to engage in direct confrontation with the United Nations (UN), stressing national sovereignty and protesting western dominance in the UN (Eldridge, 2002). Furthermore, several ASEAN governments have also criticized the 1948 Universal Declaration of Human Rights because many member states were not yet independent and therefore had no part in its formulation (Gai, 1995).

Second is the limitations of human rights that are incompatible with international human rights instruments. Limitations of human rights are also regulated in the ASEAN Human Rights Declaration (ADHR). Similar to other regional human rights charters,<sup>5</sup> the exercise of human rights and freedoms can be limited by law for the purpose of securing the recognition of human rights and the freedom of others, which meet the requirements of national security, public order, health, public safety, morality as well as the general welfare of the peoples of a democratic society.<sup>6</sup> However, while international law subjects such limitations to three strict tests, the condition of legality, legitimacy and proportionality, this

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5        Such as the African Charter on Human and People's Rights and The European Convention on Human Rights.

6        ASEAN Human Rights Declaration, Article 8.

is not the case in ASEAN. Moreover, different from other international human rights instruments, the AHRD does not apply this restriction to a selective number of rights, but to every right.

Third is the lack of determination to ratify core treaties. The ASEAN family is divided into two groups on the issue of human rights. Indonesia, Malaysia the Philippines and Thailand are positively more open to human rights and norm change. They have ratified many of the core international human rights treaties, have national human rights institutions in place and in terms of democracy and development are not at the bottom of the scale. On the other side is Cambodia, Laos, Myanmar and Vietnam, a distinct group in which the standard of living, GDP, human rights and standards of rule-based governance are substantially below other ASEAN member states (Jones, 2008). Brunei and Singapore are somewhere between the camps (Koh, 2008). Despite that the TOR of the AICHR clearly states that ASEAN member states are encouraged to accede and ratify international human rights instruments,<sup>7</sup> there is a lack of determination among them. Among all 10 members, only Indonesia, Cambodia and the Philippines have adopted all major international human rights treaties.<sup>8</sup>

In the view of establishing a regional human rights regime and improving human rights standards,

7 Terms of Reference of ASEAN Intergovernmental Commission on Human, Article 4.5

8 International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination Against Women (CEDAW); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Protection of the Rights of Migrant Workers (CMW), Convention on the Rights of Persons with Disabilities (CPRD) and Convention on the Protection of all Persons from Enforced Disappearance (CPED).

	ICCPR	ICESR	ICERD	CEDAW	CAT	CRC	CMW	CPRD	CPED
<b>Brunei</b>	-	-	-	A	S	A	-	R	-
<b>Cambodia</b>	A	A	R	A	A	A	S	R	A
<b>Indonesia</b>	A	A	A	R	R	R	R	R	S
<b>Laos</b>	R	R	A	R	R	A	-	R	S
<b>Malaysia</b>	-	-	-	A	-	A	-	R	-
<b>Myanmar</b>	-	R	-	A	-	A	-	A	-
<b>Philippines</b>	R	R	R	R	A	R	R	R	-
<b>Singapore</b>	-	-	R	A	-	A	-	R	-
<b>Thailand</b>	A	A	A	A	A	A	-	R	S
<b>Vietnam</b>	A	A	A	R	R	R	-	R	-

Figure 3.1. [ASEAN Member states Commitment to International Human Rights Law]

Key: - : (neither signed nor ratified); A: Accession; S: (signed but not ratified); R: (Signed and Ratified)

ratification of international human rights treaties is a critical factor (Hashimoto, 2004) because it displays a prima facie acceptance to international human rights norms. However, mere ratification is no guarantee for acceptance or implementation of international human rights norms. The above table may give us an idea of the national interest of each state through its way to consent to be bound to certain international conventions. Moreover, the substantive reservations to several conventions by some member states shows us the differences and nonuniform understanding and approach among ASEAN member states.

On the other hand, there are also two procedural factors, namely the structure of the AICHR with a lack of independence and weak mandates for protection (Phan, 2012).

First, there is a lack of independence in the system. Any human rights mechanism requires independence from political organs, such as national government. This standard requirement should also apply to ASEAN through the AICHR. However, this is not the case given

that the AICHR is a consultative intergovernmental body.<sup>9</sup> Despite the need to be able to provide opinions and receive information independently from its constituent governments, as a consultative body the AICHR is structured in a way that functions to accommodate its close relationship with member states' governments. This is problematic as the AICHR functions in a way that allows the promotion and protection of human rights to be influenced by the political will of its member states. The conflict of interest between the AICHR's members, governments and victims of human rights abuses interferes with the AICHR's impartiality when performing its duties.

Second is the broad and weak mandates of the TOR. The ASEAN human rights regime mainly focuses on promoting human rights rather than protecting them (Beyer, 2015). Some argue that the mandates were formulated using the promotion first, protection later approach (Wahyuningrum, 2014), where it focuses more on the promotional aspect. So far, AICHR activities have only ranged from disseminations, workshops and discussions with stakeholders, namely governments, the people and NGOs. The Rohingya crisis, for example, was not touched on by the AICHR. Instead, environmental rights have been the focus for seminars and workshops in Myanmar (Arifin, 2016). The AICHR cannot move beyond this area. None of the stipulations in the TOR of the AICHR talk about the capacity to monitor human rights practices in ASEAN member states, such as the power to investigate, monitor or enforce.

The AICHR does not provide a protective mechanism in receiving complaints from individuals or groups (Muntarbhorn, 2013). That is why the AICHR has not actively been involved in dealing with in human rights

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9 Terms of Reference of ASEAN Intergovernmental Commission of Human Rights, July 2009, Article 3.

violations in the region. The case of the mistreatment of the Rohingya in Myanmar has been one of the examples where ASEAN and especially the AICHR have been criticized for being unable to fully address the continuation of human rights violations in the region (Gamez, 2017). In other words, the AICHR fails to recognize the concept of the responsibility to protect. The summary of the factors, both substantive and procedural, that contribute to the ineffectiveness of the ASEAN human rights system can be seen in the table below.

No.	Substantive Factors	Procedural Factors
1.	Narrow interpretation sovereignty and principle of nonintervention	Lack of independence in the human rights system
2.	Limitations of human rights incompatible with international human rights instruments	Broad and weak mandates of the AICHR TOR
3.	Lack of determination to ratify core human rights treaties	

Figure 3.2. [Contributing Factors to the Ineffectiveness of the ASEAN Human Rights System]

On the other hand, while some core international human rights treaties have been signed by some ASEAN member states, implementation remains poor (Aguirre & Pietropaoli, 2012).

### 3 The Interpretation of Cultural Relativism in Southeast Asia

The debates on the universalism versus the cultural relativism of human rights are dominated by two schools of thought (Steiner, Alston, & Goodman, 2007). The main question of the debate between the extremes is whether cultural adjustments are needed to legitimate human rights action, or that this cultural diversity would form a threat to the effective guarantee of universal human rights

standards (Addo, 2010). The first school supports the idea that human rights are universal, i.e. that they apply to all human beings regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Tomuschat, 2008), and that all human beings are born free and equal in dignity and rights.<sup>10</sup> The second school claims that human rights are not universal (Tharoor, 2000), but rather can be differentiated on the grounds of national and regional particularities.<sup>11</sup> This concept of cultural differences challenged the dominant paradigm of universal human rights by positing a differential and hierarchical philosophy of rights directly in opposition and offering an alternative to Western hegemonic rights values (Jones, 2014). Therefore, cultural relativity intends to weaken the very universality of human rights. As there is no universal culture, in consequence there is no universally valid standpoint on any moral issue. Furthermore, because human rights are moral entitlements, they cannot have a universal quality, but must vary according to the cultural environment in which they originate and function (Davidson, 2001).

The majority of Southeast Asian countries, despite being parties to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>12</sup> -- all of which recognize and uphold the principle of universality -- clearly support the cultural relativism school of thought. This is closely related to the discourse of “Asian values”.

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10 Universal Declaration of Human Rights 1948 Article 1.

11 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 17 December 1991, para 8 (Bangkok Declaration).

12 See Figure 3.1, ASEAN Member states Commitment to International Human Rights Law, p.4.

The concept of specific Asian values is often used as a reason or even a legitimation as to why Asian states do not adopt human rights. In essence, Asian values have been used to promote cultural relativism as an argument against the universality of human rights. Cultural relativism, embodied in the notion of Asian values, has often been used as an argument to dismiss the western concept of democracy and human rights as unsuitable for the Southeast Asian context (Mauzy, 1997).

Evidence of this can be found in the text of several legal documents. Through the Bangkok Declaration,<sup>13</sup> Asian countries ‘recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of internal norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

Similarly, the TOR of the AICHR states that:

1. “To promote human rights within the regional context, 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.”

This position was reconfirmed by the secretary-general of ASEAN at an international event in 2010, stating that (Pitsuwan, 2010):

“I think we have to go back to the very fundamental concept of individual rights and human rights where I think the two traditions, East and West, have some fundamental differences. I am saying this not arguing that we do not have universal norms for human rights. I’m just saying that universal norms are being evolved and developed to serve our particular stages of social, economic and political development.”

The AHRD adopted in November 2012, which saw international criticism toward its culturally relativist aspect (Clarke, 2019), also mentioned that:<sup>14</sup>

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13 The Bangkok Declaration 1993, Article 8.

14 ASEAN Human Rights Declaration, Article 7.

“At the same time, 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.”

The AHRD requires that individual rights be balanced by corresponding duties, which is used as a tactic to impose restrictions on rights and freedoms.<sup>15</sup> Furthermore, the instruments recognize that human rights and freedoms can be conditioned by measures designed to uphold national law, national security, public order, public health, public safety and public morality,<sup>16</sup> without subjecting these measures to tests of legality, legitimacy and proportionality. The legal provisions above along with public statements show the paradox of universal human rights in ASEAN, which is recognized as universal in principle but particular in application. They are frequently cited to illustrate the cultural relativist stance, or situational uniqueness, of Asian governments when it comes to human rights. This limits the universal implementation of human rights in favor of cultural interpretations. In other words, ASEAN promotes and protects human rights and fundamental freedoms as long as they do not contradict the history, politics, religions or economic context of the member state in question.

The rights of ASEAN’s peoples must be compromised so as to conform to a particular history, political system or set of development goals (Bui, 2016). While some argue that the establishment of a human rights system in ASEAN is slow, one may see this through a different view using the so-called margin of appreciation doctrine.

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15 Ibid, Article 6.

16 Ibid, Article 8.

## 4 The Cultural Necessity to Establish a Human Rights System

The establishment of a human rights system will not be effective without a human rights court. Courts may offer effective enforcement of human rights in line with regional needs, experiences and legal traditions. In Southeast Asia, the need for a human rights court to promote legally enforceable human rights is crucial. One issue is the ASEAN Charter shows a lack of a clear enforcement mechanism and that there is no provision for suspension or expulsion of members who do not comply with the Charter. Furthermore, the purpose of the AICHR to protect human rights seems to have lost its way because it lacks an institutional framework in the region. But even if the protection mandates of the AICHR were strengthened, it still could not replace the role of a court because only courts are able to provide legally binding decisions. Thus, while commissions might offer remedies, the establishment of a court is needed to provide effective and enforceable remedies.<sup>17</sup>

Much has been discussed by scholars on the necessity of a court to complete the human rights system in ASEAN, including the improvements needed to accommodate such a court. In this regard, it is important to note that localized circumstances such as cultural differences, religious traditions, economic development and the nature of legal and political institutions makes implementation effective and enforceable only when it finds support in localized and regional particularities. However, these differences have caused a lack of a uniform approach to interpret human rights norms among ASEAN member states. Other regional particularities also face this

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<sup>17</sup> Ibid, p.143

situation. In Europe, it is impossible to find a uniform European stance on moral issues to guide the human rights court's interpretations (Peerenboom, 2006). Taking this into consideration, the important question is what about ASEAN? How will the court in Southeast Asia interpret human rights? Does using cultural aspects undermine a universal standard? To analyze this, one might look into the application of international law principles and standards within ASEAN, as well as the application of cultural values and differences through the margin of appreciation doctrine and how this could affect the interpretation of judges in a future Southeast Asian human rights court.

## 5 ASEAN Human Rights Standards

The international community adopted the Vienna Declaration and Program of Action (VDPA), which was endorsed by all states, including ASEAN member states. States affirmed unreservedly that the universal nature of all human rights and fundamental freedom was beyond question. They agreed that it was the duty of states, regardless of their political, economic and cultural systems, to promote and protect all rights and freedoms. This declaration was widely seen as having firmly rejected the contention of a very few that human rights are relative in nature. This was one of the key aims of the Vienna Declaration: to forge a new vision for global action on human rights into the next century. Yet the AHRD attempts to undo the Vienna consensus by requiring that human rights be conditioned on regional and national particularities. ASEAN member states generally guard sovereignty and cultural relativity specific to each member state. This fragmented positioning was represented in the AHRD and AICHR negotiations leading up to the AHRD

(Jones, 2017), through the so-called Asian ways or values.

The use of Asian ways or values in the AHRD can be seen as a specific form of cultural relativism. Asian values was a term devised by several Asian leaders and their supporters to challenge civil and political freedoms of a Western style (Bauer & Bell, 1999). However, the Asian way is seen as a fatally flawed document where scholars and experts argued that it undermined rather than reinforced universal standards (Ilona, 2012). Several major flaws include:<sup>18</sup> (a) imposing overarching limitations and conditionality on the enjoyment of rights; (b) subjugating rights to national laws; (c) a restricted and excluding provision for nondiscrimination; (d) failure to protect the rights of specific groups; and (e) provisions for specific rights that are vague, weak or otherwise fall below international standards.

While the VDPA did express that the significant different backgrounds should be borne in mind, it does not impose any obligation to consider human rights in regional or national contexts. On the contrary, it stressed that it was the duty of states, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Under international law ASEAN member states have the duty, regardless of their political, economic or cultural systems, to respect and protect all human rights and fundamental freedoms.<sup>19</sup>

Furthermore, international law allows certain rights to be subjected to limitations only under specific and narrowly defined situations. For example, under the

18 Civil Society Joint statement, ASEAN Human Rights Declaration must not provide protections lower than international human rights law and standards, Sept. 13 2012; See also Report from UN Human Rights Council, ASEAN Human Rights Declaration should Maintain International Standards, Nov. 16 2012

19 The ASEAN Human Rights Declaration, Questions and Answers, International Commission of Jurist, July, 2013

ICCPR, to which 167 states are party to, including six of the 10 ASEAN member states, only a few rights are subjected to such limitations. These include freedom of movement, freedoms of association, expression and peaceful assembly and freedom to manifest one's religion. But even limitations on these rights are subject to tight conditions of necessity and proportionality: they must be strictly necessary for protection of national security, public order, public health or morals or to protect the rights of others. The AHRD extends that all rights have the possibility to be limited, even those that are absolute under international law, such as freedom from torture and cruel, inhuman and degrading treatment and punishment. Rather than applying a condition of strict necessity, principle 8 merely states that limitations have to be imposed for the purpose of meeting the just requirements of national security and other purposes. The declaration, unlike the ICCPR, allows for limitation on the bases of general welfare of people in a democratic society. This category is so broad that it could be interpreted to encompass almost all state activity. This was also emphasized by the Human Rights Council experts where restrictions may not put in jeopardy the right itself or apply to rights that are non-derogable under international law.<sup>20</sup> However, Southeast Asian countries continue to support the cultural relativism approach.

## 6 Cultural Necessity and Margin of Appreciation

Differences in interpretation on human rights among states exist based on the sovereignty of each state. However, it is important to analyze how states could meet

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<sup>20</sup> Report from UN Human Rights Council, ASEAN Human Rights Declaration should Maintain International Standards, Nov. 16 2012

the international standard, at least as a minimum standard, if there is any. How could it be evaluated? And to what extent is it legitimate? To mediate this issue requires the margin of appreciation doctrine.

The margin of appreciation is a doctrine or key concept in determining whether limitations upon human rights are necessary in a democratic society. This doctrine is designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of contracting states within the European context (Bakircioglu, 2007). It seeks to balance the primary of domestic implementation with supranational supervision (Baik, 2012). It is applicable in the absence of a uniform European conception of the implications of the convention (De Schutter, 2010). Member states enjoy a certain margin of appreciation in asserting whether and to what extent differences in otherwise similar situations justify different treatment in law, with European supervision embracing both the law and the decisions applying it. Under this doctrine, the jurisprudence of the European Court of Human Rights (ECHR), there is a realistic judicial self-restraint in recognition of the obligation to respect within certain bounds, the cultural and ideological variety, as well as the legal variety characteristic of Europe (Steiner & Alston, 2000). In addition, the margin of appreciation doctrine has been transplanted to the jurisprudence of other international human rights mechanisms, such as the United Nations Human Rights Committee and the Inter-American Court of Human Rights.

Hence, it allows states to have a measure of diversity in their interpretation of human rights treaty obligations. The doctrine refers to the latitude that national authorities enjoy in evaluating situations and the provisions of the ECHR. It is also approved as the minimum standard by the member states of the Council of Europe, which have

more or less common traditions of democracy and human rights. The margin of appreciation doctrine has been developed to find the right balance between the national approach to human rights and the uniform application of the values of the ECHR.

In response to the explanation above, Asian states do not take uniform stances toward morally controversial issues framed as human rights issues. The issue of capital punishment, for example, differs, where Thailand, Singapore, Malaysia and Indonesia retain the death penalty, while the Philippines and East Timor have abolished it. This is evidence of the lack of general consensus that is necessary to support customary international legal norms. This sharp divergence in matters implicating public morality is to be expected in a plural world. The margin of appreciation leaves a matter to the domestic deliberation of contracting states where little or no common ground exists between them with respect to sensitive issues. This stems from the cultural, historical and philosophical differences of these states. In a more diverse global setting, a global margin of appreciation may be deployed to manage politicized rights claims in acknowledging fundamental value divergences and the importance of pluralism, democratic politics and subsidiarity (Thio, 2018).

Southeast Asia needs to have a regional human rights court, the jurisdiction of which is to assess whether member states apply the so-called Asian values enshrined in the ADHR proportionately in pursuit of international human rights law (Rachminawati, 2014). ASEAN can nonetheless retain an analogous margin of appreciation. Article 8 acknowledges the margin of appreciation by requiring human rights be exercised with due regard to the human rights and fundamental freedoms of others.<sup>21</sup>

21 Thus the margin of appreciation doctrine allows states a certain measure of discretion in such instances. See J. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights*:

The scope of the margin of appreciation depends on the nature of the rights in question. The scope becomes wider where there is no consensus among member states as to how a particular right should be protected in a particular situation, as well as where important state interests are at stake. In this way, the margin of appreciation offers a way of mediating between the need to protect human rights and the need to respect state concerns about loss of sovereignty, particularly in relation to critical issues such as national security. To balance national sovereign concerns against regional supervision of human rights, the European experience provides nuanced lessons for Southeast Asia, as greater attention is paid there to working out the interaction between sovereignty and the external human rights mechanism (Saul, 2011).

## 7 Conclusion

Both substantive (the narrow interpretation of sovereignty and the principle of nonintervention, the limitations of human rights incompatible with international human rights instruments and the lack of determination to ratify core human rights treaties) and procedural factors (the lack of independence in the human rights system as well as the broad and weak TOR of the AICHR) contribute to the ineffectiveness of the ASEAN human rights system.

While several international conventions on human rights have been signed and ratified by ASEAN member states, the implementation of those rights and the responsibility assigned in the conventions remain poor. Furthermore, while recognizing the universality of human

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Threat to the Rule of Law, 2005, *Columbia Journal of European Law*; A Legg, *The Margin of Appreciation in International Human Rights Law*, 2009

rights, the interpretation among ASEAN member states continues to be based on cultural relativism, meaning that the promotion and protection of human rights are based on aspects such as history, culture and religion. However, to complete the human rights system in the region, the establishment of a human rights court is necessary. Thus, there is a need to set a standard that is agreed on by the member states. As there is an absence of such an agreed standard, the margin of appreciation doctrine initiated by the ECHR could be a basis to interpret human rights according to conditions in Southeast Asia.

Regarding the human rights commission, the AICHR needs to make major institutional changes and take genuine steps toward fulfilling the promises behind its establishment. The AICHR should actively devise methods and strategies to be the human rights standard-setting institution of ASEAN. If the standard is based on cultural necessity, then the region needs to have a common baseline on how human rights in the AHRD are defined, interpreted and implemented. The use of the margin of appreciation doctrine may be an alternative way to resolve the standard that can contribute and accelerate the development of ASEAN's human rights system. However, further research on this matter needs to be done.

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## CHAPTER 4

# The Rights of Persons with Disabilities in ASEAN: What Progress in the AICHR?

MUHAMMAD AMMAR HIDAYAHTULLOH

### 1 Introduction

In recent decades, the international community has been raising its concern toward disability as a human rights issue. According to a study published by the World Health Organization (WHO) and World Bank in 2011, persons with disabilities made up 15 percent of the world's population and two-thirds of them live in developing countries. Persons with disabilities worldwide have poorer health outcomes, lower educational accomplishments, minimum economic participation and higher rates of poverty, thus are vulnerable to discrimination in comparison to people who live without disabilities (WHO, 2011). Various efforts have been taken in responding to disability. At first, people with disabilities were segregated, such as through residential institutions and special schools, which were seen as the common solutions for accommodating disability rights. However, advocacy by disability-related organizations and increasing awareness to consider disability as a human rights issue has shifted policy toward the inclusion of community and education (WHO, 2011). An important milestone in the struggle

for disability rights in the international community was reflected by the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its optional protocol in 2006.

In the Asia-Pacific, one in every six people live with disabilities and this number is likely to increase as the result of, among other factors, an aging population, climate-related disasters, chronic health conditions, road traffic injuries and poor working conditions (UNESCAP, 2017). The region has thus committed to strengthening the implementation of the rights of persons with disabilities by adopting the world's first regionally agreed disability-inclusive development goals, namely the Incheon Strategy to "Make the Right Real" for Persons with Disabilities 2013-2022, which is the third Asian and Pacific Decade of Disabled Persons (UNESCAP, 2015). The Association of Southeast Asian Nations (ASEAN), as one of the subregions in the Asia-Pacific and the home of 62 million people who live with disabilities has also been called on to establish a human rights friendly community (Abbas, 2015). In supporting the establishment of such a community that respects human rights and fundamental freedoms, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. In 2019, ASEAN celebrates the 10th anniversary of the AICHR, which should be an opportunity to evaluate the progress of human rights promotion and protection in the region, including disability rights. Since 2015, the AICHR has been working together with relevant ASEAN bodies to develop the masterplan to enhance disability rights and contribute to addressing the development gaps that affect persons with disabilities in the region (ASEAN, 2018). In 2018, ASEAN leaders agreed to adopt the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities. This chapter aims to explore the

progress and challenges faced by ASEAN in the promotion and protection of the rights of persons with disability.

This chapter is divided into four sections. In the first section, it defines persons with disabilities and their human rights by describing disability as an evolving concept from the “medical model” to the “human rights model” of disability. In the following section, the development of disability rights norms are described from the global to the regional level, which is formalized in the CRPD and its Optional Protocol. The progress and challenges of the promotion and protection of disability rights are explained in the section three, which focuses on the behavior of ASEAN member states, the implementation of the CRPD and the institutionalization of disability rights in ASEAN, the role of the AICHR in mainstreaming the rights of persons with disabilities, the contribution of the transnational disability network, as well as the challenge to the full implementation of the rights of persons with disability by contextualizing it in the complexity of human rights space dimensions in Southeast Asia. Finally, policy recommendations will be suggested for the better promotion and protection of disability rights in the ASEAN region.

## 2 Literature Review, Significance, and Methodology

Human rights issues are a major concern of the international community. The establishment of the United Nations Charter and adoption of the Universal Declaration of Human Rights (UDHR) were the centerpieces of the international human rights revolution (Mugwanya, 1999). Donnelly (1986) provides a comprehensive explanation in understanding international human rights regimes.

Donnelly, by referring to but narrowing on Krasner's (1982) definition, defines the international regime as norms and decision-making procedures accepted by international actors to regulate an issue area. In the context of international human rights regimes, the key to the effective implementation of human rights regime is the conformity and acceptance of states to behave following the regime's norm (Donnelly, 1986). Over the years, human rights regimes have developed significantly both in the form of regional regimes and single-issue regimes, including the regional human rights regime in ASEAN and the regime of the rights of persons with disabilities.

The establishment of the AICHR was noted as the first human rights body in the Asia-Pacific (Basham-Jones, 2012). The Terms of Reference (TOR) of the AICHR set clear mandates and functions of the body in promoting and protecting human rights in the region, including the development of the ASEAN Human Rights Declaration (AHRD) that was adopted in 2012. However, many human rights scholars argue that the mandates and functions of the AICHR were weak, particularly due to the nature of AICHR as a "consultative body", meaning the ASEAN human rights body has no independent power (Bui, 2016; Davies, 2013; Munro, 2011). Yen (2011) added that the "ASEAN Way" hampers a favorable environment for the diffusion of human rights norms, and that consensus-based decision making only slowed the progress of regional human rights cooperation. Yet, the establishment of the AICHR itself reflects the progress of ASEAN in the institutionalization of human rights, as well as building human rights norms and regimes in the region regardless of the limited mandate of the AICHR that does not encompass protective measures in enforcing human rights in the region (Wahyuningrum, 2014; Ciorciari, 2010). Gerard (2017) argued that on the one hand the

AICHR expands the protection of human rights, while on the other hand enables ASEAN elites to manage conflicts over human rights abuses based on their preferences. Furthermore, Davies (2017) concluded that through the AICHR, ASEAN plays an important role as an educator, enabler, standard setter and mobilizer in promoting and protecting human rights in the region.

The effective promotion and protection of human rights in the ASEAN region requires the collective efforts of actors involved in the Southeast Asian human rights space. It is important to bear in mind that there are other prominent actors besides ASEAN, namely domestic institutions, civil society and the global United Nations system (Davies, 2017). Therefore, the AICHR as the overarching human rights institution in ASEAN that upholds the global human rights architecture has a pivotal role in the overall responsibilities for the enforcement of human rights, as well as to engage and consult with civil society and other stakeholders, including human rights-related national, regional and international institutions (ASEAN, 2009).

This chapter aims to 1) explain the progress on the promotion and protection of the rights of persons with disabilities in the ASEAN region that is evident through the adoption of the Enabling Masterplan, 2) explain the challenge in realizing a disability-friendly region by underscoring the complexity of the regional human rights space in ASEAN and 3) suggest policy recommendations for ASEAN to realize the full and effective participation of persons with disabilities in the region.

Qualitative methods are used to analyze data and information from secondary sources. The data is obtained from books, journal articles, reports, government policy documents and legal documents. In this chapter, the author borrows from existing conceptual frameworks, notably

that of Donnelly (1986) on regime analysis on human rights norms and Davies (2017) on the Southeast Asian human rights space to examine progress and challenges in ASEAN promotion and protection of the rights of persons with disabilities in the region.

### 3 The Evolution of the Disability Model

Various theoretical approaches attempt to understand disability. There are nine notable models to understand disability, namely the moral/religious, medical, social, identity, human rights, cultural, economic, charity and limits model (Retief & Letsosa, 2018). Studies in disability offer a comprehensive theoretical background on the shift of the disability model from the medical to the social model (Degener, 2014). The latest approach of disability studies and the most inclusive model offered in the CRPD is the human rights model.

The medical model of disability gained its currency in the middle of the 19th century, which gradually replaced the moral/religious model (Retief & Letsosa, 2018). This model refers to disability as an impairment that requires treatment, cures or rehabilitation (Degener, 2016). By referring to disability as a medical issue, it locates the problem of disability within the person, which problematizes the person as a patient in need of clinical treatment (Quinn & Degener, 2002). The medical model of disability is based on two assumptions that fundamentally stops the person with disability from full enjoyment of their rights. The assumptions are that disabled persons need shelter and welfare, and the impairment can foreclose legal capacity (Degener, 2014). Each of the assumptions have consequences for disabled people. The first assumption has led to the segregation of facilities for disabled people, such

as residential institutions, special schools and sheltered workshops. Meanwhile, the other assumption has resulted in the establishment of mental health and guardianship laws that are not sufficiently capable to address the issue (Dhanda, 2007). This approach has received much criticism as it fails to distinguish impairments and sickness because many disabled people are not sick, but the impairments are not considered as daily health problems (Llewellyn et al., 2008).

The failure of the medical model to provide a better solution for disabled people triggered British disability movements in the 1960s and 1970s to advocate for policy reform by demanding antidiscrimination laws (D'Alessio, 2011). This advocacy was a logical consequence of understanding disability as the product of inequality and discrimination, which was later described by the social model of disability as a social construct (Quinn & Degener, 2002; Degener, 2016). The British disability movement, through the Union of the Physically Impaired Against Segregation (UPIAS) in the 1976 Fundamental Principles of Disability document, defined disability not as an impairment or deficit of body or brain but as a relationship between people with impairments and a discriminatory society (Shakespeare, 2004). By that, the term disabled people is preferred over the term persons with disabilities as it better reflects the societal oppression experienced by the people with impairments<sup>1</sup> (Quinn & Degener, 2002; Retief & Letsosa, 2018). Unlike the medical model mentioned by Oliver (1990) in which disability is viewed as a result of the politics of disablement through individualism and medicalization, the social model locates the problem outside the individual (Degener, 2014; Degener, 2016; Jackson, 2018). Shakespeare & Watson (2002) highlighted three important elements of the

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1 Both terms are used interchangeably in this article.

British social model. First, this model claims that disabled people are an oppressed social group. Similarly, American disability scholars and activists defined disabled people as a minority group. Second, this model differentiates between the impairment as the body or mind's condition, and disability as the social exclusion responding to that impairment (Degener, 2016). Last, this model defines disability as merely social oppression. The claims made by social model theorists have been endearing to a number of people in the disability community (Retief & Letsosa, 2018). However, the social model of disability has also received criticism, particularly concerning its artificial differentiation between impairment and disability (Giddens, 2006; Reindal, 2010; Degener, 2017).

Along with the development of social theories, the disability model was also developed saliently (Jackson, 2018). The social model that is noted as the rights-based approach was evolved vigorously (Degener, 2014). Today, the international community has moved forward in understanding disability by using a human rights approach (Retief & Letsosa, 2018). The human rights model of disability lies in four human values: dignity, autonomy, equality and solidarity (Quinn & Degener, 2002). First, human dignity is crucial for persons with disability as they deserve to be honored in the society of their inherent self-worth. Second, human autonomy is about giving persons with disabilities, like the abled-bodied, their own capacity for self-directed action and behavior. Third, human equality is central to the promotion and protection of disability rights because every individual not only has inestimable inherent self-worth, but their self-worthiness is equal regardless of their difference. Last, solidarity is also important to acknowledge that persons with disabilities are entitled to social support to ensure their full participation in society that is not limited to civil and

political participation, but economic, social and cultural participation. This approach places persons with disability equally and thus locates the problem of disability outside the person and in a society that is unlikely to enable them. Theoretically, albeit virtually synonymous as the social model of disability, the human rights model is distinct from the social model. Degener (2014; 2016; 2017) put forward six propositions distinguishing the human rights model from the social model. First, the human rights model acknowledges that impairment does not hinder human rights capacity. Second, the human rights model supports the more comprehensive implementation of disability rights that is not only limited to civil and political rights, but also economic, social and cultural rights. In addition, this model values impairment as part of human variation and acknowledges identity issues, which are the third and fourth differences respectively. Fifth, the human rights model allows prevention policy assessment as human rights protection for disabled people. Last, the human rights model offers a better, more just and more prosperous life for disabled people.

Although the theoretical paradigm on disability has evolved progressively, in its realization there are many countries that view disability through a medical lense, which is problematic. The need to institutionalize the promotion and protection of disability rights under a human rights framework in global politics was realized through the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006. Since then, the CRPD has become the principal international human rights instruments in regard to the rights of disabled people.

## 4 Disability Rights Norms: From Global to Regional

The long journey undertaken by the international community in promoting global norms of disability rights should be appreciated. The remarkable development of the international disability rights regime toward the regional disability rights regime will be recapped briefly in this part. Prior to the adoption of the CRPD, the international community's attempts to address disability can be traced back to the establishment of the United Nations in 1945, as the promotion of full and effective participation of persons with disabilities is deeply rooted in the goals of the UN Charter, which was later conceptualized in the 1948 UDHR (UN DESA, 2018). The Division for Social Policy and Development in the United Nations Department of Economic and Social Affairs (UN DESA) has played a pivotal role and is a focal point for disability issues in the United Nations system (Quinn & Degener, 2002).

Concerning the disability issue in the early years of the UN, the international community viewed disability prominently from the medical/social welfare approach. This was evident when in 1950 the General Assembly (UNGA), the Economic and Social Council (ECOSOC) and its subsidiary organs initiated the technical cooperation, rehabilitation and vocational programs for the promotion of wellbeing and welfare of persons with disabilities (UN DESA, 2019). Later, in 1969, the UNGA adopted the Declaration on Social Progress and Development emphasizing the provision of health, social security and social welfare services for the rehabilitation of persons with intellectual and physical disabilities (UN DESA, 2018). The advocacy carried out by the disability movement in the United Kingdom and United States in

the 1970s moved the international community to shift its approach on disability from a “caring” to a “rights-based” approach, and the concept of human rights for persons with disabilities were initially accepted internationally (Quinn & Degener, 2002; UN DESA, 2019).

The international community agreed to take further steps to ensure the full participation of persons with disabilities in society and development by designating the International Year of Disabled Persons in 1981. In 1982, the World Programme of Action Concerning Disabled Persons (WPA) was adopted by the UNGA as a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities for persons with disabilities, which also emphasized the disability approach from a human rights perspective (UN DESA, 1982). Following the adoption of that landmark resolution, the UN proclaimed the International Decade of Disabled Persons (IDDP) from 1983 to 1992. To ensure that disability rights were promoted and protected globally, the UN developed the Long Term Strategy to Implement the WPA to the Year 2000 and Beyond (the “Long Term Strategy”) at the end of the IDDP. During this period, regional disability rights norms began to emerge. The Asia-Pacific that contained the majority of persons with disabilities worldwide adopted the first Asian and the Pacific Decade of Persons with Disabilities from 1993 to 2002. The European Union (EU) adopted the European Disability Strategy in 1996. At a similar pace with the EU, the Organization of American States (OAS) adopted the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in 1999. These developments left Africa alone in not adopting a regional commitment before the 21st century.

Entering the 21st Century, the disability movement across the world was gaining momentum. The proposal of

the international convention on disability was initiated not only by government but also nongovernmental organization. In March 2000, the World NGO Summit on Disability was convened in Beijing and attended by representatives from national, regional and international disability organizations. The summit adopted the Beijing Declaration on the Rights of Persons with Disabilities in the New Century (UN DESA, 2018). In the following year, Mexico proposed the international convention on disability at the 56th session of the UNGA in 2001. Responding to Mexico's proposal, the UNGA created an ad hoc committee in the same year that was responsible for establishing a working group consisting of 27 states and representatives from the Disabled Person's Organization (DPO), as well as national human rights institutions. After an exhaustive series of meeting, in 2004 the ad hoc committee concluded a first reading of the draft text. Two years later, the CRPD and its optional protocol were adopted by the UNGA in December 2006.

In the history of international human rights regimes, the CRPD is regarded as the fastest-approved UN human rights treaty that shows a global commitment to promoting, protecting and empowering individuals with disabilities (UNESCAP, 2017). The ratification was praised as it only needed one year for the at least 20 state parties to ratify the convention and its optional protocol before it came into force in May 2008 (Degener, 2014). As of October 2018, the CRPD has 177 state signatories. The convention established two international mechanisms, namely the Committee on the Rights of Persons with Disabilities, and the Conference of State Parties to the CRPD (COSP) (UN DESA, 2018). The CRPD definitively reflects the human rights model of disability rights. In its preamble, the CRPD acknowledges disability as an evolving concept yet stresses that persons with disabilities are persons with

impairments and are hampered by either attitudinal or environmental issues that impede their full and effective participation in society on an equal basis with others (UN, 2006; WHO, 2011; UNESCAP, 2017). Furthermore, the CRPD is also known as the first human rights instrument with a standalone provision on development. Through disability mainstreaming, it is expected that the conventional disability policy of segregation will gradually subside by the active and equal participation of disabled people in development (Degener, 2016).

The struggle for disability rights, however, did not stop there. After the adoption of the CRPD, there was greater hope for persons with disability to enjoy equal rights and full participation in development. Prior to the launch of the 2030 United Nations Sustainable Development Agenda at the end of 2015, the international community commenced the development of the disability inclusive development agenda in 2013 by convening a High Level Meeting on Disability and Development at the level of heads of states and governments. In the same year, the UN DESA published an emancipating document entitled “Accessibility and Development: Mainstreaming Disability in the Post-2015 Development Agenda” (UN DESA, 2018). Bearing in mind that disability is a cross-cutting and development issue, the Sustainable Development Goals (SDGs) set by the UN refers to disability in specific target areas, namely education, decent work and economic growth, inequality, sustainable cities and communities, as well as the needs of global partnership in data collection and monitoring mechanisms (UNESCAP, 2017).

The development of global disability rights norms has had a positive impact at the regional level, especially in the Asia-Pacific. After the adoption of the first Asian and the Pacific Decade of Persons with Disabilities 1993-2002, it is followed by the second Decade from 2003 to

2012 along with the adoption of the Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific (BMF), and currently the region has adopted the Incheon Strategy 2013-2022.

As noted earlier, the Asia-Pacific was the first region to adopt the regional Incheon Strategy that built on the CRPD and includes 10 disability specific development goals, supported by 27 targets and 62 indicators. The strategy is a noteworthy result of over two years of consultation between governments and stakeholders (UNESCAP, 2017). In supporting the implementation of the strategy, Article 4(a) of the declaration explicitly invites stakeholders, particularly subregional organizations such as ASEAN, the Economic Cooperation Organization, the Pacific Islands Forum and the South Asian Association for Regional Cooperation to take part in the process (UNESCAP, 2012).

## 5 Disability Rights: Progress and Challenges in the AICHR

Among the aforementioned subregional organizations in the Asia-Pacific, ASEAN has an outstanding record in the promotion and protection of disabled peoples rights in the region. This section addresses the progress and challenges of the AICHR in the promotion and protection of disability rights in the region.

### *5.1. Undebated Acceptance and Conformity of ASEAN Member States*

The number of persons with disabilities in ASEAN

countries continues to grow along with population growth (see figure 4.1). As of 2018, the population of ASEAN stood at 645.75 million people with an estimated 10 percent of them living with disabilities. Table 1 shows that the number of disabled people in most ASEAN member states has increased, except in Singapore and Thailand. Meanwhile, the number of disabled people in Cambodia, Indonesia, Malaysia and the Philippines has doubled from or before 2007 to 2015. Disability is thus an important issue across the ASEAN region due to the significant number of disabled people and its impact on development. As of 2016, all ASEAN member states had ratified the international human rights instruments of persons with disabilities (see table 2). In this part, the author describes the acceptance and conformity of each ASEAN country toward disability rights norms.

No	ASEAN Member States	Population (Thousands)		Population of Persons with Disabilities (PWD)		Proportion of PWD to total population	
		2007	2015	≤2007	2015	≤2007	2015
1	Brunei Darussalam	375	423	(N/A)	4.148	(N/A)	0,98%
2	Cambodia	14.364	15.578	169.058 (2002)	301.629	1,18%	1,94%
3	Indonesia	231.627	257.564	3.063.000 (2006)	6.008.641	1,32%	2,33%
4	Lao PDR	5.859	6.802	(N/A)	56.727	(N/A)	0,83%
5	Malaysia	27.124	30.331	197.519 (2007)	359.203	0,73%	1,18%
6	Myanmar	48.798	53.897	(N/A)	1.276.000	(N/A)	2,37%
7	The Philippines	88.462	100.699	942.000 (2005)	1.442.586	1,06%	1,43%
8	Singapore	4.543	5.604	131.000 (2007)	100.000	2,88%	1,78%
9	Thailand	62.829	67.959	1.900.000 (2007)	1.478.662	3,02%	2,18%
10	Vietnam	85.590	93.448	5.333.000 (2007)	6.074.543	6,23%	6,50%

Source: UNESCAP, 2010; 2015

Figure 4.1. [Total Population and Disabled People Population in ASEAN (≤2007 & 2015)]

No	ASEAN Member States	CRPD Signature	CRPD Ratification	Optional Protocol
1	Brunei Darussalam	18 Dec 2007	11 Apr 2016	-
2	Cambodia	1 Oct 2007	20 Dec 2012	1 Oct 2007 (s)
3	Indonesia	30 Mar 2007	30 Nov 2011	-
4	Lao PDR	15 Jan 2008	25 Sep 2009	-
5	Malaysia	8 Apr 2008	19 Jul 2010	-
6	Myanmar	-	7 Dec 2011 (a)	-
7	Philippines	25 Sep 2007	15 Apr 2008	-
8	Singapore	30 Nov 2012	18 Jul 2013	-
9	Thailand	30 Mar 2007	29 Jul 2008	2 Sep 2016 (a)
10	Vietnam	22 Oct 2007	5 Feb 2015	-
Notes: (a): Accession; (s): Signature				

Source: UN Treaty Collection, 2019

Figure 4.2. [ASEAN Member States' Commitment Toward the CRPD and Its Optional Protocol]

### 5.1.1. Brunei Darussalam

Brunei Darussalam, a tiny Southeast Asian country with the smallest population in the region but with abundant oil and gas reserves, has made little progress in human rights promotion and protection as measured by number of human rights instruments ratified. Brunei has only ratified three out of nine international human rights regimes, namely the Convention on the Rights of the Child in 1995, Convention on the Elimination of All Forms of Discrimination Against Women in 2006 and the CRPD, the most recent human rights instrument ratified by Brunei. Brunei signed the CRPD on Dec. 18, 2007, and ratified it on April 11, 2016. Upon the ratification of the CRPD, the government of Brunei, however, stated that “The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles

of Islam, the official religion of Brunei Darussalam” (UN Treaty Collection, 2019). Brunei also did not sign or ratify the Optional Protocol of the CRPD. After ratifying the CRPD, the government of Brunei has been drafting the Disabled People Order. The Laws of Brunei Chapter 18 Old Age and Disability Pensions is the only legislation in Brunei that has explicitly acknowledged disable persons and is still under review. The government of Brunei’s focal point in this matter is the Ministry of Culture, Youth and Sports (UNESCAP, 2010).

### *5.1.2. Cambodia*

In Cambodia, 4.15 percent of the population is disabled. The number of disabled people in Cambodia is related to the massive human rights violations in during times of warfare and genocide in recent decades. Cambodia’s Constitution states that “The State shall assist the disabled and the families of combatants who sacrificed their lives for the nation. (UNESCAP, 2010)” Yet, the clause does not fully accommodate persons with disabilities at large. The Disability Action Council (DAC) was established in 1997 and officially recognized as a semiautonomous national coordination body in October 1999. Other than the DAC, the Disability Rights Administration under the Department of Rehabilitation, Ministry of Social Affairs, Veterans and Youth Rehabilitation (MoSVY) is also a focal point on disability. Cambodia signed both the CRPD and its Optional Protocol on Oct. 1, 2007, and ratified the convention on Dec. 20, 2012. Two years after signing the convention and its protocol, the government enacted the Protection and the Promotion of the Rights of Persons with Disabilities Law in 2009. The law defines persons with disabilities as “any persons who lack, lose

or damage physical or mental functions, which result in a disturbance to their daily life or activities, such as physical, visual, hearing, intellectual impairments, mental disorders and any other types of disabilities toward the insurmountable end of the scale. (Cambodia, 2009)". Although there is no such disability-specific antidiscrimination law, Cambodia has adopted the comprehensive law on disability (UNESCAP, 2010).

### *5.1.3. Indonesia*

Indonesia is the most populous country and biggest democracy in ASEAN, comprising over 250 million people. The Indonesian government adheres to international human rights norms, including the human rights of disabled people. There were more than 6 million disabled people living in Indonesia in 2015, with the number continuing to increase (UNESCAP, 2015). In 2004, the government established the National Coordination Team of the Measure of Social Welfare Enhancement for Persons with Disabilities under the Ministry of Social Affairs (UNESCAP, 2010). Responding to the high number of persons with disabilities in Indonesia, the government enacted the Law No. 4/1997 concerning disabled people, which was replaced by Law No. 8/2016 as the previous law was seen as no longer in line with the new approach of disability. The adoption of disability legislation is in line with Indonesia's commitment to the CRPD, which it ratified on Nov. 30, 2011. The law defines persons with disabilities as "any person who has physical, intellectual, mental, and/or sensory deficiencies for the long term that can hinder and restrict full and effective participation with other citizens based on the equality

of rights (Indonesia, 2016)”. The law mandated that the government establish the National Commission on Disability.

#### *5.1.4. Lao People’s Democratic Republic (Lao PDR)*

Lao PDR, the only landlocked country in ASEAN, has committed to the promotion and protection of disability rights. In 2008, the government signed the CRPD and ratified it in the following year. The government of Lao PDR passed the Decree on the Rights of Persons with Disabilities in 2014. Persons with disabilities in Article 2 of the decree are defined as “persons who have physical, mental or intellectual anomalies or defects including visual, hearing and speaking impairments for the long term, which hinder their daily activities and full and effective participation in society on an equal basis with others” (Lao PDR, 2014). The National Committee on Disability and the Elderly was established as the government’s focal point alongside the Ministry of Labor and Social Welfare. In order to ensure disability rights are mainstreamed, the ministry also adopted the master plan for disability (UNESCAP, 2010).

#### *5.1.5. Malaysia*

There are more than 300,000 people living with disabilities among the 30 million population of Malaysia. The government is committed to ensure persons with disabilities enjoy their rights on an equal basis in society. In 1998, the National Advisory and Consultative Council for Disabled Persons was established to be the focal point of the government together with the Department

of Social Welfare under the Ministry of Women, Family and Community Development. The government constituted the Persons with Disabilities Act in 2008 in the same year of its signature to the CRPD. The CRPD was ratified by the government on July 19, 2010. Regarding Malaysia's ratification, the government stated its reservations to Article 15 concerning the freedom of disabled people from torture or cruel, inhuman or degrading treatment or punishment, and Article 18 on the liberty of movement and nationality of persons with disabilities (UN Treaty Collection, 2019). Despite its reservations, the Disability Act recognizes disability as an evolving concept that is based on the preamble of the CRPD. The persons with disability are defined by the Malaysia's law as "those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society. (Malaysia, 2008)" Along with the adoption of disability act, the National Council for Persons with Disabilities is established for the purpose of the act. National Action Plan for Disabled Persons is also being implemented by the government to enhance the rights of disabled people in Malaysia (UNESCAP, 2010).

#### *5.1.6. Myanmar*

The military junta that ruled for decades in Myanmar was accused of committing extreme human rights violations across the country. The national human rights mechanism is still far from sufficient albeit the country's ratification of human rights instruments, including the rights of persons with disability. Myanmar had been the only ASEAN member state not to sign the CRPD, yet on Dec. 7, 2011, the government of

Myanmar acceded to the convention. There had been no comprehensive national disability legislation in the country until 2015, when the Rights of Persons with Disabilities Law came into being. The enacted law defines a person with disability as “a person who has one or more of the long-term physical, vision, speaking, hearing, mental, intellectual or sensory impairments from birth or not.” Myanmar’s government also defines disability as “being unable to fully participate in society due to the various barriers/hindrances in physical and environment, attitude and perspective or others”. Under the law, the government established the National Committee on the Rights of Disabled People and Its Duties and Responsibilities.

#### *5.1.7. The Philippines*

The Philippines has ratified the most international human rights treaties -- 8 out of 9 treaties -- among ASEAN member states. It has yet to sign up to the International Convention for the Protection of All Persons from Enforced Disappearance. In the Philippines, more than 1.4 million people live with disabilities. The Constitution of the Philippines mentions disability in Article 5 Section 2 concerning the election of disabled people, in the Article 13 Section 11 concerning free medical care for disabled people, and in Article 13 Section 13 that mandates the establishment of a special agency for persons with disabilities, the National Council on Disability Affairs. In 1992, the government enacted Republic Act (RA) No. 7277 or known as the Magna Carta for Disabled Persons to promote and protect disability rights. The law defines disabled persons as “those suffering from restriction or different abilities, as a result of a mental, physical or sensory impairment, to

perform an activity in the manner or within the range considered normal for a human being” (The Philippines, 1992). According to the law, disability is defined as “1) a physical or mental impairment that substantially limits one or more psychological, physiological or anatomical function of an individual or their activities; 2) a record of such an impairment; or 3) being regarded as having such an impairment” (The Philippines, 1992). As noted by UNESCAP (2008), the Magna Carta of Disabled People is considered both a comprehensive and anti-discrimination disability law. Furthermore, the Philippines also ratified the CRPD on April 15, 2008. Along with the ratification of the CRPD, the carta has been amended several times in order to ensure the full and effective participation of persons with disability in the region; RA 9442, RA 10070, RA 10542, and RA 11228 (National Council on Disability Affairs, 2019).

#### *5.1.8. Singapore*

Singapore envisions to be a caring and inclusive society for all, including for persons with disabilities. According to UNESCAP, the number of disabled people in Singapore between 2007 and 2015 decreased from 131,000 people to 100,000 people. Singapore is a state party to the CRPD after ratified the convention on July 18, 2013. The Singaporean government, however, had some reservations to the convention, namely to Article 12 Paragraph 4 on the legal capacity of disabled people, Article 25 Paragraph (e) on health insurance for disabled people, and Article 29 Subparagraph (a) (iii) regarding assistance for disabled people during voting in elections (UN Treaty Collection, 2019). There is no particular law on disabled people in Singapore (UNESCAP, 2010). Nevertheless, it is claimed that all policies and laws in

Singapore have no contradiction to the rights of persons with disability, and thus remains relevant and adequate in fulfilling the needs of disabled people. Singapore has been implemented three five-year enabling masterplans: 2007-2011, 2012-2016 and 2017-2021 (Committee on the Rights of Persons with Disabilities, 2016). Despite the absence of a specific disability law, the government in its initial report to the Committee on the Rights of Persons with Disabilities, for the purpose of the enabling masterplan, states persons with disabilities “include all persons whose prospects of securing, retaining places and advancing in education and training institutions, employment and recreation as equal members of the community are substantially reduced as a result of physical, sensory, intellectual and developmental impairments” (Committee on the Rights of Persons with Disabilities, 2016). At the government level, the Standing Committee on Disability was set up to coordinate disability-related policy issues involved the Ministry of Social and Family Development, National Council on Social Services and others.

#### *5.1.9. Thailand*

The government of Thailand has committed to promote and protect the rights of persons with disabilities. The number of persons with disabilities in Thailand decreased significantly from 1.9 million in 2007 to 1.4 million in 2015, according to UNESCAP. The Constitution of Thailand states the prohibition of unjust discrimination against persons with disability (UNESCAP, 2010). The government adopted a national law on disability called the Rehabilitation of Persons with Disabilities Act in 1991, which was replaced by the Persons with Disabilities Empowerment Act in

2007. According to the law, persons with disabilities mean “persons who encounter certain limitation in performing their daily activities or social participation due to their impairments in vision, hearing, mobility, communication, mind, emotion, conduct, intellect, learning or any other impairment/disabilities along with various difficulties, and specifically need some assistance to enable them to perform their daily activities or social participation as ordinary persons,” (Thailand, 2007). Under the existing law, the government established the National Commission on Promotion and Development of Life Quality of Disabled Persons that is under the coordination of the Ministry of Social Development and Human Security. Thailand’s commitment to enforcing disability rights is evident as Thailand is the only ASEAN member state that ratified the CRPD and its Optional Protocol on July 29, 2008, and Sept. 2, 2016, subsequently. On July 29, 2008, the government of Thailand made a reservation to Article 18 of the convention on the liberty of movement and nationality, which was withdrawn from the reservation on Feb. 5 2015 (UN Treaty Collection, 2019).

#### *5.1.10. Vietnam*

Vietnam has the proportion of disabled people to the total population in the region. Effort to promote and protect disability rights have been in place since this socialist republic country adopted the 1992 Constitution that confirms the rights of persons with disabilities, which was later amended in 2001, with Article 59 notably regarding the equal opportunities for disabled people to enjoy social welfare, and the Article 61 in regard to access to education and vocational training for disabled people (Vietnam, 2001). In the same year that the

Constitution was amended, the National Coordinating Council on Disability was established under the Ministry of Labor, Invalids and Social Affairs that acts as the government focal point on disability matters. The government signed the CRPD on Oct. 22, 2007, and ratified it on Feb. 5, 2015. Prior to the ratification of the CRPD, the Vietnamese Government passed the Law on Persons with Disabilities in 2010, which is the primary disability law in the country. The law defines a person with disabilities as “a person who is impaired in one or more body parts or suffers functional decline manifested in the form of disability that causes difficulties to his/her work, daily life and study (Vietnam, 2010).” A national plan of action was also implemented to support the attainment of equal opportunity and full participation of disabled people. To commemorate disability rights, April 18 is assigned as the national disability day in Vietnam.

As argued by Donnelly (1986), states do not only have the willingness but even desire to follow the United Nations in creating and elaborating human rights norms that result in a widely-accepted declaration and convention of human rights. Donnelly’s statement is relevant for the case of the rights of persons with disabilities. The number of disabled people worldwide constitutes a large portion of world’s population and significantly impact development. Therefore, the need to create and elaborate the human rights norms of disabled people has been internationalized, including in ASEAN. Each ASEAN member state has committed to promoting and protecting the rights of persons with disability by ratifying the CRPD. However, each country has a different mechanism and level of commitment toward the promotion and protection of disability rights. For instance, Brunei Darussalam, Malaysia and Singapore made reservations to the

convention, Thailand withdrew its reservation and the others completely ratified the convention without making any reservation. In addition, only Cambodia and Thailand signed and ratified the Optional Protocol to the CRPD. Upon the ratification of the convention, ASEAN member states as the state parties are expected to translate the articles in the convention into the national legislation. To date, Brunei Darussalam and Singapore have not passed any disability laws. Through analyzing the content of each country's national disability law, the author illustrated the commitment of ASEAN member states in making the rights real for disabled people, which is mirrored by the numbers of disability rights guaranteed in each country in reference to the CRPD (see figure 4.3). This phenomenon was by Donnelly, that the prominent procedural principle of the contemporary international human rights regimes is national jurisdiction over human rights questions (Donnelly, 1986), including the rights of persons with disabilities. The national performance of each ASEAN member state in implementing the regimes of disability rights can be varied albeit the acceptance of the CRPD, because each ASEAN member state has full sovereignty to determine the adequacy of its implementation. In addition, the international supervision of national performance remains insufficient because the Committee of the Rights of Persons with Disability has limited authority to review, evaluate and provide general comments and recommendations. Nevertheless, the 10 ASEAN member states have established national mechanisms and allocated disability funds to promote and protect disability rights. Other than that, all ASEAN member states have taken part in international and regional programs on disability rights, namely the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific Region in 1993, World Summit for Social

Development (WSSD) in 1995, Millennium Development Goals (2000-2015), Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific (BMF) and the Asia Pacific regional policy guideline for the Asian Pacific Decade of Disabled Persons (2003-2012), BMF Plus Five, Incheon Strategy and the UN Sustainable Development Agenda (2015-2030) (Stubbs & Chai, 2009). Therefore, regardless of the gap of ASEAN member state's national performance, it suffices for the author to assert that international disability rights norms have been widely accepted and conformed to by all ASEAN member states, as evidenced by each country's ratification of the CRPD, with or without reservation. By ratifying the convention, it also means that ASEAN member states have also conformed to the human rights model of disability that was validated by the amendment of disability laws in some countries, such as Indonesia, the Philippines and Thailand.

The acceptance and conformity of ASEAN member states to the promotion and protection of the rights of persons with disabilities has brought all ASEAN leaders to take initiative for institutionalizing disability rights in the region. The initiative of ASEAN leaders to enforce disability rights had been undertaken far before the CRPD, but after the CRPD came into force in 2008 and was ratified by all ASEAN member states by 2016, ASEAN has been able to strengthen its regional efforts toward the creation of inclusive, barrier-free and rights-based societies. The ASEAN attempt to realize a disability-friendly community is undertaken through the institutionalization of disability rights in the region that is enshrined in the ASEAN Vision. Under the ASEAN Community framework, the ASEAN Socio-Cultural Community (ASCC) is the most important pillar in the process of institutionalizing disability rights. There have been several regional mechanisms established

CRPD		CAM	IND	LAO	MAL	MYA	PHI	THA	VIE
Art 6	Women with disabilities	X	O	O	X	O	X	X	X
Art 7	Children with disabilities	X	O	O	O	O	O	X	O
Art 8	Awareness-raising	O	O	O	O	X	X	X	O
Art 9	Accessibility	O	O	O	O	O	O	O	O
Art 10	Right to life	X	O	X	X	X	X	X	X
Art 11	Situations of risk and humanitarian emergencies	X	O	X	O	X	X	X	X
Art 12	Equal recognition before the law	X	O	O	X	X	X	X	X
Art 13	Access to justice	X	O	X	X	O	X	O	O
Art 14	Liberty and security of person	X	O	X	X	X	X	X	X
Art 15	Freedom from torture or cruel, inhuman or degrading treatment or punishment	X	O	X	X	O	O	O	X
Art 16	Freedom from exploitation, violence and abuse	X	O	X	X	O	O	O	X
Art 17	Protecting the integrity of person	X	O	X	X	X	X	X	X
Art 18	Liberty of movement and nationality	X	O	X	X	X	X	X	X
Art 19	Living independently and being included in the community	X	O	X	O	X	O	O	O
Art 20	Personal mobility	X	O	X	X	O	X	X	X
Art 21	Freedom of expression and opinion, and access to information	O	O	O	O	O	O	O	O
Art 22	Respect for privacy	X	O	X	X	X	X	X	X
Art 23	Respect for home and the family	X	O	O	X	X	X	X	X
Art 24	Education	O	O	O	O	O	O	O	O
Art 25	Health	O	O	O	O	O	O	O	O
Art 26	Habilitation and rehabilitation	O	O	O	O	O	O	O	O
Art 27	Work and employment	O	O	O	O	O	O	O	O
Art 28	Standard of living and social protection	X	O	O	O	O	O	O	O
Art 29	Participation in political and public life	O	O	O	X	O	O	O	X
Art 30	Participation in cultural life, recreation	X	O	O	O	X	O	X	O
Notes:									
X: No specific clause, article or chapter explained the rights									
O: The rights explicitly stated in specific clause, article or chapter									

Source: Compiled by the author; UN, 2007

Figure 4.3 [The Rights of Persons with Disability in the CRPD and ASEAN Member States]

to address the disability issues in the region under the ASCC, such as the ASEAN Ministerial Meeting on Social Welfare and Development (AMMSWD), Senior Officials Meeting on Social Welfare and Development (SOMSWD), AMMSWD Plus Three, SOMSWD Plus Three, ASEAN GO-NGO Forum on Social Welfare and Development, as well as the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ASEAN, 2019). The regional effort of ASEAN to improve the quality of life and provide equal access, opportunities and rights

of persons with disability to realize the disabled-inclusive community can be tracked in several ASEAN documents (see figure 4.4).

<b>Year</b>	<b>Related Documents</b>
1998	Ha Noi Plan of Action (1999-2004)
2004	Vientiane Action Programme (VAP) 2004-2010 and ASEAN Socio-Cultural Community Action Plan
2010	ASEAN Strategic Framework for Social Welfare and Development (2011-2015)
2011	Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community
2011	Mobilization Framework of the ASEAN Decade of Persons with Disabilities (2011-2020)
2013	ASEAN Declaration on Strengthening Social Protection and Regional Framework and Action Plan to Implement the ASEAN Declaration on Strengthening Social Protection
2015	ASEAN Community Vision 2025 Blueprint
2015	ASEAN Strategic Framework for Social Welfare and Development (2016-2020)
2018	ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities

*Source: Compiled by the author; ASEAN, 2019*

Figure 4.4 [ASEAN Disability-related Documents]

## *5.2. Role of the AICHR: Mainstreaming Disability Rights in ASEAN*

The institutionalization of disability rights in ASEAN is inseparable from the regional human rights mechanism in the region. ASEAN through the established regional human rights body, the AICHR, is committed to promoting the rights of persons with disabilities. Although many claim that the AICHR has a limited mandate and function, the author signifies that albeit the prevailing limitations, human rights in ASEAN is progressing, particularly in the rights of persons with disabilities. The AICHR as the overarching body of human rights in ASEAN has continuously enhanced disability rights in the region since 2015 along with the creation of the ASEAN Community (ASEAN, 2018). The rights of persons with disabilities is reaffirmed and granted in the ASEAN Declaration of Human Rights (AHRD) that was adopted in 2012, which is addressed in articles 2 and 4 (ASEAN, 2012). In order to mainstream the rights of persons with

disabilities, the AICHR established the Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community. The task force consists of the AICHR representatives, the 10 SOMSWD Focal Points and two ACWC representatives. The mandate of the task force is to create a regional action plan to mainstream the rights of persons with disabilities in line with the ASEAN Community Vision (ASEAN, 2018).

The task force accomplished a major achievement for the AICHR in mainstreaming disability rights called the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities in ASEAN. The enabling masterplan is rooted in two previous declarations and frameworks, the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community and the Mobilization Framework of the ASEAN Decade of Persons with Disabilities (2011-2020). The drafting of the enabling masterplan required consultative dialogue and meetings between ASEAN member state officials and disabled people organizations. It took two years for the task force to finalize the enabling masterplan after going through a series of regional dialogues on the mainstreaming of the rights of persons with disabilities in the ASEAN Community and task force meetings and (see figure 4.5). The regional dialogues had the objective to raise the awareness of the rights of disabled people and find common regional approaches and strategies to mainstream disability rights both at the national and regional level (Human Rights in ASEAN, 2015). Meanwhile, the task force's meetings were conducted to support the task force in drafting the enabling masterplan. The AICHR also carried out the Training Programme on the Rights of Persons with Disabilities in Bangkok from Oct. 11 to 14, 2016, after the first and second regional dialogue. This human rights training had the objective to

create a better understanding on disability rights and a regional platform among ASEAN stakeholders (ASEAN, 2016). Furthermore, the AICHR organized the Regional Workshop on Enhanced Access to Education for Children with Disabilities held in Da Nang before the fourth task force meeting (ASEAN, 2017).

No	Agenda	Place and Date	Overview
1	1 <sup>st</sup> Regional Dialogue	Bangkok, Dec 1-3 2015	Discussion on good practices and lessons learned in mainstreaming the promotion and protection of the rights of disabled people, national responses to promote and protect disability rights, making disability rights a reality and gender perspectives in realizing the rights of persons with disability.
2	2 <sup>nd</sup> Regional Dialogue	Chiang Mai, Jun 29- Jul 1 2016	Discussion on the issues of health, education and employment affecting persons with disabilities in the region, as well as on the ASEAN Community and its implication on the fulfillment of disability rights.
3	1 <sup>st</sup> Task Force Meeting	Bangkok, Dec 5-6 2016	Extensive discussion on situation of persons with disabilities in the ASEAN region and exchange of thoughts and opinions on the gaps in the regional framework's implementation pertaining to disability rights and relevant challenges, as well as deliberation on the framework for the draft regional instrument
4	2 <sup>nd</sup> Task Force Meeting	Jakarta, Apr 18-19 2017	Discussion and exchange of national action plans on persons with disabilities and sharing session with the ASEAN Disability Forum and Japan international Cooperation Agency in regard to the significance of Sustainable Development Goals in reinforcing the promotion and protection of disability rights.
5	3 <sup>rd</sup> Regional Dialogue	Phuket, Jun 19-21 2017	Discussion on access to justice, persons with disabilities as entrepreneurs and disability perspectives in disaster risk management.
6	3 <sup>rd</sup> Task Force Meeting	Phuket, Jun 22-23 2017	Extensive discussion on the outline of the regional action plan on mainstreaming the rights of persons with disabilities in ASEAN by taking into consideration the priority areas indicated in the Mobilization Framework of ASEAN Decade of Persons with Disabilities (2011-2020).
7	4 <sup>th</sup> Task Force Meeting	Da Nang, 15-Dec 16 2017	Deliberation on the regional action plan draft; interface meeting with a disability expert from UNESCAP on the zero draft of the regional action plan; and the adoption of a structure for the regional action plan draft entitled "ASEAN Enabling Masterplan for an Inclusive Community by 2025: Mainstreaming the Rights of Persons with Disabilities".
8	5 <sup>th</sup> Task Force Meeting	Jakarta, Feb 5-6 2018	Interface meeting with a representative of the ASEAN Disability Forum regarding the challenges faced by and empowerment of disabled people, and the meeting with the deputy secretary-general of ASEAN for community and corporate affairs.

9	6 <sup>th</sup> Task Force Meeting	Jakarta, Apr 16-17 2018	Identification of key action points in regard to the inclusion of political, legal, economic, social and cultural environments and the full realization of disability rights in the three pillars of the ASEAN Community; consultation with the deputy secretary-generals of the Political-Security Community (APSC) and Economic Community (AEC); and discussion with the ASEAN Disability Forum on the situation of persons with disabilities in ASEAN.
10	7 <sup>th</sup> Task Force Meeting	Jakarta, Jul 6 2018	Deliberation on the draft of the ASEAN Enabling Masterplan that focuses on the finalization of the draft and discussion with the ASEAN Disability Forum on the recommendation to the draft of the enabling masterplan to ensure it is in accordance with the CRPD
11	8 <sup>th</sup> Task Force Meeting	Bangkok, Sep 14-15 2018	Finalization of the Enabling Masterplan, expected to be adopted at the upcoming ASEAN Summit.
12	4 <sup>th</sup> Regional Dialogue	Bangkok, Dec 3-5 2018	Discussion on the theme “Accessibility Through Universal Design” that emphasizes the application of a universal design as the key to achieve accessibility in various spheres; and launching of the the enabling master plan.

Source: AICHR, 2019

Figure 4.5. [Task Force Meetings and Regional Dialogues on Disability Rights in ASEAN]

After the adoption of the new and comprehensive regional action plan on disability rights, it is expected that all ASEAN member states will accept that the CRPD is in line with the ASEAN Community Vision 2025. The enabling masterplan is to be adopted to ensure that ASEAN’s national governments can fully implement the CRPD both at the national and regional levels as stated in Point 2.5 of the masterplan (ASEAN, 2018).

*“The overall goal of the enabling masterplan is to contribute to the enhancement of the implementation of the CRPD at the regional level, building an inclusive community where independence, freedom of choice, and full and effective participation of persons with disabilities in all areas of life are realized and sustained. The enabling masterplan aims to achieve equality and high quality of life for persons with disabilities, their family members, personal assistants and caregivers, where applicable.”*

The enabling masterplan is to be implemented under the AMMSWD as the focal point for interpillar cooperation. This ambitious disability regional action plan guarantees the engagement and involvement of stakeholders under the public-private-people partnership

(PPPP) scheme. The implementation of this action plan will be monitored and evaluated through a midterm evaluation, covering the period of 2018-2021, and the end-of-term evaluation covering the period of 2021-2025. The mainstreaming of the rights of persons with disabilities in ASEAN is projected to be accomplished by 2025 through mainstreaming it in each pillar of the ASEAN Community. If the author breaks it down, then the all three ASEAN pillars have its respective key action points. The APSC has 24 key action points, the AEC 25 points and the ASCC 27 key action points; that are relevant, complimentary and interrelated, making it the most comprehensive and first cross-pillar initiative on disability rights in the region (ASEAN, 2018).

Referring to Davies (2017), ASEAN through the AICHR has played several important roles in human rights promotion and protection in the region by acting as an educator, enabler, standard setter and mobilizer. With the adoption of the enabling masterplan, the AICHR could fulfill the important roles mentioned by Davies. First, as the educator, the AICHR has conducted regional dialogue, training programs and a workshop to raise awareness among ASEAN officials, and ASEAN citizens on the rights of persons with disabilities. The key action points in the enabling masterplan have given specific concern to human rights education, namely the key action points of the APSC 10; AEC 20; and ASCC 11 and 12. Second, the enabling masterplan that is deeply rooted in the Bali Declaration and the ASEAN Community Blueprint 2025 enables the AICHR to assist ASEAN member states in harmonizing laws and policies in regard to disability rights. The monitoring and evaluation of the implementation of the enabling masterplan by the AICHR will be very important in ensuring that ASEAN member states are committed to promoting and protecting disabled peoples rights.

Furthermore, with the enabling masterplan, capacity building will be focused toward enabling equal and equitable opportunity for social and economic inclusion. Third, the AHRD, as the only ASEAN declaration on the meaning of human rights, is the crucial regional standard for human rights. The enabling masterplan, to some extent, is the standard set by ASEAN to synergize the collective regional plan of action in order to mainstream the rights of persons with disabilities in the region. Last, the AICHR has played mobilizer or “catalyst” in mainstreaming disability rights in the region. The AICHR has advocated for ASEAN member states to ratify and implement the CRPD, which is crucial in fostering a disability-inclusive development agenda through the adoption of the Bali Declaration and Mobilization Framework, as well as the enabling masterplan. Other than just advocating for the ratification of the CRPD, the prevailing regional action plan gives wider opportunity for other actors such as DPOs and civil society to engage in the mainstreaming of disability rights. By that, the AICHR is thus influential for ASEAN and its member states in realizing the effective and full participation of disabled people in the community.

### *5.3. The Contribution of Transnational Disability Networks*

ASEAN in two decades has gone from openly hostile to human rights to engaging civil society, national and international actors in the region (Davies, 2017). However, ASEAN has evolved and now is advancing the regional human rights mechanism. In this context, the evolution of ASEAN is reflected by the adoption of the ASEAN Charter that explicitly stated in Chapter 5 Article 16 on entities associated with ASEAN that ASEAN may engage with civil society organizations and other

stakeholders to support the charter (ASEAN, 2007). The engagement of NGOs in ASEAN was also formalized under the ASCC regional mechanism, the ASEAN GO-NGO Forum. Regarding social welfare and development, the forum seeks to promote collaboration between government organizations (GOs) and NGOs in addressing particular issues regarding social welfare and development. At the 1st ASEAN GO-NGO Forum on Social Welfare and Development that was held in Bangkok from Sept. 7 to 9 2006, the NGOs brought up the issue of persons with disabilities and recommended speedy ratification of the forthcoming CRPD that was adopted in the following year (International Council on Social Welfare, 2006). In the same year of the CRPD's adoption, ASEAN convened the second annual forum between GOs and NGOs, and the forum agreed to put persons with disabilities as one of the key issues in the agenda of GOs and NGOs along with the issues of human trafficking and social protection (Stubbs & Chai, 2009). Since then, the issue of persons with disabilities has seen more attention from ASEAN member states.

Disability rights progress in ASEAN has been complemented by transnational disability activists. The transnational network on disability is now able to influence ASEAN in decision making because of the openness and legitimacy of ASEAN to human rights issues. The Disabled Peoples' Organizations (DPOs) is the prominent and vocal NGO in promoting and protecting the rights of the disabled. In January 2010, the Asia Pacific Development Center on Disability (APCD) held a regional workshop on Capacity Development on Self-Help Organizations of Persons with Disabilities in Bangkok (Asia-Pacific Development Center on Disabilities, 2010). The notion to establish an ASEAN forum to discuss disability emerged during the workshop. In December of the same year, the

Disabled' People's International Asia-Pacific (DPI AP) and Persatuan Penyandang Cacat Indonesia (Now: PPDI/ Indonesian Disabled People Association) co-organized the Regional Conference on ASEAN and Disability that was held in Jakarta on Dec. 1 and 2, which was attended by representatives of different sectors from 14 countries. The conference resulted in the Jakarta Declaration on the Regional Conference on ASEAN and Disability. The Jakarta Declaration contains statements and recommendations for the ASEAN Community on disability issues. The Jakarta Declaration is considered successful in delivering the interests of ASEAN's DPOs and influencing ASEAN member states to take immediate measures in addressing disability issues, particularly to establish the ASEAN Disability Forum (ADF) (Persatuan Penyandang Disabilitas Indonesia, 2012). The declaration, then, became a principle document for the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community. The advocacy of ASEAN's DPOs in influencing ASEAN officials to establish the ADF was accomplished after the ADF was inaugurated in 2011 in Bangkok, Thailand. The ADF members include the ASEAN Secretariat, ASEAN member states, international development agencies, CSOs, media, business, academic groups, disability related organizations and DPOs and their family organizations (ADF, 2019).

The ADF meets annually and is the platform for DPOs to coordinate action to advocate for disability inclusive policy formulation and implementation. It serves as the best vehicle to carry the disabled people's aspirations by bringing the voice of DPOs at the grassroots level to the policy makers at local, national, regional and international level (ASEAN Disability Forum, 2019). In this context, the ADF was involved in the drafting of various ASEAN action plans regarding disability rights, such as the ASEAN

Strategic Framework on Social Welfare and Development 2011-2015 and 2016-2020, and the enabling masterplan. The involvement of the ADF in the making of those action plans, particularly the enabling masterplan during the series of task force meetings, is crucial in ensuring that it guarantees and delivers the needs of the disabled (see figure 4.5). Without any input and recommendations from the ADF, the enabling masterplan would not be sufficient in reaching out to the needs of mainstreaming the rights of persons with disabilities in the ASEAN Community. At the last annual ADF meeting from Dec. 13 to 15 2018 in Singapore, the ADF focused on providing adequate knowledge and support to its members to prepare the alternative report of the CRPD as some ASEAN member states were set to submit their initial report in 2019 (Singapore Disabled People's Association, 2019). As of Dec. 5 2018, the Committee of Permanent Representative (CPR) of ASEAN on its 13/2017 Meeting on Oct. 10 2017 included the ADF as one of the CSOs of the registered entities associated with ASEAN by adopting the new updated list in Annex 2 of the ASEAN Charter (ASEAN, 2018).

Besides the ASEAN Disability Forum, in 2011 the General Election Network for Disability Access (AGENDA) was established. This forum was aimed to improve the access of persons with disabilities in Southeast Asia to attain their political rights as stated in CRPD Article 29 through increased public awareness and advocacy for change. AGENDA has partnered and established a network with 12 DPOs and CSOs from Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines and Vietnam. In order to increase the awareness of the importance on the political rights of disabled people, AGENDA conducted training for election administrators in Cambodia, Indonesia and the Philippines. It also conducted training for journalists from

the ASEAN region on access issues and strengthening the content of media reports, as well as holding two regional dialogues focusing on strengthening democracy by removing barriers toward full political participations. The most significant achievement accomplished by AGENDA was that during the drafting of the AHRD, AGENDA was the first representative of the disability community to submit recommendations to the AICHR specifically on civil and political rights to realize the disability inclusion principles in the AHRD (AGENDA, 2019).

The other transnational disability networks that are influential in the dynamic of disability rights enforcement in ASEAN, among others, are the International Disability Alliance (IDA) and Disabled' People's International Asia-Pacific (DPI AP). These networks actively support the disability movement in ASEAN to promote full participation and equalization of opportunity of persons with disabilities. The active involvement and engagement of those disability networks is very important to the development of disability rights norms in the region.

#### *5.4. Challenges for Disability-Friendly ASEAN*

ASEAN through the AICHR and other disability stakeholders in ASEAN such as DPOs have been progressive in promoting and protecting disability rights in the region. However, the enforcement of disability rights in ASEAN to realize the effective and full participation of persons with disability in all sectors is not without the obstacles. Davies (2017) claims that the human rights space in ASEAN that consists of domestic institutions, civil society, the UN system and ASEAN itself, is complex and thus the promotion and protection of the human rights is uneasy in the first place, noting the decentered ASEAN role. In this part, the author attempts to define the challenges in

the promotion and protection of disability rights in the region by using the concept of the human rights space to analyze the overall human rights space dimension in Southeast Asia. The human rights space in Southeast Asia is defined as a sum of political interaction on the question of the status, promotion and protection of human rights within Southeast Asian states, and it includes domestic institutions, civil society actors and global processes, and importantly it is not a definitive geographical region.

The first challenge in the promotion and protection of disability rights in ASEAN comes from each ASEAN member state. All ASEAN member states have ratified the CRPD and only Thailand has ratified the Optional Protocol to the CRPD. Both the CRPD and its Optional Protocol are the principal global disability rights standard that applies the human rights disability model. Having said that, some ASEAN member states that have not developed such national legislation and action plans to advance the rights of persons with disabilities. Brunei Darussalam and Singapore are among them. Furthermore, most ASEAN member states do not completely translate the rights of persons with disability granted in the CRPD into national disability law. In fact, the national government is the prominent actor that is responsible for promoting and protecting the rights of persons with disability in the first place. This is an inherent problem faced by all ASEAN member states, in that most of its governments do not fully adhere to international human rights standards due to socio-cultural barriers of different conceptions and values of what human rights are. Indonesia is the only ASEAN member state that fully adheres to the CRPD standard. Besides Indonesia, Brunei Darussalam and Singapore, ASEAN member states only include half of the articles of the CRPD regarding disability rights in national law. The rights to accessibility, freedom of expression and

opinion, and access to information, education, health, habilitation and rehabilitation, and work and employment are recognized by those ASEAN member states that have passed a national disability law. Meanwhile, the rights to life and respect for privacy are the least to be recognized. In addition, most ASEAN member states seem to be ignorant to establishing an independent mechanism at the national level that aims to promote, protect, and monitor the implementation of the present convention as stated in Article 33 Section 2 of the CRPD. The minimum credibility and lack of disability data because of the absence of the independent national mechanism to some extent makes ineffective and inefficient solutions for disability rights real.

The second challenge is the limited space for civil society to fully support the realization of a disability-friendly ASEAN community. Although, there are some DPO and CSO networks that have engaged with the disability agenda at all levels, not to mention ASEAN Disability Forum and AGENDA, there are still DPOs and disability-related CSOs that struggle to be recognized and access resources. Disability-related organizations are the first in reaching out to disabled people in providing services, assistance or advocacy.

The third challenge is from ASEAN itself as the regional organization that sets the standards and guidelines for the promotion and protection of the rights of persons with disabilities. ASEAN through the AICHR has significantly developed strategies and measures to ensure that persons with disabilities enjoy equal rights just like others by adopting the enabling masterplan. However, the ASEAN Way remains fundamental in ASEAN decision-making that decelerates the attainment of consensus concerning the rights of persons with disabilities. Its inability to intervene in member states to foster national

strategy for disability rights also hampers progressing the rights of persons with disability. The absence of an independent body to monitor, report and evaluate the implementation of the enabling masterplan gives space for disobedience and irresponsibility among ASEAN member states.

Last, the UN System that has adopted the CRPD and its Optional Protocol has shifted and advanced the rights of persons with disability from a medical perspective to a human rights perspective. A set of implementation and reporting mechanisms have been standardized to make the rights of disabled people a reality easier and comprehensive. However, the committee that is in charge of monitoring and evaluating the implementation of the CRPD in each state does not guarantee that the report made by them well reflects the real situation and condition of persons with disabilities. Yet, on the other hand the United Nations in carrying out its functions as a human rights norm creator is ultimately peremptory.

Regardless of the aforementioned challenges to realize a friendly community for disabled people from various dimensions, namely the minimum implementation of the CRPD at the national level, lack of civil society involvement, the ASEAN Way principle of consensus decision-making the absence of national and regional independent mechanisms for the promotion and protection of disability rights and weak global monitoring system; the regional effort to realize a disability-inclusive community should not be in trouble, but rather the attempt should be further intensified. After acknowledging the challenges; thus the formulation of solutions can be directed better. In the following part, the author provides recommendations to address the challenges, which are implementable and could enhance the promotion and protection of disability rights for the realization of the

## 6 Conclusion and Recommendations

The paradigm on disability has shifted from the medical approach to the human rights approach. It is because the rights of persons with disabilities are an inalienable, integral and indivisible part of human rights and fundamental freedoms. The paradigm shift is evident as the international community has adopted the international human rights of disabled people treaty, which is the UN Convention on the Rights of Persons with Disabilities. The creation of the CRPD has gone through contest and disagreement. However, today the CRPD and its Optional Protocol serve as the international standard for the promotion and protection of disability rights. ASEAN has been committing itself to enforce and realize the full and effective participation of disabled people. This chapter has examined the progress and challenges faced by ASEAN in realizing a disability-inclusive community.

All ASEAN member states ratified the CRPD by 2016 with Brunei Darussalam being the last to ratify. Despite the varied implementation of the CRPD in ASEAN member states, the gap of which among them being unavoidable, to some extent the ratification of the CRPD has proven the commitment of all members of ASEAN to the rights of persons with disabilities. The ratification of the CRPD reflected the acceptance and conformity of ASEAN member states to the rights of persons with disability. The international regime of disability rights is the fundamental variable in influencing the behavior of ASEAN member states as state parties to the CRPD in mainstreaming disability rights in the ASEAN Community by using a human rights approach. With the CRPD, ASEAN member

states can further strengthen their regional effort in doing so. The institutionalization of disability rights in ASEAN was formalized with the AMMSWD and other relevant regional mechanisms. Alongside the establishment of the AICHR, the promotion and protection of disability rights by mainstreaming them in the ASEAN Community has been realized by the adoption of the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities that is deeply rooted in the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community, Mobilization Framework of the ASEAN Decade of Persons with Disabilities (2011-2020), and ASEAN Community Vision 2025. As defined by Donnelly (1986), a regime is a political creation to overcome perceived problems arising from inadequately regulated or insufficiently coordinated national actions. Referring to the concept of regime by Donnelly, the ASEAN commitment in enforcing the rights of persons with disabilities is caused by the ASEAN consensus regarding disability issues, in that it is perceived as the regional problem that needs to be addressed collectively by coordinating national action.

Such significant progress of disability rights enforcement in ASEAN is inseparable from the presence of the AICHR and the contribution of transnational disability networks. In this article, the author does not contest that the AICHR has limited mandates and functions, but rather signifies that albeit the limitations, the human rights enforcement in the region is progressing, particularly in regard to disability rights. According to the TOR of the AICHR, it is essential for the development of disability rights norms in the region. The author reiterates the argument of Davies (2017) that ASEAN through the AICHR has played an important role as the educator, enabler, standard setter and catalyst of human rights

norms in the region, and so does the rights of persons with disabilities. Meanwhile, transnational disability networks, such as the ADF and AGENDA have contributed to make the rights of disabled people a reality by supporting the disability movement across the region as well as to provide inputs and recommendations to the regional action plan on disability rights.

Nonetheless, it is undeniable that to realize an ASEAN disability-friendly community, there are some challenges that need to be addressed. Given the complex human rights space in this region, domestic institutions, civil society, ASEAN itself and the UN System need to synergize their commitment and action. Therefore, the author suggests several policy recommendations as follows:

1. Regarding domestic institutions, it is important to ensure that the CRPD is well-implemented. To do so, it is suggested that all ASEAN member states immediately pass the national disability law, particularly Brunei Darussalam and Singapore. Indonesia could take the lead in encouraging the other countries to fully adhere to the CRPD by guaranteeing all disability rights in each ASEAN member states's national disability law. Additionally, establishing the national independent mechanism such as a national disability commission should be realized with the expectation that it could assist the government in actively promoting, protecting and monitoring disability rights at the national level, as well as providing accurate disability data. And, if it is deemed crucial for the realization of a disability-friendly community, calling on all ASEAN member states to ratify the Optional Protocol to the CRPD.

2. Regarding civil society, the involvement and engagement of civil society in every action plan from planning to evaluation regarding disability rights, such as DPOs at all levels by recognizing their existence and providing them with access to resources, is essential to a more effective strategy in ensuring the practical needs of disabled people are granted.
3. Regarding ASEAN, the AICHR has played an important role in mainstreaming disability rights in the region. However, given the many priorities of ASEAN, the promotion and protection of disability rights in the region is not optimal. Crucially, the ASEAN Way is believed to hamper the progress of disability rights in the region and needs to be addressed through intensive institution building. After a decade of its establishment and in line with the ASEAN Community Vision, the AICHR should move forward to develop a more effective regional human rights mechanism. Therefore, the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Persons with Disabilities will be important to realize the disability-friendly community that has the mandate to report, monitor and evaluate the implementation of the CRPD in the region.
4. Regarding the UN system, the active and substantive general comments and recommendations to the state parties of the CRPD should be undertaken with the basis of accurate data. To generate accurate data, it is important that the report of the state parties to the CRPD Committee should be complemented by the data and information and/or report from the DPOs and disability-related organizations.

More importantly, as the number of disabled people continues to grow in this region, further research on disability rights in ASEAN is necessary. Due to the fact that the enabling masterplan was adopted in 2018; further research can be focused on examining the implementation and effectiveness of the enabling masterplan.

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## CHAPTER 5

# The Protection of Refugee Rights Beyond a Legal Approach in Southeast Asia

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## 1 Introduction

### Refugees in Southeast Asia

The refugee issue has emerged as an immense crisis of our era. Since 2011, refugee numbers across the world have continued to grow, reaching 25.4 million at the end of 2017 (UNHCR, 2017a). Southeast Asia is not an exception to the growing refugee problem. The region was reported to host 3.25 million people of concern, comprising refugees, asylum seekers and stateless and internally displaced persons in 2017. According to the United Nations High Commissioner for Refugees (UNHCR), this number represented an increase of 15.4 percent from 2016 (UNHCR, 2017b). The UN agency also reported that the people of concern mostly referred to refugees and the stateless. In the regional context, this is particularly related to the repeated persecution of the stateless Rohingya in Rakhine State, Myanmar, which has repeatedly forced them to flee to neighboring countries.

This issue, it is argued, has not resulted in a sufficient degree of protection. Although the right to seek asylum has been acknowledged as a basic human

right, which is stipulated in the Universal Declaration of Human Rights, many refugees are still deprived of their basic rights. Globally, the mandate to manage asylum requests and protect refugees is borne by the UNHCR as the chief actor in the international refugee regime. The UN agency, formed after World War II, is seen as a humanitarian provider for refugees. In recent decades, however, criticism has been directed at the agency for the erosion of refugee protection principles. This criticism is primarily concerned with refugees being in limbo and the slowness of refugee status determination (Barnett, 2001; Chimni, 2000). Criticism is also directed at destination countries in the Global North that are signatories to the 1951 Refugee Convention for their restrictive policies toward asylum seekers. In the United States, for instance, the Trump administration has adopted strict asylum rules or screening tests for asylum seekers to prevent more of them from coming to the country (Shear & Kanno-Youngs, 2019). In Australia, the offshore detention policy adopted in 2012 requires all asylum seekers wishing to enter Australia by boat be “processed” —in fact, detained— on Nauru island (Karlsen, 2016).

Although criticism largely focuses on countries of the North as the actors responsible for managing forced migration, the role of the Global South is nonetheless important to scrutinize. In the case of Southeast Asia, the region matters not only because it hosts a large number of forced migrants but because it is largely reluctant to comply with the international standard of refugee protection. While the region has to deal with a number of forced migration issues, such as the Indochinese refugee crisis, Rohingya refugee crisis and more recently climate-induced displacement, Southeast Asian governments often rely on various ad hoc mechanisms. During the Indochinese refugee crisis post-1975, several member states of the

Association of Southeast Asian Nations (ASEAN) initiated the Comprehensive Plan of Action (CPA), which stressed their willingness and agreement to host Indochinese refugees temporarily while the UNHCR processed their asylum requests or until repatriation to their countries of origin was possible. During the 2015 Rohingya refugee crisis, several countries preferred to individually manage the movement of people. Indonesia, for example, set up temporary refugee camps in several cities in Aceh. Thailand and Malaysia's policy was to place them in immigration detention centers (IDCs) while the UNHCR processed their refugee applications (Rajaram & Grundy-Warr, 2004). ASEAN, despite having established a number of human rights bodies, as the regional actor was criticized for failing to take forced displacement issues into account. Regarding the Rohingya refugee crisis, for instance, the organization preferred to relegate the responsibility to the Bali Process, an Asia-Pacific focused regional initiative primarily concerned with people smuggling and human trafficking across the region. The statement made during the Bali Process forum even avoided mention of the "Rohingya crisis", instead using "Andaman Sea Crisis" as the case was sensitive for Myanmar ("Bali Process failed on Andaman Sea crisis," 2016).

The aforementioned approaches, according to many human rights activists, have created a gap in the fulfillment of refugee protection. The Amnesty International (2015) *Deadly Journeys: The Refugee and Trafficking Crisis in Southeast Asia* report, in which the group investigated the condition of refugee camps and IDCs across Southeast Asian countries, found that asylum seekers lived in a "protracted refugee situation" due to the uncertain amount of time needed to process refugee applications. Similar to this finding, Missbach (2015) calls the condition encountered by asylum seekers in Indonesia "life on hold"

due to weak law enforcement, the long refugee application process and limited long-term options. During this period of waiting in these countries, refugees can struggle to access education, healthcare and employment as the countries recognize them as “illegal” immigrants without the same rights as citizens. Furthermore, as Amnesty International reports, under some circumstances, refugees are prone to exploitative and abusive practices by immigration officials. In Thailand, refugees often find it difficult to access justice for their cases after being abused by Thai security officials in detention centers and being handled in the same manner as criminals (Human Rights Watch, 2012).

### Existing Legal Approaches

In explaining the gap in refugee protection both internationally and regionally, there are divergences in scholarly views. For one school of thought, mainly dominated by law studies, the solution to the problem of the refugee crisis is to uphold legal responsibility as ruled in the key international refugee law, the 1951 Refugee Convention. The Convention itself is regarded as central to the protection of refugee rights as it encompasses a set of government duties to provide durable solutions for refugees. However, recent studies on forced migration suggest that the Convention is irrelevant and out-of-date for managing the global refugee crisis primarily due to its inability to recognize new drivers of migration, such as climate change. The following discussion further elaborates on how scholars express different views regarding legal and non-legal approaches, both in the international and Southeast Asian context.

Although scholars mainly differ on what should be done to resolve the problem, they share the belief that the 1951 Refugee Convention has significant flaws. Besides being unable to recognize different types of “refugees”

(Betts, 2010; Biermann & Boas, 2010; Marshall, 2011; McAdam, 2011), it also lacks enforcement and detailed provisions of refugee rights (Edwards, 2005). However, for Edwards (2005), a legal approach is still necessary as the core problem is not the Convention itself but rather its implementation related to the political nature of international law. She suggests that states refer to the International Human Rights Law (IHRL) as the higher standard for refugee protection as it acts as an international customary law that no state can escape from. With a similar emphasis on the importance of a legal approach, Marshall (2011) asserts that a feasible solution would be to create a new definition of “refugee” that includes other factors of forced displacement.

On the contrary, Betts (2010) argues that reform is required in the existing international refugee protection regime by adopting a soft law framework. In contrast to the view that supports binding agreements, he suggests that the current regime needs to be stretched or adapted to different locations and situations. Similarly, McAdam (2011) stresses the need for a multilateral instrument instead of a new treaty because what the world currently encounters are particular concerns that cannot be addressed by a single universal treaty. A more relevant approach is to strengthen bilateral and regional arrangements in managing forced migration.

Debates are also ongoing in the Southeast Asian context. Taylor and Rafferty-Brown (2010), Reza (2016) and Human Rights Watch (2017), for instance, encourage Southeast Asian states to ratify the Refugee Convention in order to better provide refugee rights across the region. Such action is considered important because the absence of a legal mechanism has been generally used as an excuse to avoid the responsibility of fulfilling refugee rights by Southeast Asian governments. On the other side, several

scholars argue that relying on ratification will not address the problem (S. E. Davies, 2006b; Kneebone, 2016; Lavoie & Knock, 1990). According to Kneebone (2016), the protection gap in Southeast Asia is not due to the lack of a legal basis but the lack of conceptualization of which legal rights should be protected. The repeated calls for ASEAN's intervention on this matter has also proven to be ineffective. For many human rights scholars and activists, ASEAN is known for its "toothless" nature toward human rights protection (M. Davies, 2017; Poole, 2015)

Among these diverging views, this paper argues that a legal framework is by no means an effective or feasible solution to address violations of refugee rights in Southeast Asia. This argument is not to suggest Southeast Asian leaders completely abolish legal approaches, but consider alternative solutions beyond legal approaches that emphasize the role of local and refugee communities. There are two rationales for this argument. First, many critiques have been directed at the insufficiency of the existing refugee regime in protecting refugee rights. As put forward by many scholars, the legal basis for refugee protection is limited in defining what a "refugee" is. A "refugee" has been narrowly defined as a person escaping political persecution of specific criteria. Not only does this criteria fail to recognize other drivers of migration, such as climate change, but also that this criteria poses more vital problems. The narrow definition of "refugee" makes it difficult for asylum seekers to articulate their traumatic experiences in order to fit themselves into the criteria of refugees. Hence, the tight distinction between "genuine refugees" and "general migrants"—who fail to claim their "rights" to refugee protection—reinforced by the refugee regime might lead to contrasting human rights conditions for both categories.

Second, even if the aforementioned issue on the

“refugee” definition can be resolved through creating a new law, a legal framework is still unfeasible for ASEAN and its member states because they consistently reject international refugee law. As Davies (2006b, p. 563) states, the majority of Asian states strongly oppose the 1951 Refugee Convention because it is “Eurocentric and therefore inappropriate for dealing with Asian refugee experiences”. They generally perceive forced displacement as a problem of the North and consider their countries as merely transit points. This has been the general stance of Southeast Asian countries since the outbreak of the Indochinese refugee crisis post-1975 (Lavoie & Knock, 1990). Meanwhile, pushing ASEAN to adopt a regional framework is also unrealistic. In response to the Rohingya refugee crisis in 2015, for instance, ASEAN relegated the problem to the Bali Process, which focuses on people smuggling and trafficking practices in the Asia-Pacific. Hence, forced displacement is framed in security-centric rather than humanitarian language. Even if ASEAN agrees to adopt a regional framework, there is no guarantee that it can produce any significant outcomes, given that the existing legal bodies aimed to uphold human rights principles lack enforcement. The ASEAN Intergovernmental Commission on Human Rights (AICHR), for example, is criticized for its failure to solve human rights crises in the region, notably regarding Myanmar’s atrocities against the Rohingya (Poole, 2015). Therefore, placing our hope only in ASEAN, its member states and their legal frameworks is insufficient.

### Data and Methodology

Having discussed the debates about the correct approach to address forced migration issues in Southeast Asia, this paper asks what alternative methods to the existing legal approach could be undertaken. To answer

this, this paper primarily seeks multiple forms of providence of refugee protection offered by Southeast Asian societies to forced migrants. Data comes from secondary sources, such as previous academic research, policy documents, newspapers and relevant websites that provide information on how non-legal approaches are carried out in Southeast Asia. While there is no specific case selected in this chapter, a specific focus will be given to key events of forced migration in the region. Thus, the selection of sources analyzed will revolve around these events.

This chapter comprises four sections. The introductory section briefly discusses the background problem and reviews the literature on the topic. The following section will highlight several key events of forced migration that Southeast Asia has experienced. The third section will then elaborate on non-legal approaches to refugee management undertaken in the region during these events. Last, an analysis of the role of ASEAN as a key organization in the region will be presented.

## 2 Southeast Asian Experiences of Forced Migration: Key Events

Southeast Asia has been affected by refugee movements across the globe. Although the number of forced migrants in the region is far lower than other regions, such as Europe, the widespread populist agenda of rejecting refugees in destination countries of the North has forced refugees to stay in “transit” countries such as Southeast Asia for indefinite periods. Generally, forced migrants in this region can be differentiated based on their modes of movement: irregular or by mass influx. Irregular

migration here refers to a mode of migration whereby migrants arrive in an area either by flight, boat or land in small numbers. This usually occurs irregularly at different times of the year. On the contrary, mass influx refers to migrants arriving in large numbers of groups, usually by boat, in events of mass humanitarian crises. Because irregular migrants in many Southeast Asian countries are perceived as mere “illegal” migrants due to the lack of “proper” travel documents and thereby are deprived of legal rights, this chapter focuses on mass refugee influxes to which Southeast Asian countries offer various ad hoc humanitarian approaches. Among the many examples, this chapter selects three: 1) the Indochinese refugee crisis post-1975, 2) Rohingya refugee crisis in 2015 and 3) climate-induced displacement.

#### Indochinese refugee crisis

Although it was not the very first experience, the flow of Indochinese refugees was among the earliest migration concerns across Southeast Asia. When the Vietnam War first broke out in the 1940s, political and socioeconomic instability hit Vietnam and its neighboring countries, in which these countries saw nationalist movements post-World War II. The most impacted countries, however, were Vietnam, Laos and Cambodia. The clash between communist and democratic forces in these countries at that time forced many people to flee their homeland to other Southeast Asian countries, primarily Thailand. At first, the nature of this movement was humanitarian. Yet, after the second war started in 1964 between North and South Vietnam, the crisis became politicized as the Soviet Union supported the communist-led group in North Vietnam and consequently the United States joined the battlefield on the side of South Vietnam. After South Vietnam and the US lost the war, the majority of refugees during the

second influx comprised anticommunists attempting to escape the ruling communist regime.

During the war, the number of Indochinese refugees exceeded 1 million people. In 1975, the number of refugees was estimated to be between 184,000 and 200,000, including around 9000 Cambodians, 32,000 Laotians and 143,000 Vietnamese (S. E. Davies, 2006a). Thailand hosted the majority of refugees with 169,167 refugees arriving by land, followed by Malaysia that hosted 74,408 boat people, Indonesia 44,347 people, the Philippines 4,938 people and Singapore 821 people (Wain, 1979).

Although the response to the Indochinese refugee crisis often refers to the affectionate and cordial attitudes of Southeast Asian countries in the context of forced migration, as they were willing to host a large number of refugees, the type of refugee “protection” provided was only temporary. During the crisis, only the Philippines agreed to ratify the 1951 Refugee Convention as a commitment to uphold the international standard of refugee protection. Besides, the idea of establishing “refugee processing centers”, first initiated by Malaysia during the Geneva Conference in December 1978, was actually aimed to alleviate socioeconomic and political burdens on Southeast Asian countries as countries of first asylum while countries of the North bore the responsibility to provide assistance. The proponents initially expressed hope that the centers would be located outside of the ASEAN region—an idea adopted as an ASEAN initiative by the ASEAN Standing Committee on February 21, 1979 (Frost, 1980). The offer from Indonesia and the Philippines to provide islands for refugee settlements was also put forward on the condition that the government retain control over the settlements, resettlement to third countries be guaranteed and all related expenses be borne by extra-regional countries. Furthermore, although most refugees were encouraged to

assimilate into local communities, many of them chose to continue to emigrate to other countries—either through resettlement or repatriation after the war ended—because of the dire conditions of refugee shelters in multiple Southeast Asian sites (Wain, 1979).

### Rohingya refugee crisis

In the contemporary era, another refugee crisis in Southeast Asia was the Rohingya refugee crisis. Escalating in the middle of 2015, ethnic persecution toward the Rohingya minority in Rakhine state, Myanmar, induced the exodus of thousands of people to Thailand, Malaysia and Indonesia. In Indonesia, the Rohingya refugee influx first occurred in 2012 after a conflict between the Rakhinese and Rohingya took place in Kyauktaw. The arrival of people by boat to Aceh's shores quickly attracted attention, especially because the media portrayed the Rohingya as oppressed Muslims. In 2015, a similar tragedy took place in which Rohingya boats were first noticed by the Indonesian army. Although several weeks later the government offered temporary shelters to Rohingya refugees in Langsa, Aceh, and was seen as good will from the government, it was actually Indonesian fisherfolk who saved and brought around 17,000 refugees onshore during the four waves of arrival (Lamb, 2015). The Indonesian army that first noticed the boats actually pushed them back in the name of protecting Indonesian territorial sovereignty. Only after the information about the fisherfolks' help spread did the government begin to discuss a feasible response.

The first response of the Indonesian government demonstrated a security-centric framework that perceived refugees as “aliens” who posed a threat to the host country. Moreover, this was not only the stance of Indonesia but also that of Thailand and Malaysia, which were also impacted by the mass refugee movement at that time. Although in

the end these three countries agreed to cooperate and offered temporary asylum to the Rohingya refugees, the fate of these people remains unclear. Many humanitarian organizations could only offer temporary humanitarian relief and the refugee application process by the UNHCR proceeded slowly—as resettlement places were limited and repatriation and local integration was not possible. As a result, many Rohingya refugees were trapped in limbo about their future and were unable to realize their basic rights due to the lack of legal status.

### Climate-induced displacement

The third example that is less commonly discussed is environment-related displacement. With the global threat of climate change, the phenomenon of climate-induced displacement cannot be underestimated. The United Nations reported that in 2016, the number of people displaced due to sudden disasters stood at 24.2 million people—three times larger than the number of people displaced because of conflict. These disasters were mostly climate-related and most of them occurred in East Asia and the Pacific (United Nations, 2017). Because of its growing significance, the International Organization for Migration (IOM) created a term for these migrants: environmentally-induced migrants. They are defined as “persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad” (Elliott, 2012).

This new trend of migration also affects Southeast Asia. The region, especially the archipelagic states, is exposed to various coastal concerns. Furthermore, problems related to freshwater availability and agriculture

because of warming temperatures and changing precipitation patterns are also encountered by Southeast Asian countries. According to Ewing (2012), warming temperatures over a long duration can affect germination periods and agricultural grow cycles on large islands. In the long term, these will induce heavy rains that will cause erosion and runoff. In addition, weather alterations generate El Nino phenomena that contributes to worsening droughts and floods—depending on the season. Apart from the internal condition of the region per se, its close geographical location to the Pacific is also significant for the increasing number of climate-induced migrants. The Pacific region is particularly prone to climate and environmental changes due to sea level rises, especially for small countries like Kiribati, the Marshall Islands, Tokelau and Tuvalu. Other areas with large populations that are located along the coastline are expected to be exposed to climate change impacts and natural disasters, such as earthquakes and tsunamis (Tabucanon, 2013). Although the direct causal link between climate change and migration is still debated, many studies suggest that in several vulnerable countries, people have already migrated to safer places. Currently, climate-induced displacements mostly occur temporarily and internally within large islands. However, in the near future, it should be considered that cross-border migration will likely occur, especially among small islands (Tabucanon, 2013).

In Southeast Asia, rapid urbanization is already apparent. The urban population has rocketed from roughly 15 percent in 1950 to almost 42 percent in 2010. Although the driver of this internal migration is not merely environmental problems, the fact that the region is vulnerable to climate change impacts, that most countries in the region are developing countries which rely heavily on natural resources and have limited capacity and

infrastructure to adapt to climate change, the severe effects of these environmental problems and its possible relation to migration is concerning (Ewing, 2012).

ASEAN has prioritized disaster risk reduction and climate change response. Its member states have also agreed to the ASEAN Agreement on Disaster Management and Emergency Response, to which all 10 states agree to cooperate during disaster emergencies. However, neither ASEAN nor its member states have specific laws or agreements relating to climate-induced cross-border migration. The regional institutional frameworks on forced migration, such as the Asia Dialogue on Forced Migration, Abu Dhabi Dialogue, Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime and the Colombo Process are largely silent on climate-induced displacement (Tabucanon, 2013).

### 3 Non-legal Approaches to Forced Migration in Southeast Asia

The above discussion on the various examples of forced migration suggests the weakness of state-centric legal approaches in providing protection to forced migrants. As this chapter argues, various non-legal approaches, which generally refer to non-statist approaches, offer an alternative solution, however the approaches have lacked discussion. Based on this study, there are two main approaches that can be found across Southeast Asian countries: community-based protection and refugee-driven solutions.

#### Community-based protection

At both the international and regional level, legal and statist approaches are more commonly discussed and

undertaken, whether during particular refugee crises or on a regular basis. During the Indochinese refugee crisis, several studies discussed the failure of ASEAN and its member states to address the crisis. Davies (2006a), for instance, emphasizes the reluctance of Southeast Asian states to offer durable solutions to refugees and the hesitancy of the UNHCR to recognize Indochinese asylum seekers as “refugees”. What they offered were “temporary refugee-processing centers” where refugees waited for the UNHCR to process their asylum requests. The state-centric approaches undertaken were also apparent during the Meeting on the Displaced Persons and Refugee Situation in South East Asia held in December 1978, 1979 Indochinese conference, as well as the Comprehensive Plan of Action (CPA) agreed in 1980, where Southeast Asian states stressed the following solutions: provide temporary asylum, provide more resettlement places and persuade Vietnam to stop encouraging mass departures—all of which reinforced the role of the state as the key actor. Furthermore, Davies (2006a) also explains how resettlement became the only feasible option at that time, yet the resettlement places provided by destinations in the North were very limited.

Apart from ad hoc regulations that regulate forced migration management during particular events, Southeast Asian states generally perceive refugees as “illegal” migrants, therefore legitimizing security-centric policies. There are two main security-focused approaches, namely the militarization of border control and the detention policy. The militarization of border control is undertaken to prevent the refugee influx, not only in popular destination countries but also in transit countries, such as in the Southeast Asian region. Such cases occurred during the Rohingya crisis when ASEAN preferred to relegate the responsibility to the consultative mechanism

under the Bali Process—which has an “official” agenda to securitize human trafficking practices. A study undertaken by Cheung (2011, p. 65) indicates that the Bali Process’s direction lead to the criminalization of smugglers and traffickers—but did not protect refugees as “victims”, where procedures regarding border control, security, law enforcement and documentation fraud were prioritized.

Meanwhile, the refugees that entered the countries were “detained” under the detention policy. Through domestic policy, detention centers are commonly used to “detain” asylum seekers in Indonesia, Thailand and Malaysia. As the governments lack legal frameworks to manage refugees, they treat these people as “illegal immigrants” who cross their territories without “proper” legal papers. Subsequently, the authorities put these people in detention as if they were criminals while waiting for the UNHCR to determine their refugee status (Missbach, 2015, p. 75; Rajaram & Grundy-Warr, 2004) . This detention policy often results in the “in limbo” and uncertainty experienced by refugees as the refugee application are often processed over the course of an uncertain period (Missbach 2015, 48). According to Rajaram and Grundy-Warr (2004, 58), this situation is represented by “the growth of ‘temporary’ refugee camps along borders, detention facilities and regimes of temporary protection.”

Apart from these approaches, non-legal approaches undertaken by host communities are not absent. One example is community-based protection. There are various forms of protection offered. In Indonesia, the IOM, Jesuit Refugee Service (JRS), Church World Service (CWS) and Dompot Dhuafa have built more than 42 community dwellings across six provinces (IOM, 2014). While Southeast Asian countries still maintain conventional shelters and IDCs, community organizations offer protection in the form of supporting livelihoods, education

and healthcare services. In a workshop report published by the UNHCR, community-based protection is implemented through nine means: strengthening partnerships between community organizations, expanding protection space, reaching refugee communities, supporting refugee autonomy, addressing heightened vulnerability and expanding refugee resources, accessing national health care systems, accessing national education systems and supporting livelihoods (UNHCR, 2015). In places where refugees face hardships to access their rights, these forms of support by community organizations have been proven to assist refugees. In terms of education, for instance, refugee children in Malaysia cannot attend public school. Many community organizations such as the Tzu Chi Foundation in Malaysia have set up private schools that accept those children. Regarding employment, the UNHCR Philippines and Community and Family Services International (CFSI) assist refugees to access employment in the Freeport Area of Batan. Furthermore, other nongovernmental organizations (NGOs) also provide job placement services to help prepare refugees to compete with other job seekers in the Philippines.

These examples of community-based protection are likely to offer more humane and effective protection to forced migrants in Southeast Asia compared to the existing policies adopted by state actors. By strengthening the role of the Southeast Asian host community, refugees will have the opportunity to directly engage with their surroundings and the society in which they live. This sense of a “normal life” can help relieve traumatic displacement experiences and minimize human rights violations as evident in camps and IDCs. In a study conducted by the JRS in Bangkok, Thailand, for instance, the research team found that the first responders to distress and trauma encountered by refugee communities in Bangkok were not the UNHCR or

other state officials but neighbors, families and community leaders. Therefore, the JRS established a stress reduction agenda and psychosocial support in a community-based manner (UNHCR, 2015, pp. 13–14).

Southeast Asia has enormous sociocultural capital to support this community-based protection agenda. In the Indonesian context, for instance, local communities play a vital role in helping refugees. This role was apparent during the Rohingya refugee crisis. In 2015, Aceh fisherfolk rescued stranded Rohingya migrants that landed on the shores of Aceh, Indonesia. The assistance provided by Acehnese people at that time displayed a sense of humanity toward refugees, even after Indonesian authorities pushed back the first boat arrivals in the Andaman Sea. As one of the fishermen stated, “We helped out of solidarity [...] no matter who they are. The police did not like us helping but we could not avoid it,” (Lamb, 2015, para. 9). In the case of the Rohingya refugee crisis, religious ties between the Acehnese and Rohingya certainly played an important role, but so did other cultural features. The Goetanyoe Foundation, an Aceh-based organization, for instance, drew lessons from disaster management in Aceh during the 2004 tsunami tragedy to manage the refugee crisis in Indonesia. Moreover, Aceh’s particular experience with internal conflict between military and insurgent groups also provides “lessons” to the Acehnese in managing displacement and providing humanitarian relief for victims of conflict. This is similar to what McNevin and Missbach (2018, p. 307) describe as “the value of contingency”, which refers to how Acehnese fisherfolk deal with risky options and unpredictable situations. In this specific case, people understand the state of being “displaced” and consequently offer the assistance they would like to obtain if they were refugees. Other than local experience, the Acehnese response to the Rohingya refugee crisis is rooted in their

tradition of *peumulia jamee*<sup>1</sup> and traditional customary maritime law (McNevin & Missbach, 2018, p. 299).

This potential alternative solution offered by the community, however, is not without its limitations. While compassion by Southeast Asian communities has been demonstrated in recent years, particularly after the Rohingya refugee crisis, it was not similarly demonstrated for Indochinese and climate refugees. There are two factors that restrain communities to fully display sympathetic attitudes. First, there is deep-rooted racist behavior toward the out-group. During the settlement of Indochinese refugees on Galang Island, for instance, the prolonged anti-Chinese tension in Indonesian society became more intense during the massive influx of Vietnamese refugees to the island as most of them were ethnic Chinese (Nguyen, 1992, p. 29). Chinese-Indonesians have long been seen as a threat to Indonesia's economic and sociopolitical stability.

In the context of the Rohingya refugee crisis, the Rohingya and Bangladeshis were also differently treated. While the former were provided with a degree of refugee protection, the latter were presumed as "illegal migrants". Bangladeshi "migrants" who arrived in Indonesia—mixing up with the Rohingya—in early 2016 were seen as different types of migrants because society perceived them as job seekers who did not deserve protection. In fact, the factors driving migration often overlap between poverty, political instability and in the Bangladeshi context, environmental issues. To some extent, this can be portrayed as a problem of defining refugees as mentioned previously, which consequently posits "nonrefugee" people as the "other" who require different treatment. The fear of "aliens" who are simply different from the majority of the host community

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1 *Peumulia jamee* means "honoring your guests" in Acehese. It broadly refers to the tradition of accepting newcomers in great respect.

is the main challenge for the refugee protection regime, not only in Indonesia during that period, but also in other parts of the world. Another strong racist narrative was also seen from how the local community repeatedly mentioned the Rohingya as “Muslim brothers who need to be protected” (Bireuen, 2018). This example proved that the community’s receptive attitude toward the Rohingya was mainly encouraged by religious ties. The similar experience of fleeing oppression from non-Muslim people referred back to Acehneses’ own and Prophet Muhammad and his followers’ experiences as the Muhajirin (Zulkhairi, 2013).<sup>2</sup> This eventually stimulated the local community to act as the Anshar and help the Rohingya. The absence of similar fate held by the Bangladeshi “migrants” was therefore another factor of the different treatment between those groups.

The second restraint is related to the external factor, namely the role of state actors and the international refugee regime. As mentioned before, the blur in the definition of “refugee” that has been internalized to the host community by the dominant power of the UNHCR in some ways causes people to prioritize one specific type of refugee. Furthermore, the government also plays an important role through means of media and public statements. The sentiments toward out-groups, for instance, is often not ingrained in a community, but produced and reinforced by a government with a specific political motive. As an Indonesian human rights activist stressed, communities

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2 During the early period of Islam, Prophet Muhammad and his followers were oppressed by the people of Mecca who rejected his teachings. Thereby, they escaped as Muhajirin (refugees) and went to Medina, a neighbouring city, where they were warmly welcomed and helped (Anshar) by local people. This reflects the experience of the Rohingya who fled an oppressive regime in Myanmar and the Acehneses who experienced persecution during Aceh sectarian conflict (although not necessarily involving non-Muslim groups).

often demonstrate welcoming gestures toward refugees but government officials usually provoke and incite social tension by mentioning how refugees who do not work are given funds by the IOM (Amalia, 2016). Another instance can be seen when Indonesia was reluctant to offer protection to Tamil asylum seekers who fled Sri Lanka due to a prolonged conflict and social discrimination. When these people arrived by boats in the area where the Rohingya were rescued several months earlier, the local and national authorities initially prevented them from disembarking and repeatedly produced narratives such as “Indonesia is not their destination country” (Tuwo, 2016) or “Sri Lankan people are illegal immigrants who flee because of economic reasons” (Setyadi, 2016). Therefore, the “legitimized” actors were powerful in shifting public perception through reproducing a particular set of discursive ideas.

### Refugee-driven solutions

The second component of the alternative solution is refugee empowerment. In the existing refugee regime, empowering refugees and enhancing refugee-led solutions are acknowledged as an important humanitarian strategy to address refugee crises. This approach is in line with what the UNHCR and other concerned groups have advocated for. The point here is to adopt a protection approach that centers on refugees: treating them as capable human beings with agency, not as passive victims. This approach relies not only on the role of the local community to assist refugees but also on the refugee community themselves. In Southeast Asia, this approach is also what differentiates statist and non-statist approaches.

Across Southeast Asian countries, there are several examples where refugee empowerment initiatives take place. In Bangkok, Thailand, a community organization

Asylum Access developed community action plans (CAPs) in which refugees formulate and implement activities with the goal of improving their and members of their community's lives. Facilitated by Asylum Access's staff, CAPs taught refugees to express their own feelings, identify their own challenges and formulate their own solutions. In a CAP that focused on practical skills for refugees, one refugee group succeeded in identifying the type of business they wanted to establish. Business training was then provided by the International Labour Organization (ILO), which gave these people the required tools to realize their business projects (Asylum Access, 2018). Meanwhile, in Malaysia, epistemic communities are also involved in the refugee empowerment agenda. Monash University Malaysia, for example, developed various programs aiming to assist and empower refugees through capacity building. One program was Connecting and Equipping Refugees For Tertiary Education (CERTe), which gave 15 young refugees of different backgrounds the opportunity to learn about tertiary education. The participants learned about how to apply to higher education institutions, different academic disciplines and how to develop research skills required in universities (Monash University Malaysia, 2018). A similar project was run by the Rohingya Society of Malaysia in 2010 that aimed to eradicate illiteracy, empower women and help young refugees access higher education and professional employment. The project consisted of computer and literacy classes (Urban Refugees, 2019).

In terms of employment, although refugees cannot formally work in Southeast Asian countries, many of them are able to work in the informal sector and thus reduce dependence on external assistance. Several employment opportunities have been created by host communities to support refugees. The Picha Project is one example

of a Malaysia-based social enterprise that creates jobs for refugees, such as food delivery services and catering businesses. Refugee families who took part in the project stated that the businesses established by the project enabled them to earn a sufficient income for their monthly necessities (World Bank, 2018). Moreover, refugees' economic activities are believed to contribute to economic growth in their host countries. This kind of narrative contrasts with the state-centric perspective that perceives refugees as a financial burden. This narrative implies that when given opportunity and assistance, refugees can carve out their own protection space and find solutions to their hardships. Furthermore, by allowing refugees to exercise their agency, not only is their support system with other refugee communities strengthened but the interaction with the host society can be enhanced, thereby integration between both communities can be improved.

One supporting example is demonstrated by a study suggesting that by empowering refugees, refugees can carve out their own protection space and better integrate into a locality (Cheung, 2011). By examining experiences of Rohingya refugees in Malaysia and Bangladesh, the study revealed that economic and sociocultural components, such as access to sustainable livelihoods and nondiscriminatory interaction with host communities, contribute to strengthening refugees' self-reliance and rights realization despite the lack of a legal-political component. With these components, refugees' capacity to exert some basic rights—to education and employment—through informal mechanisms was heightened. Another example comes from a case in Indonesia. Lumenta, Ariefiansyah and Nurhadist (2017) found that refugee and local community engagement offers a space where refugees are able to exert their freedom of movement and expression. Through an anthropological approach, they

discuss how Oromo refugees from Ethiopia had been involved in a collaborative music project led by refugees with Indonesian students, which created a space that challenged local/refugee and citizen/migrant dichotomies. This finding supports the studies suggesting that refugee empowerment can help refugees adapt and integrate into society. Similarly, Sampson, Gifford and Taylor (2016) suggest that despite uncertain and insecure conditions refugees encounter during their “transit” period in Indonesia, they can pursue livelihoods as “normal” individuals and integrate with the host society.

Moreover, the solutions that are driven by refugees themselves open up the opportunity for these people to overcome their own hardships. As Lumenta, Ariefiansyah and Nurhadist’s (2017, p. 61) study reveals, by interacting with the host community, refugees successfully negotiate the representational categories and stereotypes they often encounter: “the process liberated them from the burden of having to constantly represent themselves as ‘self-reliant’, ‘good migrants’ or even ‘victims’”. Similarly, Franck (2019) found that refugees in Malaysian urban spaces could navigate the legal categories, confines and exclusions they had to deal with. The trend of urban settlement and the status of migrant il/legality has forced state authorities to establish an “urban borderscape”, whereby bordering practices manifested in identity controls have in many ways excluded refugees from fulfilling their basic rights, such as working or simply moving around the city. Interestingly, by living with the local community and having firsthand experience of surviving the borderscape, these refugees were able to take advantage of the complex architecture of the urban (social-political) landscape and develop spatial and physical strategies to respond to and negotiate with such mechanism of control, for instance by carefully deciding which routes to take and avoiding

frequent eye contact. Nevertheless, depicting refugees in a positive tone does not necessarily equal to downplaying the state of emergency experienced by these people, but rather implies that they have hope and control over their fate. By creating a good relationship between refugees and the host society, refugees gain the opportunity to live as humans deserving a certain degree of security, from both political and economic threats, thereby creating their own protection space.

To effectively implement this solution, however, local communities require material resources to sustain refugees' livelihoods. This is the loophole where the government and other stakeholders should play a role. Thus, the community along with the government is equally important in providing an alternative solution to refugee issues, not only through discursive ideas of what refugees and protection are, but also in optimizing material resources needed by communities in supporting refugees. Moreover, the government's role is also crucial to provide long-term protection. Despite its huge potential, community- and refugee-driven solutions cannot be sustained without government support. Although Southeast Asian countries have not yet created and implemented effective legal frameworks, many refugee rights are contingent on legal status. A child refugee's right to education, for instance, will not be fulfilled without a recognized identity that can be formally used to get into public school.

#### 4 ASEAN: Business as Usual or a Sign of Hope?

Given this chapter's discussion on various nonlegal approaches undertaken by nonstate actors to address

forced migration issues in Southeast Asia, the question about the role of ASEAN remains. Since the organization was founded in 1967, ASEAN has been seen as a highly bureaucratic and top-down body. Although its member states have agreed to realize an “ASEAN community”, it remains unclear whether civil society actors can actually influence policy formulation and implementation in ASEAN. Related to the issue of forced displacement as mentioned in the previous sections, ASEAN has been largely silent about the issue. Southeast Asia is highly vulnerable to cross-border migration, both voluntary and involuntary, yet significant attention is given to voluntary and skilled labor migration. Thus, in several refugee crises, ASEAN has relied on ad hoc mechanisms.

During the Indochinese refugee crisis, ASEAN was forced to find solutions and its member states were challenged to cooperate to solve the problem. The agreed Comprehensive Plan of Action (CPA) was brokered by ASEAN, the UNHCR and destination countries of the North in response to ASEAN member states’ concerns. When the agreement was concluded, all temporary refugee processing centers established in various Southeast Asian countries were closed and followed by a resettlement program to third destination countries and also the return of “migrants” who failed to fit the UNHCR standard of “refugee” (Petcharamesree, 2016). This mechanism clearly reflects the role of ASEAN as member states’ tools to achieve their political interests. This political nature of ASEAN did not completely change after the Indochinese war and Cold War ended. When the Rohingya refugee crisis occurred, ASEAN was also reluctant to agree on a particular action, especially because it was constrained by the membership of Myanmar as the issue was politically sensitive for the country. Consequently, the refugee flow was responded to individually by each country affected. Even from a

humanitarian basis, the AICHR failed to address human rights concerns because of the view of several country representatives who believed that the crisis should be solved at the national level (Petcharamesree, 2016). Moreover, although the commission welcomed insights and advice from NGOs, all meetings and discussions were conducted behind closed doors.

Although the responses to both refugee crises demonstrated the political nature of ASEAN, during the Indochinese refugee crisis ASEAN did agree on a particular action. During the Rohingya refugee crisis, however, there was no agreement or cooperation at the regional level. For Petcharamesree (2016), this difference in response was because ASEAN did not recognize the Rohingya refugee situation as a “crisis”, thus there was no perceived necessity to cooperate. ASEAN has multiple relevant institutions, such as the ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children (2004), ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), the AICHR and the ASEAN Human Rights Declaration (AHRD), but none were referred to during the crisis. ASEAN member states preferred to utilize the Bali Process instead. This Asia-Pacific focused initiative, however, was also state-centric and bureaucratic. Kneebone (2014) argues that the Bali Process shared many features with ASEAN, especially in terms of the general avoidance of human rights language when discussing refugee issues and hierarchical agenda setting. The Bali Process uses a “securitized” discourse of forced migration that primarily focuses on transnational crimes of people smuggling and human trafficking. Therefore, the discussion on the human rights and protection of asylum seekers and refugees was very limited

and restricted (Kneebone, 2014).

The ASEAN response regarding climate-induced displacements is even more limited. As mentioned before, neither ASEAN nor its member states have regional or national laws regarding cross-border migration due to environmental problems. Although ASEAN member states are also members of the United Nations and are bound by the task of “achieving international cooperation in solving international problems” and “promoting and encouraging respect for human rights” (Tabucanon, 2013), it remains unclear whether these obligations can be extended to include people outside the countries’ own populations. However, there are still signs of hope. ASEAN has several experiences on environmental issues, such as the ASEAN-brokered 2002 Agreement on Transboundary Haze that is considered a global role model in addressing transnational haze issues and the 2004 ASEAN Declaration Against Trafficking in Persons that explicitly addresses human trafficking. Given that environmental issues are less politically controversial than the Rohingya issue, if ASEAN member states are forced to discuss this matter, the two agreements can serve as a basis upon which ASEAN can develop mechanisms to address climate-induced displacement. Furthermore, member states such as Indonesia have stated that it will consider renting out some of its islands to host climate refugees (Tabucanon, 2013).

Repeating the main argument advanced in this chapter, although many scholars believe in the power of law enforcement to address forced displacement, a legal approach is by no means an effective or feasible solution for ASEAN or its member states. Further analyzing the aforementioned conditions, the problem with ASEAN’s approach to tackling refugee issues does not only rely on the lack of legal devices but also on the way by which the

term “refugee” is understood. If a legal approach is the answer, ASEAN already has a vast number of relevant legal institutions. Many put their hope in the ASEAN Community 2020 project, particularly on the socio-cultural pillar and the people-centered agenda, manifested in several summits and the declaration on human rights protection. However, the reluctance of ASEAN to take the Rohingya refugee issue into account was a clear example of the slow progress of the project. Although the project clearly states “all people” instead of “all citizens”—which also includes the stateless Rohingya—the strong sovereign character of ASEAN and its member states hinders the stateless from being treated as “people” in the ASEAN Community. Drawing on Arendt’s and Kant’s perspective, Nishikawa (2018, p. 11) emphasizes the paradox between national sovereignty and universal human rights existing within the state-centric ASEAN-led human rights regime. Thus, the problem is not only the lack of legal agreement and its enforcement. One cannot expect the body to protect a category of people that are not even recognized as a part of it.

Regarding the role of the AICHR, the business of ASEAN runs as usual. This is the specific body that bears the mandate of protecting human rights but the commission remains highly bureaucratic. All AICHR representatives have served as government officials while only some of them have experience in the academia or NGOs. The selection of the representatives in most countries also lacks democracy and transparency; meaning that they are more accountable to national governments than human rights principles (Piromya, 2019). During the 2015 Rohingya refugee crisis, they failed to agree on a decision while only Indonesian and Malaysian representatives dared to “shame” Myanmar. As Indonesia’s representative to the AICHR stressed, there had been a reluctance among other

member states' representatives to agree on what human rights they should protect and that the protection of human rights might lead to social instability (Wisnu, 2018). The failure of the AICHR to address refugee rights, besides the reluctance to recognize the stateless/refugees as "people" deserving protection, is also due to the state- and security-centric paradigm that puts refugees and human rights as a security issue. The mandate for promoting human rights is borne by the ASEAN political and security pillar instead of the socio-cultural pillar. Thus, it appears almost impossible to force states to take action without de- and reconstructing their conception of refugees and human rights.

Given the complexity of the problem discussed above, a first step to realize an alternative non-legal approach would be to optimize the power of civil society. Southeast Asian society has enormous sociocultural capital to advance refugee protection in the region by, foremost, treating them as human beings. Furthermore, by optimizing this capital to protect and empower refugees, the alternative solution to ending refugee hardship can be realized. However, civil society cannot act alone. As the previous discussion has stressed, the role of ASEAN and its member states is vital as community- and refugee-driven solutions can only provide temporary and "informal" protection for refugees. Thus, repeating the main argument stated earlier, the ineffective existing legal approach does not render refugee law unimportant or negligible. In fact, the alternative perspective and role of nontraditional actors, such as local society, must contribute toward improving the legal system in the long term.

To arrive at this, civil society can take advantage of its status as the representatives of the "ASEAN community" to challenge and reproduce a new discourse of refugee

protection; a discourse that identifies refugees as human beings deserving protection regardless of their race, gender, religion and political affiliation. As Nah (2016) finds, the Asia Pacific Refugee Rights Network (APRRN) as a network encompassing Southeast Asian NGOs advocating for refugee rights was successful in putting strong pressure on governments and building an effective communication strategy with the UNHCR. The challenges ahead will be to break the barrier between ASEAN officials and their “people”, as was apparent during policy formulation in the Bali Process (Kneebone, 2014) and the consultative meeting between civil society organizations and the AICHR (Piromya, 2019). However, as many successful transnational campaigns illustrate, starting small and local is key. A stronger and well-managed advocacy strategy by civil society actors could change public perceptions toward refugees and thus with stronger public support, the perception and attitudes of ASEAN officials might change as well.

## 5 Conclusion

This chapter has demonstrated that by exploring local context and experiences, it is possible for Southeast Asia to offer a better human rights space for refugees. Although most examples presented here are from the Indonesian context, the fact that other countries in the region have similar conditions and sociocultural richness renders the proposed solution applicable to the regional context. In lieu of a comprehensive, relevant and feasible legal framework outlining durable solutions for refugees at the regional and national level, Southeast Asian countries should explore their rich local cultures and values to contribute to a humane and intermediate solution for

refugees during their transit in the region. As discussed in the previous section, the reluctance of ASEAN and its member states to protect human and refugee rights is due to its failure to recognize forced migration as a defining issue for Southeast Asia and the entrenched assumption that human rights are imposed on Asian countries as a political tool of the North. A local-based solution, alternatively, has the potential to reveal that the idea of human rights is also rooted in local cultures and not contradictory to international norms.

This nontraditional and local-based approach that puts emphasis on the role of local community and refugees themselves has in various ways brought refugee protection practices in the Southeast Asian region to a higher standard. They have proven their ability to fill the gap created by traditional statist and security-centric approaches that have limited space for refugees to exercise their rights and agency. The key challenge ahead would be to empower local and refugee communities to advance the level of refugee protection and convert national and regional governments' security-centric lens when dealing with refugee issues. If successfully implemented, this approach can provide lessons in best practice as an initial step for the formulation of durable solutions in the future; solutions that dismiss the strong sovereign and toxic nationalist characters, either in ASEAN or its member states.

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## CHAPTER 6

# Algorithmic Governance and the Evolution of the ASEAN Human Rights Mechanism

NI KETUT DIVYA KARYZA PUTRI

### 1 Introduction

Established in 1967, the Association of Southeast Asian Nations (ASEAN) built the momentum for the region's development of human rights norms and institutions when the ratification of its Charter by all member states took place in 2008 (Wahyuningrum, 2014). Beginning with the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in October 2009, ASEAN continues to symbolize its leaders' commitment to uphold human rights by launching the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in April 2010. While it is apparent that the AICHR needs to step up its game in promoting and protecting human rights in ASEAN, reviewing the commission's work over the years remains important for a better future. The second consultation meeting regarding the review of the AICHR Terms of Reference (TOR), for instance, produced a good suggestion to interpret the TOR more creatively for future implementation (Wahyuningrum, 2014). Indeed, even though the AICHR is not mandated to address human rights issues in specific

countries and labeled a “toothless tiger” because its lack of law enforcement (Kelsall, 2009), the AICHR still has the capacity to explore different kinds of human rights promotion and protection scenarios, two of them being ensuring freedom of expression in cyberspace and, in a broader sense, promoting digital rights in ASEAN.

Many things have happened in the course of 10 years in ASEAN considering the rapidly changing digital media environment: After the 2014 coup d'état, the Thai government and military utilized digital technologies to identify the regime's traitors and suppress political opposition, creating what Pinkaew Laungamsari calls in her paper “cyber dystopia” as the Thai government continues to militarize cyberspace by combining mass surveillance and surveillance of the masses (Laungamsari, 2016). In 2017, Indonesia witnessed how racism and sectarianism played a significant role in social media and electoral politics in the 2017 Jakarta gubernatorial election, an event packed with negative information and false news disseminated through websites that deliberately published fabricated content and disinformation (Lim, 2017). In fact, in the same year, Indonesia and Vietnam were ranked 124th and 175th respectively in the World Press Freedom Index, emboldening the problem of fake news in ASEAN countries.

However, ASEAN comprises 10 countries with different domestic laws in respect of their different social, political and cultural values. When it comes to ensuring the freedom of expression in cyberspace and promoting digital rights in ASEAN, it is important to realize that the concept of digital rights is very vague: It can be debated using various perspectives, and there will always be disagreements about the meaning and interpretation of relevant rights, whether it belongs to the users, citizens or humans—and how they should be balanced with security

or economic efficiency, to name a few other concerns to take into account (Karppinen, 2017). Nevertheless, it is apparent that ASEAN leaders could agree on pushing ASEAN toward a secure, sustainable and transformative digitally enabled economy as stipulated by the ASEAN Information and Communication Technology (ICT) Masterplan 2020 (ASEAN, 2015). Indeed, ASEAN covers a region of 330 million internet users engaging in e-Commerce worth US\$50 billion in 2017 (Custer, 2018), serving the region with not only tremendous economic opportunities, but also challenges.

Responding to the opportunities and challenges the digital economy presents is a must, and the urgency is recognized by recent ASEAN strategy documents seeking to position ASEAN in a transition toward a digital economy. More importantly, being one of the three pillars of the ASEAN Community, the ASEAN Economic Community (AEC) Blueprint 2025 contains an element of e-commerce within which are harmonized consumer rights and protection laws. The ASEAN Digital Integration Framework, which aims to develop mechanisms to develop coordination to enhance enforcement of intellectual property rights in the digital environment, integrate e-commerce considerations into the ASEAN High-level Consumer Protection Principles and enhance consumer rights awareness is one among various other frameworks to prepare the region for the transition, like the Framework on Personal Data Protection and Framework on Digital Data Governance (ASEAN, 2017). Suffice to say, ASEAN leaders show awareness that in the digital age, companies are generating, storing and maintaining an overwhelming amount of big data to assess markets and human behavior (Jenkins, 2015), hence the formation of regulations to protect consumer rights and governing digital data. Now, what happens to the social struggles happening in

cyberspace?

The issues of the threat of restrictive laws, fake news, safety of journalists and harassment of women online in ASEAN were discussed during the AICHR High Level Dialogue on Managing Freedom of Expression in the Information Age in 2018 (UNESCO, 2018). Then-representative of Indonesia to the AICHR, Dr. Dinna Wisnu, stated that while focusing on finding ways and means to secure freedom of expression, ASEAN member states also need to realize that understanding and identifying potential shortcomings in how freedom of expression is perceived and managed is equally important. It is true that the AICHR faces apparent challenges in ensuring freedom of expression in cyberspace, as some media outlets are facing intimidation by the state and having their licenses revoked, and religious, ethnic and social minorities continue to be subjected to discrimination (Wahyuningrum, 2018). Despite these serious issues, 10 years after its establishment the commission remains paralyzed by the guidelines to be “nonconfrontational” and to refrain from interference in member states’ affairs, thereby raising the urgency to develop an evolutionary approach that could contribute to the development of human rights norms and standards in ASEAN (Wahyuningrum, 2018).

This evolutionary approach is stipulated within the AICHR’s TOR, and while there is no definition on it, the ASEAN 2009 declaration on the Intergovernmental Commission on Human Rights clarified that its expected outcomes are balancing the promotion and protection mandate of the AICHR, among other things (ASEAN High Level Panel, 2009). However, it is misleading to think of an evolutionary approach as a linear change toward a credible human rights system when it is supposed to be a dynamic effort, the outcomes of which could be progressive, regressive or something in between

(Wahyuningrum, 2018). It can be inferred that the AICHR's inactivity on human rights issues is hampered by its own limits and state controls. It is also apparent that the challenges faced by the AICHR are new, it involves a whole range of complexity, adding digital governance and big data into the mix: The rapidly changing digital media environment requires deeper understanding to identify the potential shortcomings in how the freedom of expression is perceived and managed in ASEAN, just as Dr. Wisnu pointed out. This new digital environment could be a challenge, but it could also be an opportunity to evolve ASEAN's human rights mechanism. Hence, this chapter will discuss why the AICHR should consider technological development in the evolution of its human rights mechanism.

## 2 ASEAN and Human Rights Problems in the New Digital Environment

ASEAN and digital transformation are inseparable. Forecast to have 483 million internet users by 2020, Thailand, Indonesia, Vietnam, the Philippines, Malaysia and Singapore's online retail market combined is projected to reach \$88 billion by 2025 (Hong Kong Trade Development Council, 2017). However, economic growth is not the only thing following digital transformation. The Internet of Things (IoT)— part of the transformation—is also an increasingly important tool through which human rights defenders and activists mobilize and advocate. Simultaneously, it provides people with access to infinite amounts of information. Given its versatility, the United Nations Human Rights Council (UNHRC) passed a resolution affirming that “the same rights people have offline must also be protected online,” (UNHRC, 2016).

This acknowledgment calls for further elaboration on the universal definition of human rights protection online and adoption of viable frameworks or policies to address the human rights violations online in ASEAN.

Human rights violations online in ASEAN as discussed during the AICHR High Level Dialogue on Managing Freedom of Expression in the Information Age in 2018 include the threat of restrictive laws, fake news, safety of journalists and harassment of women online (UNESCO, 2018). In Thailand, for instance, the Thai state and military initiated Cyber Scouts and Cyber Witch Hunts programs to curb political opposition to the authoritarian government after the 2014 coup d'état online (Laungamsari, 2016). Simultaneously, groups such as Social Sanction (SS) and Rubbish Collector Organization (RCO) utilize Facebook as a platform to spread hate speech and mobilize mass events supporting the authoritarian government. In 2016, the Thai UNHCR branch had to shut down its Facebook page as a result of relentless threats and internet attacks launched by the RCO after the international organization granted asylum for a government opposition activist (Schaffar, 2016). Furthermore, Thai's lese-majeste law bans Thai citizens from insulting the monarchy—a provision now hampering prodemocracy activists and putting at least 117 authoritarian government's critics in jail from 2014 to 2018 (Nitta and Ono, 2018). Nevertheless, the other nine ASEAN member states also struggle with laws restricting freedom of speech online.

In Cambodia, the lese-majeste provision was introduced in March 2018, followed by amendments to articles 34 and 42 of Cambodia's Constitution to require every Cambodian to act against political parties that do not place the nation's interests first (Human Rights Watch, 2019). These new provisions hamper Cambodia's media freedoms further, as the country already suffers from

attacks on human rights defenders and the government's political oppositions as well as increasing government surveillance and interventions in social media networks (Human Rights Watch, 2019). On the other hand, the Indonesian government struggles in defining "negative content" in its endeavor to curb terrorism, hate speech and pornography.

Lacking a clear definition of "negative content" and proper reporting mechanism, the Indonesian Electronic Information and Transactions Law (ITE Law) was deemed unaccountable and vague by the Institute for Policy Research and Advocacy (ELSAM) and other human rights groups (The Jakarta Post, 2019). Furthermore, the revision of the 2008 ITE Law passed in 2016 grants the government full authority to terminate access to prohibited content and requires electronic system organizers to delete electronic information deemed irrelevant by someone requesting deletion based on court ruling—a capacity feared to lead to abuse of power and restriction to information (Johnson, 2016). Similarly, the Myanmar government has increased the use of its vaguely worded laws to imprison individuals.

In 2018, 60 percent of defendants charged for criminal defamation under section 66(d) of the 2013's Telecommunications Act were journalists and activists, with most complainants being the Myanmar government, military or political party officials (Human Rights Watch, 2019). These journalists and activists' offenses include broadcasting a satirical play about armed conflict on Facebook and sharing an experience as a forced child soldier at the age of 14 in an interview. The same pattern is seen in the Philippines, where Duterte's "war on drugs" takes a toll on media freedom.

The Duterte administration's threat to shut down Rappler.com—an online news outlet critical of the government's "war on drugs"—in January 2018

marked the increase in attacks on media freedom in the Philippines (Human Rights Watch, 2019). Another concern for the country's struggle for freedom of speech was the formulation of the new draft regulations by the Philippine House of Representatives in May 2018. Designed to allow Congress to ban reporters who sully lawmakers' reputation, the new draft regulations are deemed ambiguous and stifling by various journalists and several Congress members who denounced it (Human Rights Watch, 2019). While the "war on drugs" stifles critics in the Philippines, citizen's struggle for freedom of speech online in Malaysia stemmed from the government's endeavor to curb fake news.

Introduced in March 2018, Malaysia's Anti-Fake News law was criticized for its failure in considering technological advancement and vagueness (Human Rights Watch, 2019). Despite its shortcomings, the Anti Fake News law remains a Malaysian government endeavor to curb fake news—a small part of disinformation and misinformation that affect how societies perceive the world, the existence of which are made even more significant with the increasing utilization of social media (Yatid, 2019). The authorities in ASEAN member states are trying to keep up with technological advancement and continue their struggle with internal politics and human rights dynamics simultaneously. Nevertheless, while Malaysia's newly elected government has considered repealing the law, Vietnam's problematic Cybersecurity Law went into effect in January 2019.

According to the data localization and representative office requirement of the law, service providers are obliged to take down offensive content within 24 hours of receiving the Ministry of Public Security or the Ministry of Information and Communication's request as well as disclose user data to the authorities (Thuy, 2018).

Indeed, it is important to note that ASEAN's plan to digitalize should be hand-in-hand with proper policies and planning to ensure the fulfillment of human rights.

### 3 New Media, Social Media Activism and the ASEAN Struggle for Freedom of Expression Online: The Cases of Indonesia, Myanmar and Thailand

It is apparent that the discussion on the new media, interaction between technology and social, political and cultural structures and relationships, and the digital dimensions of political processes in ASEAN are a starting point to evolve ASEAN's human rights mechanism. This is because it can be seen that the phenomenon sparks various responses in ASEAN member states social and political dynamics, especially social media activism. In Indonesia, for instance, the belief in the internet as the deliverer of a better society put forth by the country's internet development actors, activists and users is believed to shape how technology, including social media, is used in Indonesia's domestic politics. While this stems from the belief that the source of Indonesia's successful resistance against Suharto was political mailing lists, the linkages between the internet, other media and offline social networks made radical information spread beyond the digital elites and reach society at large have to be taken into account to understand the problem ASEAN faces when it comes to ensuring freedom of expression in cyberspace (Lim, 2013). Thus, the term new media is fitting to explain the complexity of this phenomenon.

In a 2016 paper titled *New Media in Southeast Asia: Concepts and Research Implications* (2016), Dayana

Lengauer gathered various concepts revealing the depth and earnest implications of digital media in everyday and institutional life, giving insights into the dimensions of state-citizen relations that are often veiled. Various ethnographic studies have discovered the unusual ways in which digital technologies are becoming a part of daily dynamics of social, political and cultural life, even though it is important to note that this phenomenon largely depends on regional situations, infrastructure, offline relationships and other locality factors (Lengauer, 2016). Indeed, the term new media itself was introduced by Ilana Gershon (2012) as she argued that the definition of new in this sense is the people's perceptions and experiences with social media like Facebook and Instagram, rather than the technologies themselves. Thus, exploring the way in which different actors set their parameters for participation in cyberspace and seizing digital media for its socio-political and cultural agenda without disregarding political centralization, bureaucratization, urbanization and regional uniqueness is important to understand how digital media feeds into, reflects and shapes "symbolic struggles over the perception of the social world," (Bourdieu, 1989)—something that can be done by allowing the emergence of new types of exchange "across the gap between the virtual and the actual," (Boellstorff, 2012).

ASEAN member states like Singapore and the capital cities of Malaysia, Indonesia and Thailand are shaped and continuously modified by the scientific and technical novelty. Despite startling technological developments, digital divides continue to exist, often pointing to the "more fine-grained issues of social and economic status and access," (Tacchi, 2012). Development models that often center on the arguably interactive, participatory and democratic perspectives Web 2.0 technologies open

(Castells, 2009) overlook the more “informal ways in which the consumers, service providers and platforms come to subvert, resist and reconfigure mobile media infrastructures,” (Horst, 2013). As scholars like Merlyna Lim and Jo Tacchi have argued, the availability of new media does not prescribe the development of a participatory culture. Furthermore, numerous cases in Indonesia show that social activism does not always yield the support of the masses, nor does it translate into a vast offline movement (Lengauer, 2016). These scholars are basically doing a more “careful analysis of political processes and their digital dimensions,” (Postill, 2012) because digital media cultures evolve within a complex society and more encompassing systems of power relations. Hence, the process-related approach Postill introduced directs attention to the gaps between cyber and physical space where the emergence of the new forms of social interaction take form, instead of referring to cyber and physical space as two distinct and sovereign arenas of action (Lim, 2015).

Indeed, the significance of social media lies in the dynamics that unfolded as millions of people get in touch with technology and utilize it to collaborate, share information and socialize (Ellison & Boyd, 2013). The social impacts of the internet and social media are best understood as the “result of the organic interaction between technology and social, political, and cultural structures and relationships,” (Lim, 2013). Both Pinkaew Laungamsari and Wolfram Schaffar follow Evgeny Morozov’s (2012) critique on the idea that the new media is advancing democracy and freedom by showing how the Thai state and military utilize digital technology to militarized cyberspace in the aftermath of the 2014 coup d’état: Initiated by the government, programs such as Cyber Scouts and Cyber Witch Hunts are the harbingers of an emergent right-wing movement carried

by individuals and ultra-royalist groups dedicated to work as a countermovement against political oppositions and traitors of the regime (Laungamsari, 2016). Another example showing how features new media technologies are misused in Thailand is shown by Schaffar through the case of Social Sanction (SS) and Rubbish Collector Organization (RCO), both Facebook groups serving as a hate speech and mobilization tool for state-sponsored mass events by the authoritarian regime that came into power with the coup d'état. In 2016, the RCO managed to make the Thai United Nations High Commissioner of Human Rights (UNHCR) branch shut down its Facebook page after the group openly threatened and relentlessly launched internet attacks on the organization for granting asylum to a government opposition activist (Schaffar, 2016).

In Indonesia, on the other hand, social media's potential for politics has enthused optimistic pronouncements on digital empowerment and the renewal of public spheres. As Merlyna Lim (2017) argues, this overoptimistic view shows how social media platforms intensify civic exchanges among citizens, boost citizen engagement, alter political engagement, and enable citizen journalism that promotes transparency. Nevertheless, it is important to note that studies have also shown that the internet has been used to put forth not only democratic opinions, but also undemocratic ones (Lengauer, 2016). Social media's potential for grassroots activism in Indonesia was first heralded through Prita Mulyasari's case, where the mother of two was prosecuted for defamation in 2008 when she sent an e-mail to friends and relatives complaining about a certain private international hospital (Lim, 2017). This case became popular online, birthing the "Coin for Prita" Facebook page that managed to gather donations to pay her court fine—she was

eventually found not guilty. The draconian Cyber Law, as Toriq (2015) calls it—along with the defamation law used against her, though, remains to be problematic on its own. After being amended in 2016, activists from the Legal Aid Institute for the Press and the Institute of Policy Research and Advocacy noticed that the newly passed amendment granted the government capacity to terminate access to contents that were deemed inappropriate and prohibited it from the internet, which could possibly lead to power abuse (Johnson, 2016).

Nevertheless, a successful case of social media activism like Prita's case is largely an anomaly. While activists and marginalized communities use the media for many causes, social media provides a friendly environment for activism that revolves around simplified narratives targeting urban middle class consumers—the landscape is generally unfavorable for complex issues like injustice and inequalities, or for the poor (Lim, 2017), as causes of the poor are largely framed by middle class advocates, as Lim put it, and not by the poor themselves. Furthermore, it is important to note that social media platforms are dependent upon a larger media system, making social media activism dependent on “the incredible shrinking sound bite” culture of the mainstream media (Lim, 2017). Thus, bearing in mind that social media usage is embedded in everyday social and cultural practices of the urban middle class that revolves around consumption, the understanding of social media's impact on Indonesia's politics should be within the context of personalized forms of the urban middle class political participation's rise within which communication practices is inseparable from consumptive orientations (Lim, 2017). Indeed, in Indonesia, Lim argues that individuals are mobilized by commercial frameworks with affect and emotion as the main currencies.

It is important to note that communication technologies are not automatically political, but the use of digital media can undoubtedly be meaningful politically, like what had been shown by Prita's case. Thailand has shown the same positive impact of social media in its political dynamics: The political expressions and social media rhetoric of Thai women during the 2013-2014 Bangkok political protests analyzed by Olivia Guntarik and Verity Trott demonstrate how the rise of digital media has altered the trajectories of political experiences and formations of political participation in Thailand, as they argue that social and digital media have enabled Thai women to speak out their opinions despite the country's conflict laden environment. Furthermore, all previous discussions confirmed the significance of online communication platforms when offline forms of activism or other forms of social and political participation are restricted or limited. However, further inquiry into the wider effects and implications these technologies and their appropriation bring along for different actors and their "revolutionary" projects have to be done to pinpoint the problem of freedom of expression in ASEAN because of its relevance to the proliferation of hate speech and fake news in the region.

Since the digital media has become intrinsic to both the institutions that structure and the practices that organize social and political life, the rise of online activism is indicative for ongoing transformations within political landscapes and state-citizen relationships (Lengauer, 2016). Hence, Guntarik and Trott plead for reconsideration of what it means to be politically engaged in a digital age, adhering to changing forms of citizenship that develop along autonomous forms expression and loose networks of social interaction and are accompanied by a broader mistrust toward politicians (Lengauer, 2016).

Further inquiry on the implications of technologies in creating alternative spaces for political participation and civic engagement shows that there is rise of hate speech on social media as they become sites for the open expression of discontent, a trend in the context of Southeast Asian political dynamics (Lengauer, 2016).

In Myanmar, Rainer Eizenberger discusses popular interpretations of the internet and local use of social media. According to his interview with the cofounders of the Myanmar ICT for Development Organization (MIDO), seeing the fact that digital technologies and new media only recently hit Myanmar's market, Facebook is largely perceived as a legitimate news channel. While the internet is the "central conduit and node" (Coleman, 2010) for the work of both freelance journalists and news agencies, the difference between quality news and light package of information may not be clear under some circumstances (Lim, 2013). Indeed, as had been mentioned before, the narrative of activism always competes with entertainment content tailored for urban middle-class consumers. Furthermore, as Lim (2017) argues, it is important to note that a high proportion of users access social media from mobile devices are tailored for the quick bite experience.

Social media activism marks a period of innovation and experimentation in the use of new media technologies and participatory culture. Online expression and popular culture, combined with socialization, create multiple layers where millions of Indonesians come together. On Facebook, Twitter, and the like, citizens meet, organize, collaborate and act—however, these platforms, as Lim argues, do not facilitate deliberative discourses on complex issues, mainly because the features of social media are first and foremost, social. Hence, as it should be, utilization of social media by urban middle classes revolve around fun, self-expression and social gain—it facilitates and amplifies

a culture that helps establish a foundation, a training ground, and a learning space for individuals to express their opinions, exercise their rights and to collaborate with others. Understanding the nature and limitations of social media activism and its conditions for success, activists may utilize, employ and transform it into meaningful civic engagement and political participation (Lim, 2013). This brings about the necessity to analyze how this can be achieved and what kind of concept should be utilized to show the way in which news of social and political significance is produced, disseminated and consumed within social media platforms.

## 4 Algorithmic Regulation

Algorithmic regulation is essentially decision-making systems that regulate a domain of activity to manage risks or alter behavior by doing continuous computational generation of knowledge (Yeung, 2018). Like so, the systems continuously collect real-time data emitted from numerous dynamic components within a regulated environment. The collected data is then used to identify, as well as automatically refine or prompt refinement of the system's operations when necessary—in order to achieve a prespecified goal (Yeung, 2018). Yeung explained that there are two types of decision-making systems: reactive and preemptive. Yeung also introduced a taxonomy identifying eight different forms of algorithmic regulation based on their configuration at each of the three stages of the cybernetic process that takes place at the level of standard setting, information gathering and monitoring, and at the level of sanction and behavioral change (Yeung, 2018).

On the two types of decision-making systems, the

first one is reactive systems, which trigger an automated response based on algorithmic analysis of historic data. Preemptive systems, on the other hand, act preemptively based on the algorithmic assessment of historic data in order to infer predictions about future behavior (Yeung, 2018). These two types are distinctive from each other based on their underlying logic drawn from the various standards of regulatory governance's literature. The logic behind reactive algorithmic systems, for instance, can be examined by drawing on insights from "tools of government" literature that can be found within public administration, which are outcome-based regulation and performance-management systems (Yeung, 2018). Conversely, preemptive algorithmic systems are understood as an arrangement of risk-based regulation, as an arrangement of actuarial justice, and as an arrangement of systematic surveillance-driven "social sorting" (Yeung, 2018).

Focusing on the preemptive algorithmic systems and the three types of arrangements underneath the umbrella. As an arrangement of risk-based regulation, it is utilized to monitor the performance of regulated entities to identify those considered "high risk" and thus prioritized for attention (Yeung, 2018). As an arrangement of actuarial justice, algorithmic regulation is oriented towards intervention seeking to shape the future by preventing unwanted activities, accentuating the power of risk profiling process that is greatly enhanced by the utilization of Big Data analytics (Yeung, 2018). Last, as an arrangement of systematic surveillance-driven social sorting, algorithmic regulation utilizes data mining techniques to segment populations into different user groups and targeting them accordingly. Through this process, objects of interest can be profiled.

## 5 Governance by Algorithms and Digital ASEAN Initiative

The role of algorithms in development of the Internet of Things (IoT) lies in mining, sorting and configuring large sets of data comprised of potentially useful information into useful packages (Danaher, et al., 2017). Indeed, algorithms are problem solving mechanisms—it includes Big Data and the algorithmic treatment of these data (Castro, 2018). Seeing that the new media phenomenon ignited various social and political issues in ASEAN, focusing on internet-based services built on algorithmic selection will bring a new light on how, unbeknownst to policymakers, governance by algorithm is taking place and why an adequate democratic legitimation of this form of governance by algorithms is necessary, strengthening the argument that mainstreaming algorithmic research to accumulate more data to explain the features and risks algorithms present in all ASEAN member states is important for the evolution of an ASEAN human rights mechanism.

Just and Latzer (2017) put their attention specifically on internet-based services that build on algorithmic selection, which is defined by the automated assignment of relevance to specifically selected pieces of information. Just and Latzer (2017) provided a basis for the discussion of the governing role of algorithms in information societies, characterized by a growing flood of big digital data creating a rise in demand for automated algorithmic selection to handle and make sense of massively collected data, by showing the categorization of internet applications build on algorithmic selection in accordance to their central societal function ranging from search (e.g. Google, Shutterstock, Info.com, Ask.com), surveillance (e.g. Sonar,

Webwatcher), and forecasting (e.g. PredPol) to filtering (e.g. Norton), content production (e.g. Google AdSense, Yahoo!) and recommendations (e.g. Spotify, Netflix) (Latzer, et al., 2014). The functioning of these algorithmic selection applications can be best described and explained with a basic input-throughput-output model: Starting from a user request and available user characteristics, statistical operations to select elements from a basic data set are applied, and relevance is assigned. Algorithmic selection on the internet is, in accordance to this process, defined as a process that assigns relevance to information elements of data set by an automated, statistical assessment of data signals that are decentralized generated (Just & Latzer, 2017).

The role of algorithms in managing contemporary society, Castro (2018) argues, is heavily associated with neoliberalism. Castro argues that Big Data denotes the injunction of “measurability that affects all walks of life and is beholden to competition, [with] the latter looms as an intrinsic value to neoliberalism, dissociating itself from cooperation through the division of labor, established as the standard of economic organization by Adam Smith (1981) and social structure by Durkheim (1893).” Further arguing that algorithmic analytics are projecting a market framework into the social sphere and amounts to a kind of risk management, Castro contributes to this writing by showing that ASEAN’s initiatives in digital transformation to enhance its digital economic prowess makes mainstreaming algorithmic research to strengthen its human rights mechanism even more crucial.

The Digital ASEAN initiative is led by a coalition of leading tech companies, including Cisco, Google, Grab, Lazada, Microsoft, Sea Group and Tokopedia, according to the Center for Finance, Technology and Entrepreneurship. Indeed, the Digital ASEAN initiative was announced

at the World Economic Forum in 2018, where ASEAN leaders pledged to train 20 million people in Southeast Asian Small and Medium Enterprises (SMEs) by 2020 and commitments from the aforementioned companies to hire and train 200,000 digital workers in ASEAN (Centre for Finance, Technology and Entrepreneurship, 2019). Member countries' determination to follow up this pledge and further the region's digital transformation can also be seen through the integration of the top-down governmental plan in Singapore's regulatory bodies, called Smart Nation, that is dedicated to transition Singapore into a digital innovation hub (Centre for Finance, Technology and Entrepreneurship, 2019). Other ASEAN countries have followed suit: Industry4WRD—an initiative which aim is to speed up digitization of local manufacturing companies to improve efficiency and productivity—was recently launched in Malaysia. The Philippines, on the other hand, promotes digitization by launching the Inclusive Industrial Strategy (i3s) initiative focused on revamping the country's industrial, logistics and commerce sector through the introduction of Big Data and analytics, while Thailand has Thailand 4.0 and Indonesia has Indonesia 4.0.

Discussion on the ASEAN human rights mechanism is therefore getting more and more complicated—in the wake of the proliferation of governance by algorithm, the algorithmic predictions of user preferences deployed by social media platforms guide not only what advertisements individuals might see, but they also personalize search results and dictate the way in which social media feeds, including newsfeeds, are arranged. A Council of Europe (2018) study, for instance, considers the centrality for many experiences of the Internet as a quasi-public sphere (Latzer, 2013) and the ability to massively amplify certain voices (Latzer, 2013) of big platforms like Google and Facebook.

On the other hand, the personalization of information that users receive based on their predicted preferences and interests can create what is called “filter bubbles”, which could compromise the right to information comprised within freedom of expression. While filter bubbles and echo chambers are concepts that are plausible and widely discussed, it is important to note that empirical evidence for their existence in ASEAN is intertwined. Europe is facing the same challenge in this matter.

Nevertheless, the point remains that in the wake of the Digital ASEAN initiative, the degree to which the digital media and device networks can be utilized as tools of social control continues to be a concern (Shorey & Howard, 2016). From the discussion of the new media phenomenon in ASEAN countries and the Digital ASEAN Initiative, it can be inferred that algorithms do have a governing role. Governance can generally be understood as institutional steering, which is further elaborated by Latzer (2014) as the horizontal and vertical extension of the traditional government. Horizontally, this role of governance requires the role of actively governing technology to be adequately considered—vertically, it suggests focusing on multilevel governance including global aspects and technological governance strategies—hence the application co-evolutionary and institutional perspective on governance by algorithm (Just & Latzer, 2017). In the contemporary world, technology, particularly software, has been playing a growing role in the media sector. Related to this is the emerging awareness that technology can have impacts and can be perceived as an actor or agency or as an institution that could affect individual or collective behavior and eventually social order. This situation calls for and leads to an intensified discussion about the role and characteristics of different technologies (Just & Latzer, 2017).

In line with the growing awareness of algorithms’

significance in the evolution of communication systems, technological issues are increasingly seen and treated as policy issues, also in the case of algorithms, directing attention away from a merely functional or instrumental understanding of technology to an understanding that technology (software) is design, even a reality construction with the ability to evoke a specific behavior, to shape and reshape meaning and activities (Latzer, 2013). If internet governance is defined as how a multitude of actors and their governance mechanisms or instruments shape the evolution and the utilization of the internet, then (software) technology needs special attention – both as a governance mechanism or instrument and as an actor (Just & Latzer, 2017).

The assessment of technology's role as an instrument of governance and actor in general, and of algorithmic selection on the internet specifically, depends on the choice of analytical lenses. The long debate on the rights approach is characterized by an antagonism between technical and social determinism. In most cases, also in communications, technology is, in the contemporary world, understood as being shaped primarily by social forces (Just & Latzer, 2017)—a perspective believed to systematically underestimate technology's role. The research is challenged with the situation where theories, classifications and research findings have been elaborated on the basis of a techno-economic reality that no longer exists, based on a pre-Internet reality that no longer reflects media convergence and the evolution of quaternary media, represented by algorithmic selection applications. An innovation-coevolution-complexity approach introduced by Latzer (2013) allows the appropriate integration of the role of technology and technological change taking place in the contemporary world, seeing the fact that innovations such as new algorithms are the center of

change. It is also important to note that the advantage of innovation approaches in technology studies lie in their finding that technology is not just formed by society, but that it can also be active as a structure, institution and even actor (Latzer, 2013).

Combined with evolution theories, innovation theories are moved towards an evolutionary economics of innovation (Just & Latzer, 2017). This perspective posits that technological innovation processes are understood and assessed as evolutionary processes (Just & Latzer, 2017). The term “complexity” comes from the fact that algorithms have features like elements’ interdependencies, nonlinear developments, emergence, and feedback loops characterize complex systems. Furthermore, they are both systems where big networks of interdependent components without central steering and with only simple rules on the individual level develop sophisticated collective behavior characterized by highly developed information processing and a capability to adapt through trial and error learning, which are both characteristics of evolution (Just & Latzer, 2017). These complexity characteristics, including the resulting low predictability and controllability in policymaking, clarify the evolution of the internet in general and the effects of algorithms on, specifically, the internet (Latzer, 2013).

## 6 Digital Revolution and the Evolution of the ASEAN Human Rights Mechanism

The Digital ASEAN Initiative invites more people to be included in the digitization of the region—technology is widely used in a lot of aspects, and before no time, innovations in networked digital communication technologies and the rise of Big Data, omnipresent

computing, and cloud storage systems, it is getting more and more important to ensure the legitimacy and accountability of these technologies, or software—which algorithms are a part of. Social media activism marks a period of innovation and experimentation in the utilization of the new media technologies and participatory culture. Online expression and popular culture, combined with socialization, create multiple layers where millions of Indonesians come together. On Facebook, Twitter, and the like, citizens meet, organize, collaborate and act—however, these platforms do not facilitate deliberative discourses on complex issues, mainly because the features of social media is first and foremost, social. Still, it has the potential to be a platform of meaningful civic engagement and political participation. Acknowledging the fact that activities in general and media consumption are increasingly shaped by automated algorithmic selection is the first step to make sure its legitimacy and regulate it.

Amid the growing use of technology in ASEAN, focusing on internet-based services that build on algorithmic selection, or the automated assignment of relevance to selected pieces of information, Just and Latzer provided an empirically based, functional typology of the rapidly growing number of services that build on automated algorithmic selection of the internet that demonstrate the broad scope of algorithmic selection applications in information societies with algorithmized societal functions ranging from search and recommendations to forecasts and content production (Just & Latzer, 2017). Algorithmic selection applications are a prime example of the growing importance of software, as well as an example of the governing role of software. As an institution, software is affecting societies similarly to laws, contracts, and values that are imprinted in algorithms. A basic governance model technological and societal change

shows the co- evolutionary interplay and highlights the role of technology simultaneously designing and being designed. Algorithms are active in governance tools, as well as self-learning and relatively autonomous actors in increasingly complex ecosystems, characterized by nonlinear developments, emergence, and feedback loops. The consequences of growing complexity are declining predictably and controllability, as well as increasingly unintended consequences of private and public attempts to govern via algorithms (Just & Latzer, 2017).

Based on empirical-analytical findings, it is argued that algorithmic selection on the internet has become a growing source of and factor in social order, in a shared social reality in societies, which is increasingly what we think about but also how we think about it and consequently how we act, thereby co-shaping the construction of individuals' realities, structurally similar but essentially different to mass media (Just & Latzer, 2017). Algorithmic reality construction has various peculiarities, and it differs from reality construction by the traditional mass media and consequently the social order in contemporary information societies. Generally, these differences lie first in the growing personalization of constructed realities and the subsequent individualization effects. Second, there are major differences in the constellation of actors, a consistent part of the internet's ecosystem (Just & Latzer, 2017).

Personalization as a formative feature of algorithmic reality construction happens based on user characteristics, behavior, and location. It furthers individualization in societies, both in the form of dangerous and endangered individuals: dangerous in the sense of fragmentation, fewer unplanned encounters and less shared experience, and decreasing social cohesion—and endangered, in a sense of more controlled individuals, with less privacy and freedom. Nonetheless, technology not only causes these

problems but at the same time offers solutions by the way it is designed (Just & Latzer, 2017). Essentially, the special constellation of actors in algorithmic reality construction is marked by the dominance of private governance by global companies, increasing platformization, and algorithms as actors and policymakers. The prevalence of private algorithmic governance based on proprietary Big Data tends to strengthen selection criteria oriented on special interests concerned with profit maximization, thus weakening public interest goals and social responsibility in the construction of reality and eventually consolidating and creating new social inequalities (Just & Latzer, 2017). Algorithms as intermediaries push the platformization of markets and modify power structures, leading the mass media to lose ground in the construction of realities. Furthermore, the increasing role of algorithms as actors that are relatively autonomous with delegated (moral) agency, driven by rising machine intelligence, raises agency and accountability challenges for complex ecosystems that produce outcomes that are less controllable and predictable when compared to mass media's reality construction (Just & Latzer, 2017).

Altogether, this comparative exploration of governance by algorithms demonstrates how and in which direction the increasing individualization, commercialization, inequalities, and deterritorialization and decreasing transparency, controllability, and predictability that algorithmic selection in the internet tends to shape individuals' realities and consequently, social order. From a public-policy perspective, formative features of algorithmic reality construction highlight several risks—making adequate democratic legitimation of this form of governance by algorithms to be called for. All in all, the article suggests that the overview of features and risks identified can form the basis for further

investigation in this direction.

The importance of why a human rights mechanism is needed in the fulfillment, protection and respect of human rights is to ensure that through independent institutions the principles of human rights can still be well implemented even in a country led by an authoritarian regime. This mechanism is also carried out when the process of establishing international human rights standards reaches its peak with the adoption of a number of international instruments, the United Nations (UN) begins to move the next stage of implementation through reporting, monitoring and enforcing the norms stated in these instruments. This is done openly by the appointment of a Special Rapporteurs team filled by independent experts appointed by the United Nations, whose main task is to look for facts that occur in the country relating to human rights violations and report them back to the UN (Subedi, 2011).

The human rights mechanism at the international level has important functions to monitor the implementation of human rights values by states who are bound into international agreements. Such actions will be very influential when a country is still controlled by an authoritarian government where individual complaints about the fulfillment of human rights by the state are taboo. However, the shortcomings of this mechanism lie in the fact that its implementation requires the approval of the parties, especially the state. Then, the recommendations made by the treaty bodies have a non-binding nature because the implementation remains dependent on the goodwill of the state to meet the recommendations of the committee (Nurhidayatulloh & Febrian, 2019).

Regional human rights protection mechanisms constitute the main pillars of the international system for the promotion and protection of human rights. In the last

decade, several nonlegally binding declarations on human rights have been adopted, such as the Declaration on the Elimination of Violence against Women in the ASEAN Region, the Declaration against Trafficking in Persons Particularly Women and Children, and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

The quest for the AICHR is to respond to the need for checks and balances in the exercise of power, and the need to build an effective and accessible system for the promotion and protection of human rights from the national to the regional, complemented by the multilateral (Muntarbhorn, 2012), with the simple philosophy behind this approach being that of “human rights are and should be the business of everyone,” (Muntarbhorn, 2012). The expectations faced by ASEAN are thus high, especially because of the Charter and the birth of the various bodies mentioned. The challenge now is to progress beyond the legitimization of human rights through those entry points – to the actualization of human rights in terms of genuine protection and implementation of human rights. One of the AICHR’s shortcomings is that it has no authority to issue binding decisions, consider cases, or conduct investigative visits. These missing functions and the lack of binding requirements for independence and expertise of the AICHR members lead to criticism, with the most criticized provision being “decision by consensus” only, which implies that each state might reject any criticism of its human rights records by veto (Raventos, et al., 2010).

In accordance to its mandate and functions, being proactive is encouraged in Article 5— this includes an invitation to promote the implementation of international instruments on behalf of women and children, help the UN’s Universal Periodic Review and helping report preparation for human rights treaties, encourage data

collection, capacity building and review of national laws and practices, promote actions for the prevention and elimination of all forms of the violations against the rights of women and children—including victims’ protection and support for women and children’s participation (ASEAN Secretariat, 2010).

## 7 Results

Although the important argument of this chapter will be that technology matters to human rights promotion and protection in ASEAN, it is important to understand why technology matters for ASEAN. Wiebe E. Bijker’s explanation on why technology matters to politics, and vice versa, is observable in ASEAN’s case. First, the reason lies in the relations between technology and modernization (Jasanoff, 2006). Modernization theorists such as Emile Durkheim, Karl Marx, and Max Weber began with the Industrial Revolution and how it transformed societies and politics in Western Europe. Subsequently, there is a link between modernization and development. Graham (2001) observes that the technological revolution produced a major realignment in politics and economics as it is linked to information technology, the growth of knowledge-based industries, and the globalization of economic processes (Jasanoff, 2006). In this general conception of modernization, the relation between technology and democratization is also relevant for ASEAN, considering the region’s demographic shift to a younger population, rising middle class, and rapid implementation of technology (ASEAN, 2012). Going back to the emergence of knowledge-based industries. These industries create “knowledge societies” where democratic institutions are favored because these

societies are comprised of well-educated and innovative workers who tend to apply this point of view to politics, making them more active and demanding (Inglehart, 2001). In Indonesia's case, however, increasing citizens' participation in politics could be seen from Merlyna Lim's (2017) analysis on the 2017 Jakarta gubernatorial campaign. Outburst of social media utilization was becoming an effective tool for electoral politics as it eases information dissemination to influence voters and facilitates freedom of expression, transforming the creation, dissemination, and distribution of information. The positive relationship between technology and democratization can also be observed in the increasing networks of activists focusing on issues of pluralism, equality, and justice. However, Lim (2017) noted that "freedom to hate"—a condition where social media acts as a platform for citizens to voice their negative, divisive comments—simultaneously emerge. This poses another challenge for policymakers. Nevertheless, in this case, technology, specifically social media, matters to Indonesia because it is shaping the modern state as well as its democratic and political institutions.

Second, technology matters to ASEAN because it sets the conditions for political discussion and development—it helps shape ASEAN government's aims and means, and simultaneously becomes an object of politics and technology policy (Jasanoff, 2006). In ASEAN's case, the standard image of technology is the dominant view widely held by politicians. In the political thought domain, this "standard image" leads to technocratic proposals where technology is seen as an end to itself. This implies a technological deterministic view of technology and society, which Bijker (2006) posits to be comprised of two elements: First, technology develops autonomously and is independent of external influences. Second, technology shapes society through its economic and social impact. Even

though technological determinism is criticized because it assumes that technology is immune from political debate or policymaking, ASEAN governments arguably think that politics can only anticipate technological developments and effects (Winner, 1977). Applied to, for example, the rapid penetration of international satellite television in Malaysia in 1992. Malaysian Prime Minister Mahathir Mohamad said that, “the people must equip themselves with new technologies to face an ever-competitive world (Atkins, 2002).” The Prime Minister’s speech implies that the complex forces shaping the use of satellite technology and the programming to be relayed on it were dwarfed by the mere potential of the satellite as a medium. This understanding encapsulates the implementation of ASEAN’s Digital Transformation initiative with economic transformation as its main goal.

The establishment of the AICHR in 2009 marks the institutionalization of human rights promotion and protection in ASEAN. Adjacent to the AICHR’s orchestration is the emergence of ASEAN governments’ initiative toward digital transformation marked by the birth of the first ASEAN Information and Communication Technology (ICT) Masterplan 2015 in 2010. The ICT Masterplan 2015 became the symbol of significant progress in economic transformation, people empowerment and engagement, infrastructure development, human capital development and bridging a digital divide in the region (ASEAN, 2015). In 2015, the ASEAN Community was established. Comprised of the ASEAN Political-Security Community (APSC), ASEAN Socio-Cultural Community (ASCC), and most importantly the ASEAN Economic Community (AEC), the significance of ICT in supporting regional integration and connectivity continued to skyrocket.

ASEAN government realizes that ASEAN has

a great potential in becoming the world's fourth largest economy by 2030, considering the region's demographic shift to a younger population, a rising middle class, and rapid adoption of technology (ASEAN, 2012). This rapid use of technology could contribute to the growth of its digital economy from USD31 billion in 2015 to USD197 billion by 2025, leading to the conclusion that the digital economy is the key factor in driving the region's economic growth. However, the relationship between ASEAN Digital Transformation initiative and economic growth is uncanny. According to ASEAN's ICT Masterplan 2020 (AIM 2020), ASEAN is committed to achieve an accessible, inclusive and affordable digital economy, deployment of next-generation ICT to enable growth, creating a sustainable development through smart city technologies, and establishing ICT with the ability to support a single regional market to facilitate regional integration and connectivity efforts (ASEAN, 2015). Another example of ASEAN government's commitment to implement the Digital Transformation initiative to enhance trade and investment, provide e-Business platforms and green technology could also be seen in AEC Blueprint 2025 (ASEAN-Australia Business Summit, 2018). One of the outcomes of this commitment, is foreign and ASEAN digital multinational enterprises (MNEs) as well as ICT companies' increasing attention to ASEAN. Thus, it could be seen that technology matters to ASEAN not just because it shapes the region but also because it brings on many possibilities that must be considered in the protection and promotion of human rights.

Yeung's contribution in explaining the continuity of long-established approaches (regulatory governance, legal and social science literature) in algorithmic regulations helps in mapping the enablers and challenges of technological disruption unfolding in ASEAN. Taking

the Digital Transformation initiative as a case study shows that keeping track of multiple innovations and tackling the ensuing implications of their implementation, especially towards human rights, can be overwhelming for policymakers. Indeed, as the World Economic Forum posits in its 2014 “Delivering Digital Infrastructure: Advancing the Internet Economy” Industry Agenda issue that policymakers need to be aware of the potential for fragmentation at multiple levels in how, and by what rules, technology is governed (World Economic Forum, 2014). This makes it important for ASEAN through the AICHR as its human rights body to evolve in sync with ASEAN’s learning economy and society (Hanna, 2018). Take in the example of Smart Nation initiatives taking place all over ASEAN countries—AICHR has an important role in setting appropriate goals for ASEAN that prioritizes human rights.

## 8 Conclusion and Further Research

Setting an appropriate goal for ASEAN is crucial considering its Digital Transformation initiative. The role of the AICHR is crucial in this transformation stage to make sure that the ASEAN government is setting appropriate goals for inclusivity and human rights protection and promotion in the implementation of the initiative rather than focusing merely on the economic growth.

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# Regionalization, Not Regionalism: A Way Forward For Upgrading Economic and Developmental Rights in ASEAN

SHAH SURAJ BHARAT

## 1 Introduction

As ASEAN celebrates the 10th anniversary of the ASEAN Intergovernmental Commission on Human Rights (AICHR), it must reflect on the path of development member states are on and how economic and developmental rights, as a fundamental component of human rights, are incorporated into strategies for achieving long-run growth. Indeed by incorporating such rights into economic policy and business practices, ASEAN can pursue an inclusive development strategy that not only upholds welfare but induces policymakers and the private sector to seek upgrades in human capital and productive activity. It will thus help the region avoid development traps and prevent a race to the bottom in low-cost, low-value production among competing member states.

In the discourse on economic and developmental rights cooperation in ASEAN, much attention has been paid to the dynamics of regionalism, referring to top-down political processes and formal institutions. This emphasis has led to policy recommendations commonly advocating the strengthening of institutional capacity,

compliance mechanisms and monitoring through a political process of conscious design. Rarely, however, do these recommendations truly suit ASEAN's secondary institutional form as an intergovernmental organization, the primary institutions of which are defined as the "ASEAN way", comprising norms such as noninterference in another's domestic affairs, consensus decision-making and informality (see Bharat, 2019).

Indeed when commenting on the AICHR, many seem to miss the point: it is an "intergovernmental commission", not a supranational one, while the AICHR's Terms of Reference (TOR) do not include complaint, investigation or intervention mechanisms on rights issues (see Nandyatama, 2019). Moreover, when making recommendations on rights cooperation, scant attention is paid to the drivers of institutional change in ASEAN. Institutional change and regionalism in ASEAN is reactionary to exogenous factors (see Beeson, 2003), and ASEAN is not a trendsetter but a trend taker, as it reflects the trends and national policy preferences of its member states (Bharat, 2019). There thus needs to be greater recognition that policymaking in ASEAN takes place within national borders and not at the regional level.

This does not mean, however, that there is no room for regional cooperation, only that the way cooperation is thought to come about needs to move away from redundant recommendations that are incompatible with ASEAN's institutional form. If ASEAN's primary institutions prevent the development of secondary institutional regionalism, then we need to focus more on agency through ASEAN regionalization, referring to cross border flows of capital, goods, people and norms. This suggests a greater focus on the private sector and civil society at the national level, as well as a reliance on feedback loops between the two with ASEAN member states and policymakers, in which

to enhance economic and developmental rights. In pursuit of this argument, this chapter puts forward the concept of harnessing ASEAN competition for good, in which the economic benefits of realizing developmental rights encourage a “race to the top” in fulfilling these rights through the dynamics of regionalization.

In elucidating the argument, (2) the following section discusses how concepts of economic and developmental rights are structurally embedded in both ASEAN and its member states’ political economies, with the realization of such rights being demanded by the agency of the region’s growing and politically conscious middle classes. This section justifies why there is reason for optimism for change through regionalization. (3) It then examines how centralizing such rights as a development strategy can help member states upgrade production and avoid development traps, justifying why policymakers and the private sector have an interest in implementing such rights. (4) It then examines to what extent an economic and developmental rights agenda has been incorporated into the AICHR, as well as the body’s institutional design. (5) It ends by offering analysis on how change can come about through the dynamics of regionalization based on ASEAN’s institutional form.

## 2 Economic & Developmental Rights in ASEAN

What are economic and developmental rights and how do they differ from civil and political rights in the ASEAN context? Civil and political rights cover freedoms such as justice and equal treatment by the law, freedom from violence, freedom of thought, religion and sexuality, as well as protecting the entitlement of individuals to

participate in civil and political life without discrimination or repression from the state. Basic definitions of economic rights, meanwhile, include rights to education, health, food, housing, social security and equal pay for all genders (OHCHR, 1966). More expanded definitions of economic rights, termed developmental rights, include rights to, among other things, financial inclusion, enjoyment of the benefits of science and technology, lifetime learning and access to quality infrastructure, such as high-speed internet and transportation.

Among global institutions and policy objectives in both developed and developing countries, economic and developmental rights were set out in the 1986 United Nations Declaration on the Right to Development (OHCHR, 1986). The preamble states: “Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” Furthermore, concepts of economic and development rights were arguably expanded in the Sustainable Development Goals set out in 2015. Noted goals on expanded definitions of such rights include goal eight on decent work and economic growth, goal nine on industry, innovation and infrastructure, as well as goal 10 on reducing inequality (UN, 2019).

In mostly Western discourses, civil and political rights had for decades taken precedence over economic rights. The notion of economic rights having the same priority as civil and political rights, however, were rejuvenated in the West in the 1990s. Academics such as Gomez (1995) and Kelsey (1993) argued that there was a renewed need for focusing on economic rights as narratives supporting a strong state, seen as necessary to

uphold economic rights, were losing steam, in which the market had taken center stage as the dominant ideology.

Economic and developmental rights among ASEAN member states, however, were a priority decades before the debate was rejuvenated in the West. Indeed Yash Ghai (1994) described how the prioritizing of economic and developmental rights represented an ideological clash between the Global South and North. Among developed and developing countries, there were perceptions of a conflict between realizing civil and political rights and economic growth, the former viewed as being in tension with development and the optimal allocation of resources (McKay & Vizard, 2005). It was Malaysian Prime Minister Mahathir Mohamad who drew ire from the United States at a 1997 ASEAN meeting when he criticized the Universal Declaration of Human Rights (UDHR), saying that in Asia economic growth was more important than civil liberties and that societal interests were more important than individual ones.

Indeed the notion of socioeconomic rights as being equally important as civil and political rights were argued for by Southeast Asian countries such as Indonesia and Malaysia in their struggle for independence, with economic and developmental rights being enshrined in their national constitutions. The 1945 Constitution of Indonesia states in Chapter 9 Article 33 that the poor and destitute shall be cared for by the state, and that the natural riches of the country would be controlled by the state and exploited for the benefit of all people. It further described the principle of economic democracy in which production was done by all for all, in which social and not individual prosperity was the goal. Additionally, Article 62 of the 1976 Vietnamese Constitution states that the development of science and technology is a national priority, in which the state will provide favorable conditions for everyone

to participate in and enjoy the benefits of scientific and technological activities. The 1987 Constitution of the Philippines, meanwhile, states in Article XXI that upgrading productivity is the key to raising the quality of life for all.

Critics will note that this economic and developmental rights rhetoric was a smokescreen for political and civil illiberalism in Southeast Asia. This is not disputed, however the point stands that the notion of economic and developmental rights as being equal to or a priority over political and civil rights is institutionally embedded in ASEAN member states' political economies. Skeptics may again point out that economic and developmental rights were never properly upheld or implemented, or that they were simply normative, relating to things that ought to be the case. However, it is posited that in the contemporary period, as ASEAN member states experience sustained growth, including the growth of noisy and demanding middle classes that are to some extent products of the state (see Schlogl & Sumner, 2014), demands are made on ASEAN member states, both in democracies such as Indonesia and illiberal democracies such as Malaysia, on delivering economic growth and upgrades in welfare if elites wish to maintain power.

At the regional level, economic and developmental rights were also given equal priority to civil and political rights. Indeed while ASEAN endorses the UDHR, the ASEAN Human Rights Declaration and the Phnom Penh Statement expands on it by adding new categories, one of which is the right to development, which immediately follows the section on economic, social and cultural rights. The articles affirm that development is an inalienable human right in which all people have the right to contribute to and enjoy the benefits of economic growth, that development should be carried out equitably, and

that the lack of development should not be used to justify human rights violations (ASEAN, 2013).

Moreover, ASEAN further recognizes developmental rights as stated in the SDGs. As argued by Nonthasoot (2017), all of the SDGs can be found in the ASEAN Economic Blueprint 2025. SDGs eight, nine and 10 particularly refer to developmental rights, which can also be found in the AEC Blueprint 2025 as seen in the table below.

Sustainable Development Goals	Human Rights Category	AEC Blueprint
Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all	Right to work	A2. Trade in services A3. Investment environment A5. Facilitating movement of skilled labor and business visitors D1. Strengthening the role of micro, small, and medium enterprises
Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation	Economic rights, social rights	A3. Investment environment B4. Productivity-driven growth, innovation, research and development, and technology commercialization C1. Transport C2. Information and communications technology D3. Public-private partnership C9. Science and technology
Goal 10: Reduce inequality within and among countries	Nondiscrimination	B6. Good governance B8. Sustainable economic development D4. Narrowing the development gap D5. Contribution of stakeholders on regional integration efforts E. A global ASEAN

Source: Nonthasoot (2017)

Figure 7.1. [SDGs in AEC Blueprint]

Human rights, particularly those identified as Western conceptions, are at times viewed as exogenously thrust upon the region and thus seen as incompatible with local realities. Concepts of economic and development rights, however, are endogenous to the region and institutionally embedded in the political economies of both ASEAN and its member states. Moreover, while the conceptions of such rights may be normative in nature, ASEAN member states are increasingly held to account in fulfilling these rights by their domestic constituencies. This symbiotism between the structural institutionalization of such rights and the agency of domestic constituencies demanding development gives reason for optimism in advancing economic and developmental rights through the dynamics of regionalization.

### 3 Avoiding Development Traps & Promoting Inclusive Growth

ASEAN member states have enjoyed sustained growth in recent decades, with some transitioning from low- to middle-income status. In 1980, Malaysia, the Philippines, Thailand and Indonesia had per capita incomes of US\$1,803, US\$684, US\$683 and US\$536 respectively. By 2014, the corresponding figures increased to US\$10,830, US\$2,842, US\$5,561 and US\$3,315 (WDI Online, 2019). The implementation of basic economic rights were fundamental to achieving these increases in income. To transition from low- to middle-income status, economies must ensure their populations have access to education, healthcare, a nutritious diet and adequate housing, as well as maintenance of the rule of law (see Barro, 1996; McKay & Vizard, 2005). These are the basic determinants of growth, in which investment is attracted

by ensuring an economy's production and human capital base is conducive to simple and labor intensive production, such as textile manufacturing, food processing or manual assembly, with productive capabilities further developing as domestic industries are built up (Ohno, 2009).

However, while basic economic rights have allowed member states to transition to middle-income status, countries are now at risk of succumbing to development traps, such as middle-income, low-value production and skills traps. This is chiefly because while basic economic rights create the conditions for economies to compete in attracting simple production, their competitiveness is based on low-cost labor and production of low-value goods. Moreover, policymakers who have seen their economies transition from low- to middle-income status are likely to maintain these growth strategies, partly out of fear of disrupting income flows to vested interests (Dollar, 2015).

For economies to transition from middle- to upper-middle or high-income status, however, the factors of growth must undergo a structural transformation where growth is based not on physical inputs and low-cost labor but skilled human capital, where technology and management capabilities are internalized. Implementing only basic economic rights has little prospect for helping economies make this transition. More expanded definitions of developmental rights thus become important to sustaining growth in ASEAN member states. When rights include enjoyment of the benefits of science and technology, quality infrastructure, industry and innovation, and crucially when these rights are broad based instead of reserved for elites or enclaves of an economy, then this creates the foundation for economies to upgrade capabilities and thus break through development traps. By implementing more expanded definitions of economic and

developmental rights, it is argued that policymakers and businesses, in dealing with inevitable growth slowdowns and domestic constituencies demanding development, will be induced to seek upgrades in production given the greater productive capabilities available (see Snower, 1994; Ashton & Green, 1997).

Furthermore, the pursuit of economic growth in ASEAN, as well as neighbors China and India, has raised questions on whether this growth has been inclusive and equitable, with concerns raised on the distributional pattern of growth. Proponents argue market reforms in these countries have raised millions out of poverty and improved other aspects of social wellbeing. However, critics stress that growth has come at the cost of high inequality, environmental degradation, created opportunities for rent seeking and corruption, and the pursuit of wealth has led to violations of people's rights, such as the exploitation of workers or displacing people from their land to make way for projects (Nonthasoot, 2017). Indeed the protection and promotion of rights requires resources, and this is especially difficult in low-income countries (McKay & Vizard, 2005), which it is posited contributes to increasing inequality during periods of growth (see Sumner, 2017). ASEAN, however, is now largely a bloc of middle-income countries, with resources and fiscal space available in which to progressively pursue the realization of economic and developmental rights. Moreover, as "rights", they should be universal and inalienable, thus upholding such rights should promote inclusive growth by ensuring the surplus generated from productive sectors of the economy are invested in the productive capabilities of its people, while also ensuring broad sections of society have the agency to take part in value-added production.

As this section has argued, policymakers and the private sector have incentives in which to pursue an

economic and developmental rights agenda because of the need to upgrade production to achieve long-run growth, while middle-income states in ASEAN have the resources in which to progressively realize such rights. There are significant challenges in achieving this, namely through institutional persistence and the presence of entrenched interests who stand to lose from economic change. However, as argued in the previous section, sustaining growth and development is necessary if ASEAN elites wish to maintain power as noisy and politically conscious middle classes demand development. This symbiotism gives further reason for optimism in achieving change through the dynamics of regionalization.

#### 4 Economic & Developmental Rights Promotion in the AICHR

Economic and developmental rights are not a priority for the AICHR, and common with other criticisms of the commission, it focuses not on rights protection but promotion. Its three most recent activities on such rights were a youth debate on development and sustainability in September 2019, an interregional dialogue on good business practices and human rights in June 2019 and a forum on women's economic empowerment in August 2018. Not only were these all promotional rather than protective activities, that only three activities were held over 13 months suggests low priority for advancing economic and developmental rights through the AICHR. Furthermore, the agenda of such rights do not appear to be a priority for the AICHR's representatives either. In 2017, for example, the AICHR had its first interface with the ASEAN Economic Community's (AEC) Senior Economic Officials Meeting in Bangkok. However, while

all AICHR representatives were invited, only two attended the meeting, namely the Philippine representative as the AICHR's chair, and the Thai representative (Nonthasoot (2017)). Moreover, among the representatives of the 2019-2021 term, only Cambodia's representative, Polyne Hean, comes from an economics background.

Despite this low priority, however, there are more fundamental issues at hand. The AICHR has come under criticism for its inaction in responding to rights issues, with notable violations in recent years including the Rohingya crisis, Philippine President Rodrigo Duterte's "war on drugs", and excessive force by Indonesian authorities in Papua. Many point out that in the AICHR's TOR, it has a mandate to promote and "protect" rights. While the AICHR has been effective in the former, however, it has disappointed in the latter. According to FORUM Asia (2019), of the 121 activities conducted by the AICHR in the past decade, the absolute majority, if not totality, have been about promotion rather than protection, and not one addressed rights crises as they unfolded. This is also seen in the agenda for economic and developmental rights as mentioned above. FORUM Asia (2019) also stated that civil society organizations (CSOs) perceive the ASEAN approach of solidarity to rights as a solidarity of ASEAN elites when coming under criticism for inaction on human rights, and authoritarianism in the region more generally. Moreover, CSOs and activists look to international rather than ASEAN institutions when seeking to highlight or redress rights violations, as they are more likely to get a response.

That the AICHR has disappointed in protection, however, should have surprised no one: Point 3 of the TOR states the commission is an intergovernmental and consultative body. Indeed the disappointment in the AICHR seems to stem from a poor understanding of the

AICHR's institutional design, or more broadly a naivety in buying into ASEAN rhetoric and the delusions of ASEAN regionalism (see Jones & Smith, 2002). Similarly, suggesting the AICHR is a human rights "mechanism" is questionable given that it is not mandated with powers to receive complaints, conduct investigation or intervene. That the AICHR lacks teeth as a human rights body is also not unique to the region. Writing in 1995, Gomez questioned the effectiveness, accessibility and credibility of newly formed human rights machinery in a number of Asian and African countries, arguing many institutions and processes had been created in the form of human rights commissions and national institutions, yet what they had achieved was questionable and even posited to be a propaganda tool for national governments, a point echoed by Narine (2012) on the AICHR in the contemporary period.

To better understand the AICHR we need to look at ASEAN's institutional economy, namely by examining ASEAN's and the AICHR's primary and secondary institutions (see Bharat, 2019). Primary institutions refer to deep and durable social practices and values that undergo evolution rather than design. Secondary institutions are the formal institutional design constitutive of primary institutions. Thus, primary institutions define both the rules of the game (primary institutions) and what the pieces are (secondary institutions) (Manning, 1962; see Buzan, 2014).

The AICHR's secondary institutional form comprises an intergovernmental and consultative body, the primary institutions of which comprise the norms of the "ASEAN way", defined as noninterference in another's domestic affairs, consensus decision-making and informality (see Bharat, 2019). These are explicit in the AICHR's TOR:

2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular:

- a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states;
- b) noninterference in the internal affairs of ASEAN member states;
- c) respect for the right of every member state to lead its national existence free from external interference, subversion and coercion” (ASEAN, 2009).

Crucially, without the ability to interfere in the domestic affairs of a member state, it is impossible for the AICHR to act as a regional “mechanism”. With this in mind, we need to recognize that policymaking in ASEAN happens not on the regional level but within national borders. Indeed Article 2.3 of the TOR states:

“[...] the primary responsibility to promote and protect human rights and fundamental freedoms rests with each member state,” (ASEAN, 2009).

In light of this, devoting attention to ASEAN regionalism and formal institutions, such as the AICHR, is insufficient to offer a way forward for economic and developmental rights at the regional level. We cannot alter the AICHR’s secondary institutional design without first fundamentally changing ASEAN’s primary institutions, or “the rules of the game”. Moreover, primary institutions are deep and durable social practices that undergo evolution rather than design. Indeed in TOR Article 2.5 ASEAN calls for the:

“Adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN,” (ASEAN, 2009).

How can this evolutionary approach come about or be advanced? Certainly not through top-down regionalism, which has little prospect for changing ASEAN’s deep and

durable social practices defined as the “ASEAN way”. We need to focus instead on agency through bottom-up regionalization.

## 5 Regionalization & Harnessing ASEAN Competition for Good

Policy recommendations regarding ASEAN organizations, particularly those related to human rights, commonly advocate strengthening institutional capacity, enhancing compliance mechanisms and improving monitoring. Rarely, however, do these recommendations truly suit ASEAN’s institutional form. Moreover, scant attention is paid to the drivers of institutional change in ASEAN, which is reactionary to exogenous factors (see Beeson, 2003), while ASEAN is not a trendsetter but a trend taker, as it reflects the trends and national policy preferences of its member states (Bharat, 2019). There thus needs to be greater recognition that policymaking in ASEAN takes place within national borders and not at the regional level.

This does not mean, however, that there is no room for cooperation on the regional level, only that the way cooperation is thought to come about needs to move away from the recommendations commonly advocated that buy into the facade of ASEAN regionalism. If ASEAN’s primary institutions prevent the development of regionalism, referring to top-down political processes, institutions and enforcement mechanisms, then we need to focus more on ASEAN regionalization, referring to the crossborder flows of capital, goods, people and norms. This suggests a greater focus on the private sector and civil society, and a greater reliance on positive feedback loops between the private sector, civil society and governments

of ASEAN member states.

Moreover, that ASEAN member states are competitive rather than complementary should be harnessed and not only seen as a hindrance to regional cooperation. Indeed in regard to poor outcomes of regional economic integration through the AEC, ASEAN member states emphasize the diversity of their national political economies, which are competitive instead of complementary, as hindering integration. At the same time, however, in normative discourses ASEAN member states benchmark economic performance against one another, and look for lessons on best practices among each other. This is somewhat counterintuitive given that ASEAN points to high levels of economic diversity as hindering cooperation. Yet it shows that member states influence one another, not through processes of regionalism but regionalization, where learning and norm diffusion takes place through market competition.

ASEAN competition can thus be harnessed for good. Indeed as argued by Evans (2018; 2019), social change is accelerated when we see others are changing. Reflecting the arguments put forward by Evans, ASEAN member states that are said to be in competition with each other for investment are often seen as repressing rights and keeping wages low in response to competition to attract production. However, by the same logic, we could expect member states to uphold economic and developmental rights if they are incentivised by the prospects of upgrading production through implementing such rights. Indeed incentives exist in the threat of growth slowdowns in tandem with noisy middle classes demanding development. It is posited that if economic and developmental rights are seriously implemented by policymakers and the private sector at the national level in ASEAN, and this leads to positive outcomes for long-

run and inclusive growth, the positive feedback loops that this creates will encourage governments across ASEAN to make bold policy decisions in extending such rights. This happens through the dynamics of regionalization, and fits with how institutional change actually happens in ASEAN, in which ASEAN, as a reactionary organization and trend taker as opposed to trendsetter, reacts to and reflects the national policy preferences of its member states.

This process, however, will not happen by itself. It also requires an empowered populace that can mobilize and push for the adoption of substantive change. As argued earlier, ASEAN is structurally endowed with the embedded idea that the state is responsible for upholding economic and developmental rights, with noisy domestic constituencies demanding development. This structure-agency symbiotism gives reason for optimism that change is possible. This is where the role of civil society and the private sector comes in. In accelerating change in ASEAN through regionalization, CSOs and the private sector will have a vital role to play in keeping such rights on the agenda, educating and mobilizing people on their rights, and keeping pressure on ASEAN governments in implementing and upholding such rights. Thus, rather than seeking to strengthen the AICHR and regionalism in ASEAN, we need to instead focus on empowering CSOs and the private sector to drive regionalization in ASEAN. The positive feedback loops created when economic and developmental rights are implemented will, we hope, accelerate the evolution of ASEAN's institutional form.

## 6 Conclusion

This chapter has argued that in advancing economic and developmental rights in ASEAN, we

need to focus not on ASEAN regionalism, but ASEAN regionalization, referring to cross border flows of capital, goods, people and norms. This suggests a greater focus on the private sector and civil society, as well as a reliance on feedback loops between the two with ASEAN member states and policymakers, in which to enhance economic and developmental rights. In pursuit of this argument, this chapter puts forward the concept of harnessing ASEAN competition for good, in which the economic benefits of realizing developmental rights encourage a “race to the top” in fulfilling these rights through the dynamics of regionalization.

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## Conclusion: The Future of Human Rights in ASEAN

RANDY WIRASTA NANDYATAMA

### 1 Introduction

Southeast Asian people might find the relationship between ASEAN and human rights a bit strange. Generally deemed to be reluctant in and even anathema to respecting universal human rights norms for more than four decades, ASEAN has been characterized by new aspirations in establishing a more institutionalized human rights mechanism in the region for the past two decades. ASEAN's willingness to adopt human rights lexicon is striking. From declaring that human rights and their position as "conditionalities" in many international agreements were Western countries' way of pressuring and undermining Asian countries in the joint communique of the 24th ASEAN Ministerial Meeting (AMM) in 1991, ASEAN demonstrated ground-breaking progress and signaled a dramatic shift in the regional perspective of human rights after the Asian financial crisis. The ASEAN Charter (2007, p. 3), in fact, declares that the commitment "to promote and protect human rights and fundamental freedoms" is one of the main regional principles, highlighting the prominence of such norms in the region.

In the eyes of its founding fathers, ASEAN

was intended as a regime with “minimalist” structure (Kusumaatmaja 1990, 170). Instead of focusing on controversial perspectives and embedding them into a regional mechanism, ASEAN’s main goals were about defusing tension and building trust among Southeast Asian countries. Despite going through significant changes in forming a stronger sense of community and creating rules-based structures, the reluctance of formalizing sensitive norms has apparently lingered in ASEAN. While the development of the 2007 ASEAN Charter and ASEAN Human Rights Declaration in 2012 demonstrate progress in the institutionalization of human rights, these documents also show the strong commitment for noninterference with domestic affairs, signaling the limitation of ASEAN in providing proactive human rights protection in the region.

Against this backdrop, there is an enigma that needs to be addressed, particularly on how the future of human rights will progress in ASEAN. In further assessing this issue, this chapter focuses on highlighting the ways in which the ASEAN human rights agenda progresses. Member states are deeply entangled by the need for respecting and maintaining the existing and dominant norms in ASEAN. As such, progress in sensitive issues, such as human rights, can only exist within a limited political space in ASEAN and depend on the creative capability of political actors within such limited political space.

This concluding chapter consists of three main parts. The first part elaborates the achievements and limits of the contemporary progress of human rights in ASEAN. The second part of the chapter links the elaboration of the progress of human rights with the challenges that ASEAN faces. This part underlines how the existing and dominant regional norms and member states’ domestic political

contexts pose a big challenge for future human rights progress in ASEAN. The chapter concludes by assessing the possibility for collaboration between political actors in the region, especially in further pushing the progress of the institutionalization of human rights in ASEAN.

## 2 The Achievements and Perils of Human Rights Progress in ASEAN

The adoption of human rights was indeed a salient element of ASEAN regionalism, particularly in the post-Cold War era. Numerous ASEAN agreements, such as the ASEAN Human Rights Declaration in 2012, and the Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community as well as the Mobilization Framework of the ASEAN Decade of Person with Disabilities in 2011, clearly state the importance of promoting human rights in the region. Nevertheless, the increasing number of human rights-related ASEAN documents were not produced in smooth fashion, particularly as there has been a longstanding debate on how the idea of human rights is viewed by ASEAN member states.

Human rights started to be widely discussed at the ASEAN level, especially in tune with growing pressure from Western powers, after the end of the Cold War. This sparked a distinct international debate. One of the heated issues was how Asian countries viewed Western powers as engaging in cultural imperialist projects, especially during the promotion of human rights norms in the international arena (Mauzy, 1999; see also Vincent 1986). Some Southeast Asian leaders, such as Mahathir Mohamad and Lee Kuan Yew, rejected Western pressure and suggested

the need for the limitation of human rights as necessary for economic development, arguing for the existence of the so-called “Asian values” of human rights (Freeman, 1996; see also Zakaria 1994; Ghai, 1995).

Nevertheless, the month after the UN World Conference on Human Rights in Vienna in June 1993, ASEAN issued a joint communique of the 26th AMM that respected the notion of universal human rights. The then-six ASEAN member states welcomed the result of the Vienna Conference 1993, but at the same time emphasized some “Asian values” arguments in respecting specific socio-economic and political contexts in Southeast Asia. This marked both ASEAN’s acceptance and hesitance in institutionalizing human rights norms in the region. As a result, we saw no further ASEAN progress in adopting human rights after 1993.

Progress on human rights in ASEAN started to appear again after the Asian financial crisis in 1997, especially in less sensitive issues. The 31st AMM in 1998, for instance, agreed on giving protection to women and children. In this context, ASEAN seemingly tried to adapt with post-Cold War global issues, including human rights. Subsequently, ASEAN also demonstrated its progress in adopting human rights norms through the ASEAN Vision 2020 and the Declaration of ASEAN Concord II (Bali Concord II) in 2003. Despite the absence of literal human rights terms, these agreements opened up the opportunity to socialize the human rights agenda through less controversial terms, such as the idea of human and comprehensive security. Along with these terms, member states were expected to get accustomed to a humanistic approach in dealing with regional problems.

After the abovementioned progress, ASEAN was in a better condition to adopt human rights norms. The drafters of the ASEAN Charter, for instance, could gather

consensus from all member states on the need to uphold the commitments of promoting and protecting human rights as well as establishing a regional human rights body in the Charter. The adoption of such commitments signaled a significant development in regional acceptance of human rights norms in ASEAN. Moreover, the formal reference of human rights in the Charter cemented the prominence of such norms within the region.

However, human rights progress in ASEAN was not without pitfalls. The lingering dominant norm of noninterference and the hesitance to fully deal with sensitive issues affected the progress of human rights in ASEAN. While the ASEAN Charter stipulated the promise of creating a regional human rights body in the region, its Terms of Reference (TOR) signaled the adherence of ASEAN to cultural relativism instead of universal human rights values and avoided any specific mechanism for providing human rights protection. The TOR of the ASEAN Intergovernmental Commission on Human Rights (AICHR) (2009: 4), for instance, limits its own power by fully respecting “national and regional particularities and mutual respect for different historical, cultural and religious backgrounds”. Moreover, the TOR also did not include any mechanism for receiving complaints from individuals, conducting investigation or intervening in human rights crises.

The limits of ASEAN’s commitment to human rights were also seen in the ASEAN Declaration on Human Rights (AHRD) in 2012. Indeed, the AHRD signaled progress in the region, especially in providing detailed meaning and coverage of various human rights issues and aspects. The declaration, for instance, covered the notion of the so-called third generation of human rights that use a more holistic view of human needs, such as the need to “meet equitably the developmental and environmental

needs of present and future generations” (ASEAN, 2012; see also Clarke, 2012). However, as the product of regional consensus among member states, the AHRD also signaled a cultural relativism narrative in understanding human rights and ASEAN’s hesitance to the idea of providing human rights protection (see Bui, 2016). Article 8 of the AHRD (2012), for instance, underlined the respect for each member states’ sovereignty and only allows human rights provisions that “meet the just requirements of national security, public order, public health and public morality and the general welfare of the peoples in a democratic society”.

Against this backdrop, we can see the development and limits of human rights in the region. While ASEAN repeatedly signaled its hesitance in providing universal human rights protection, some progress can still occur, especially on less controversial issues. Apart from establishing the AICHR, ASEAN member states successfully agreed on the Terms of Reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and formally launched the ACWC in 2010. Nevertheless, similar to the TOR of the AICHR, the ACWC is required to respect member states’ sovereignty, limiting its capability in providing human rights protection during times of crisis.

### 3 Contemporary challenges

Despite the vivid tendency of avoiding sensitive issues that can have a detrimental effect on the member states’ elite groups, ASEAN is far from static. There is possibility for progress in the institutionalization of human rights in ASEAN. In responding to international and domestic pressures, ASEAN member states can alter their

position on human rights, advocate a new human rights agenda, and build a consensus on such an agenda at the ASEAN level. Nevertheless, there are two main challenges that ASEAN faces today, namely the longstanding dominant value of respecting member states' sovereignty and its paramount position in the regional mechanism, and the contemporary trend of the decreasing civic space in ASEAN member states.

ASEAN's institutional framework is by default an intergovernmental organization, where the position of member states' elite groups is undoubtedly cardinal. This context shapes ASEAN, especially in generating distinct diplomatic practices—i.e. noninterference, consensus and pacific approaches to problems, and incrementalism—that affect and constrain normative development in the region (see Nandyatama, 2018). Decision-making has always been a delicate procedure in ASEAN; if one member state declares a clear objection to a certain norm during a regional meeting, other member states will respect and refrain from institutionalizing such a norm. Even in the light of international pressure, ASEAN prioritizes maintaining harmony instead of pushing a radical agenda for the region.

Indeed, it is important to understand the impact of colonialism and the Cold War era in the region and how Southeast Asian countries struggled in gaining and maintaining sovereignty against foreign interests. As a result, ASEAN will always try to build a flexible consultation mechanism rather than impose a strict decision-making process, strive to achieve agreement on well-shared concerns and avoid sensitive issues in the region (see Hernandez, 2007). However, this certainly makes progress difficult in ASEAN. In saving face among member states and avoiding public criticism, discussions and meetings within ASEAN are often held in a closed-

door fashion. While this can be useful in giving ample time for all parties to come to terms with one another, this elite-oriented process limits the wider push in dealing with regional problems and sensitive issues, such as human rights. In responding to the Rohingya refugee crisis in 2015, for instance, ASEAN could only hold a series of closed-door meetings with Myanmar without the ability to discuss the crisis within “human rights terms” or prepare a “people-oriented mechanism to resolve” the problem (Umar, 2017). Moreover, given the preponderance of the member states’ focus on maintaining the existence of their regime, progress on human rights relies much on how the issue is framed and narrated as a palatable and less controversial notion. For example, while the Indonesian government successfully advocated the idea of “political development” in the Bali Concord II as a stepping stone for embracing human rights and pushing the development of a democratic agenda in ASEAN member states; at the same time, the Indonesian government also had to dilute its own proposal for the sake of mitigating criticism and achieving regional consensus (see Sukma, 2009).

Along with the abovementioned dominant diplomatic practices, the only way of pushing the human rights agenda in ASEAN is by narrating the agenda as a palatable idea for the sake of building consensus. As such, in socializing human rights, the promoter should be ready to revise and dilute the initial proposal to accommodate criticism and objection. This will certainly result in lowering the initial target of providing universal human rights protection and limiting the quality of human rights progress in ASEAN.

Moreover, one of contemporary challenges for human rights progress in ASEAN is the dynamics of ASEAN member states’ democratic and human rights protection quality. The progress of human rights in

ASEAN is by default the reflection of real progress of human rights within ASEAN member states. For example, we can see the rapid progress of human rights in ASEAN after the Asian financial crisis in 1997. This corresponds to the fact that ASEAN member states' participation in international human rights treaties was very low before the Asian financial crisis in 1997; only after the crisis did some ASEAN member states, like Indonesia and Thailand, engage in regime transformation, shift toward democracy and adopt international human rights instruments. The domestic political developments within these ASEAN member states not only shaped their respective polities, but also provided a push for regional politics.

Nevertheless, there is a new political trend in the region. The decreasing civic space in many democratic countries in Southeast Asia will affect the general affinity of ASEAN to human rights norms. Some more democratic Southeast Asian Countries, especially, Indonesia, the Philippines and Thailand, have demonstrated a vivid decrease in civic space, signaling the backsliding of human rights protection and less support for a human rights agenda at the regional level (see figure 8.1). Along with the generally low quality of human rights protection in other countries, such as Brunei Darussalam, Cambodia, Laos, Myanmar and Vietnam, the backsliding of human rights protection in democratic countries in Southeast Asia will limit the political space for a human rights agenda in the region.

Most Southeast Asian countries face a similar hurdle, namely decreasing political space and openness to universal human rights protection. Brunei Darussalam is by default not an electoral democracy. The government is dominated by the sultan's power, with no direct legislative elections. Along with the rise of religious politics in Brunei, the government is posed to implement sticker rules on

society. Cambodia has been showing the character of a one-party state under the leadership of Hun Sen. Despite slightly relaxed pressure on the opposition and civil society, especially after pressure from the international community, the Hun Sen government still limits political space and provides no clear human rights protection or commitment to solving past human rights violations, such as the case of Sombath Somphone. Moreover, Laos has been showing limited progress, including in tightening the rule of law and fighting corruption. Nevertheless, the government still lacks real action in bolstering transparency and democratic accountability. The government still maintains its authoritarian structure and practices, leaving no clear human rights protection for its citizens. For Myanmar, the government has been demonstrating a vivid struggle in providing human rights protection. Sustaining the autocratic authority of the military, the Myanmar government provides no clear progress on human freedoms, especially with the persecution of the Rohingya in western Myanmar. Vietnam, in this case, remains weak in its commitment to human rights protection. The Vietnamese government, in fact, just adopted a new law that allows the authorities to access private data and restrict online speech.

Indeed, the backsliding of human rights protection in Southeast Asia also occurring in Thailand. While receiving the score of 53 in the Freedom House Index prior to the military coup, Thailand underwent significant decreasing civic space, resulting in a score of 31 in the same index in 2018 (see Freedom House, 2019). The Thai junta limits the political space and prevents the establishment of real political opposition. With the political regime holding onto power after the 2019 election, the government's authoritarian tendencies will likely remain. In the Philippines, President Rodrigo Duterte demonstrates

distinct political leadership, especially in cracking down on the freedom of the press and those who are critical of his policies. Moreover, the Philippine government also continues to weaken the judiciary, especially through the political campaign of allowing the extrajudicial killing of drug suspects.

ASEAN Member States	Freedom House Index (2013)	Status	Freedom House Index (2018)	Status
Brunei Darussalam	30	Not Free	28	Not Free
Cambodia	29	Not Free	30	Not Free
Indonesia	65	Free	64	Partially Free
Laos	11	Not Free	12	Not Free
Malaysia	48	Partially Free	45	Partially Free
Myanmar	26	Not Free	31	Partially Free
Philippines	63	Partially Free	62	Partially Free
Singapore	52	Partially Free	52	Partially Free
Thailand	53	Partially Free	31	Not Free
Vietnam	19	Not Free	20	Not Free

Source: Adapted from All Data FIW 2013-2018 (Excel)

Figure 8.1. [Comparison of Southeast Asian Countries' Freedom House Index in 2013 and 2018]

Rather similar with other countries in Southeast Asia, the trend of human rights protection in Indonesia is not really positive. While showing some of the best democratic practices, Indonesia is increasingly threatened by religious conservatism and authoritarian tendencies. President Jokowi's growing lenience to the practice of religious-based local politics limits the human rights protection of minority groups in Indonesia. Moreover, his campaign promise of solving past human rights problems has apparently been sidelined in the face of increasing political opposition and his priority for accelerating infrastructure development. Meanwhile, Malaysia's government might show unique progress in Southeast Asia. Malaysia's government is one of the most active

Southeast Asian countries in advocating for the Rohingya problem at the international level and providing some services for refugees. The new Malaysian government under Mahathir Mohamad also signals solid commitment for institutional development, especially in eradicating corruption. However, real progress is yet to be seen, especially at the domestic level.

#### 4 Searching For a Way Forward

Despite facing serious challenges in terms of the trend of member states' decreasing civic space and the diplomatic hurdles in the regional mechanism, it is important to open and maintain the opportunity to improve human rights protection in ASEAN, especially through widening the political channels for civil society organizations (CSOs). In this context, the involvement of CSOs are crucial not only for providing political pressure on ASEAN but also giving support for the member states, especially as a source for external input. In pushing for a reformed ASEAN, member states often need interesting proposals to be brought before the Association; and through the engagement with CSOs, member states can gather fresher and creative ideas. Moreover, CSOs can also be essential in enhancing communication between state and nonstate actors, creating a close-knit community in the region.

Indeed, the idea of a “people-oriented and people-centered” ASEAN and the ASEAN reform agenda, including Bali Concord II in 2003 and ASEAN Charter of 2007, signaled the Association's commitment and willingness to widen its political space. This context attracted CSOs to actively engage with the Association, resulting in a growing number of relevant political actors in ASEAN. However, it is imperative not to treat CSOs

as always having access to ASEAN. Instead, we need to cautiously and continuously check the quality of ASEAN's political space for them. Allowing CSO involvement will add and maintain external pressure to the elite group in ASEAN, reducing the elite-driven nature of the Association and opening up the regional political space for wider issues and norms, like human rights.

Ultimately, the future of human rights in ASEAN is not fully grim. Progress in the institutionalization of human rights can exist within a limited political space in ASEAN and thrive along with the increasing creative capability of political actors within such limited political space. Further collaborations among CSOs across the region and between CSOs and member states will undoubtedly lead to myriad opportunities to maintain the human rights spirit in each member states' domestic realm as well as giving human rights a better and suitable narrative for all ASEAN member states.

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This year marks a historic moment as the ASEAN Intergovernmental Commission on Human Rights (AICHR) celebrates its 10th anniversary, after the body was inaugurated on October 23, 2009, at the 15th ASEAN Summit in Hua Hin, Thailand. Its first 10 years has not been without criticism or hurdles as the only regional human rights body in Southeast Asia has frequently been regarded as “toothless” given the lack of protection power granted by ASEAN governments during its establishment. While for some a failure, the AICHR is still the only human rights institution this region has.

This book offers alternative viewpoints of assessing the AICHR, valuing the evolutionary character of the institution. The limited protection or investigative power of the AICHR shall not be perceived as the endgame, but rather serve as a stage to increase attention toward and continue advocacy work to strengthen the role of the AICHR in promoting and protecting human rights in ASEAN.

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