
THE ASEAN HUMAN RIGHTS DECLARATION AND INDIGENOUS RIGHTS

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INTRODUCTION

On 18 November 2012, ten Southeast Asian leaders signed the Association of Southeast Asian Nations ('ASEAN') Human Rights Declaration ('AHRD'),¹ signifying an important milestone in the development of regional human rights standards for its 600 million-strong population. ASEAN Member States consist of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Despite being hailed as a landmark for ASEAN consensus and cooperation in human rights, the AHRD has not been short of criticisms. 55 civil society organisations described the AHRD as a 'declaration of government powers disguised as a declaration of human rights'.² Many contend that the AHRD defers the application of human rights to the state and in many instances, qualifies existing inalienable and universal international human rights norms.

Indigenous non-governmental organisations have also expressed their disappointment with the AHRD due to its non-inclusion of Indigenous peoples' rights.³ This observation is pertinent in a Southeast Asian context considering that Indigenous peoples in the region number close to 100 million.⁴

This article highlights salient provisions of the AHRD and whether they sufficiently address Indigenous rights. In doing so, it will be observed that the AHRD strongly emphasises the ASEAN concept of non-interference with national sovereignty and general reticence towards Indigenous rights. Consequently, the AHRD fails to reaffirm undertakings by Member States contained in the United Nations Declaration on the Rights of Indigenous Peoples⁵ ('UNDRIP'). However, the article concludes that the AHRD does not limit existing pledges and obligations of ASEAN countries to abide by international human rights standards, including those relating to Indigenous rights and that there remains potential for the regional development of Indigenous rights.

THE ASEAN HUMAN RIGHTS DECLARATION ('AHRD')

The AHRD contains 40 articles that consist of sections

which encompass General Principles (arts 1-9), Civil and Political Rights (arts 10-25), Economic Social and Political Rights (arts 26-34), the Right to Development (arts 35-37), the Right to Peace (art 38) and general provisions for cooperation in the promotion and protection of human rights (arts 39 and 40). In preambular paragraph 3, Member States reaffirm their:

commitment to the Universal Declaration of Human Rights⁶ ('UDHR'), the Charter of the United Nations, the Vienna Declaration and Programme of Action⁷ ('Vienna Declaration'), and other international human rights instruments to which ASEAN Member States are parties.⁸

Of particular note are the General Principles. The right to equality contained in the General Principles (arts 1 and 3) must be understood in the light of other General Principles. Article 6 provides that the enjoyment of human rights must be balanced with the corresponding duties that a person has towards other individuals, the community and society, suggesting that discriminatory treatment may be permissible where a person has failed in his duty towards others. Duties to individuals and the community are also contained in the UDHR (art 29 para 1) and the right to freedom of expression of International Covenant for Civil and Political Rights⁹ ('ICCPR') (art 19), but they are not worded in a manner that generally curbs the enjoyment of human rights.

Despite expressly acknowledging the universality and indivisibility of all human rights, article 7 favours cultural relativism. Article 7 provides that 'different political, economic, social, cultural, historical and religious backgrounds' must be borne in mind in the realisation of human rights. Article 7, which also provides for the 'regional and national context' to be considered in the realisation of human rights, reaffirms the principle of non-interference contained in article 2 paragraph 2 of the ASEAN Charter of 2008.¹⁰ Among other matters, the article provides that ASEAN and Member States shall: (1) respect the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; and (2) not interfere in the internal

matters of ASEAN Member States. Article 7 can therefore function to consolidate and perpetuate Member States' non-recognition and violation of human rights by citing domestic values and national peculiarities.

Article 8 also limits the exercise of human rights and fundamental freedoms by broad terms, including national security and public morality. Although such limitations can be found in the ICCPR, they are in relation to specific rights, for example, the right to freedom of movement (art 12) and not couched as a 'General Principle'.

Article 9 includes the principle of non-discrimination but seems to limit the applicability of such principles to 'human rights and freedoms contained in this Declaration'. With these qualifications in mind, the AHRD will be examined in the context of Indigenous rights.

WHITHER INDIGENOUS RIGHTS?

Similar to the earlier ASEAN Charter and the Terms of Reference of the ASEAN Intergovernmental Commissions on Human Rights ('TOR'),¹¹ the AHRD makes no specific reference to Indigenous peoples.

The omission of Indigenous peoples arguably goes against Member States' express reaffirmation of the Vienna Declaration in preambular paragraph 3 of the AHRD. Amongst other matters, paragraph 20 of the Vienna Declaration calls upon states to take concerted positive steps to ensure respect for all human rights and fundamental freedoms of Indigenous people, on the basis of equality and non-discrimination, and to recognise the value and diversity of their distinct identities, cultures and social organisation. Paragraph 31 of the Vienna Declaration urges states to ensure the full and free participation of Indigenous people in all aspects of society, in particular in matters of concern to them.

It is equally remarkable that Indigenous peoples are not expressly mentioned in the AHRD considering all ten ASEAN states supported the UNDRIP. Much earlier, paragraph 28 of the Vienna Declaration had called on the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of the UNDRIP. By voting for the UNDRIP, all ASEAN Member States have proclaimed the UNDRIP as a standard of achievement to be pursued in the spirit of partnership and mutual respect (preambular para 24) and are, at the very least, under a moral obligation to take appropriate measures to achieve the ends of the UNDRIP

(art 38). It is therefore pertinent to consider the AHRD in the light of the basic tenets of the UNDRIP.

Under the UNDRIP, all ASEAN Member States have unequivocally proclaimed and acknowledged Indigenous collective rights (art 1) and reaffirmed that these rights are indispensable to their existence, well-being and integral development as peoples (preambular para 22). Pursuant to article 3, all States have also proclaimed the right of Indigenous peoples to freely determine their political status and their economic, social and cultural development. However, contextualised recognition and protection of Indigenous rights given their unique historical background and social organisation,¹² an important aspect of the UNDRIP, are missing from the AHRD. Accordingly, the AHRD does not specifically address Indigenous rights that are part and parcel of the UNDRIP and an emerging body of international norms, including the rights to: (1) Indigenous identity, lands, territories and resources; (2) self-determination; and (3) free, prior and informed consent in matters that concern Indigenous people.

As discussed in the previous section, articles 7 and 8 of the AHRD potentially permits a Member State to place extensive restrictions on principles of equality and non-discrimination contained in articles 3 and 9 respectively. Article 9 calls for the principle of non-discrimination but in respect of 'rights recognised in this Declaration'. A Member State may argue that Indigenous rights are not expressly 'recognised' in the AHRD.

Consistent with the principle of non-intervention contained in the ASEAN Charter, article 7 of the AHRD, providing for the realisation of human rights in a regional and national context, seemingly defers Indigenous rights to the national level. Further, the consideration of 'different political, economic, legal, social, cultural, historical and religious backgrounds' for the realisation of human rights may be used to push a majoritarian democracy and development agenda, that may work to strip Indigenous minorities of their rights. Resource-extractive models for national development, all too common in the economically emergent region of Southeast Asia, can be used to validate the dispossession of Indigenous peoples from their lands, territories and resources for the greater good of the nation.

General Principle 8 provides that human rights and fundamental freedoms shall be subject to such limitations 'solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others' and to meet the 'just requirements' for amongst others, the

‘general welfare of the peoples in a democratic society’. These phrases, extracted from article 29 paragraph 2 of the UDHR, fail to take into account contemporary approaches to the protection and promotion of international Indigenous rights as synthesised in the UNDRIP. Far from catering for effective engagement with Indigenous communities, it is the Member State who appears to determine what is ‘just’ in the context of human rights and fundamental freedoms.

The ‘general welfare’ limitation can be used as an escape clause to justify policies for the good of the majority but perhaps at the expense of Indigenous minority rights. Further, the term ‘welfare’ can be used to foist developmental policies upon Indigenous communities that may not necessarily be acceptable to them. In Malaysia, the controversial Orang Asli land rights policy involving the grant of individual titles for cash crops and subsistence was rejected by the Orang Asli community as it involved amongst other matters, the potential loss of customary lands and the lack of prior consultation and free, prior and informed consent.¹³ The Government’s rationale for the policy was the socio-economic welfare of Orang Asli. This example exemplifies the risk to Indigenous communities where unbridled power is vested in a Member State to determine what is for the welfare of Indigenous minorities.

Article 35 of the AHRD provides for the inalienable right to development of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. In the realisation of the right to development, the article provides for the developmental and environmental needs of present and future generations. However, there is no provision for Indigenous peoples to determine their own priorities for development. In addition to article 3 of the UNDRIP, the right to freely pursue economic, social and cultural development is entrenched in article 1 paragraph 1 of the ICCPR, an instrument ratified by 160 countries, including six ASEAN Member States.

The AHRD does disservice to three decades of gains made in the field of international Indigenous rights. Despite the ASEAN members’ seemingly consistent stand in supporting the UNDRIP, the difficulties in reaching a regional consensus on Indigenous rights must be appreciated in an ASEAN context. ASEAN principles of non-interference, mutual respect and consensus, all contained in the TOR, have functioned to weaken the AHRD.

Meijnecht and de Vries observe that a regional consensus on Indigenous rights would be a challenge in the ASEAN region, where non-conformity with mainstream society is largely seen as a threat to national unity and progress.¹⁴ ASEAN member agendas to develop into industrialised nations apparently necessitate pushing Indigenous peoples into conformity with the norms of mainstream society.¹⁵ Compounding matters, Asian values, particularly the ‘collectivist way of thinking’ among the ASEAN populace leave little room for minority or Indigenous peoples rights.¹⁶ In this environment, cultural relativism provides justification for the violation of Indigenous rights in the name of the collective progress.

CONCLUSION

The ASEAN Secretariat has called the AHRD a political document rather than a legal document.¹⁷ As explained in the final preambular paragraph of the AHRD, the Declaration ‘helps establish a framework for human rights cooperation in the region’ and contributes ‘to the ASEAN community building process’. Further, article 40 of the AHRD provides that nothing in the Declaration may be interpreted as implying the destruction of any of the rights in the Declaration and those contained in international human rights instruments to which ASEAN Member States are parties. While the scope of article 40 may be debatable, it would nonetheless be difficult to envisage the AHRD as a document that legally limits human rights obligations already undertaken by ASEAN Member States in various international fora. A better interpretation would be that the AHRD reinforces and complements these human rights commitments through the political consensus achieved by ASEAN Member States in respect of human rights.

On a more positive note, both article 1(4) of the TOR and article 2(2)(1) of the ASEAN Charter call for the mutual respect for different historical, cultural and religious backgrounds of ASEAN peoples while article 32 of the AHRD provides for the right of every person to ‘take part in cultural life’. These provisions may provide a starting point for the development of regional Indigenous rights.¹⁸ The tendency of ASEAN to respond ‘mimetically’ to international human rights developments with the intention to secure its position as a legitimate institution¹⁹ supports the fluid nature of ASEAN views on human rights. Despite structural limitations within the current ASEAN human rights framework, the potential for Indigenous rights to develop accretionally in ASEAN should not be underestimated.²⁰

As much as cultural relativism can work to deny Indigenous rights, Asian values, like the values of 'consensus and racial and religious harmony'²¹ can provide the necessary catalyst for the regional development of Indigenous rights in ASEAN provided there is the 'collective' will to do so.

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- 1 ASEAN Secretariat, 'ASEAN Human Rights Declaration', 19 November 2012 (hereafter 'AHRD').
- 2 Aliansi Masyarakat Adat Nusantara, et al, 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration: AHRD falls far below international standards' (Press Release, 19 November 2012).
- 3 Asian Indigenous Peoples Pact, 'Indigenous Peoples Statement on the ASEAN Human Rights Declaration' (Statement, 4 December 2012).
- 4 Ibid.
- 5 *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2007).
- 6 *Universal Declaration of Human Rights* ('UDHR'), GA Res 217A(III), 10 December 1948 (1948).
- 7 *Vienna Declaration and Programme of Action*, UNGA A/Conf 157/23, 12 July 1993 (1993).
- 8 AHRD, above n 1, preambular para 3.
- 9 *International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 10 *Charter of the Association of Southeast Asian Nations*, art 2 para 2.
- 11 ASEAN Secretariat, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, October 2009 <<http://www.asean.org/archive/publications/TOR-of-AICHR.pdf>>.
- 12 S James Anaya, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people', UN GA Doc A/HRC/9/9 (2008), paras 85-6.
- 13 See Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19(2) *Waikato Law Review* 44, 63-4.
- 14 Anna Meijknecht and Byung Sook de Vries, 'Is There a Place for Minorities' and Indigenous Peoples' Rights Within ASEAN? Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous Peoples' (2010) 17(1) *International Journal on Minority and Group Rights* 75.
- 15 Ibid 79-81.
- 16 Ibid 87.
- 17 ASEAN Secretariat, *Press Release of the Second meeting of the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration*, 17 February 2012.
- 18 Meijknecht and de Vries, above n 14, 104.
- 19 Hiro Katsumata, 'ASEAN and Human Rights resisting Western pressure or emulating the West?' (2009) 22 *The Pacific Review* 619, 625-6.
- 20 See Catherine Renshaw, 'Understanding the new ASEAN Intergovernmental Commission on Human Rights: The Limits and Potential of Theory' [2010] *UNSWLRS* 53.
- 21 Meijknecht and de Vries, above n 14, 107.

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