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Bothe, Christian

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Im Dialog / In Dialogue

***Institutionalizing Human Rights in South-East Asia:
The birth of ASEAN's Intergovernmental Commission on Human Rights***

An Interview with Param Cumaraswamy

CHRISTIAN BOTHE

ASEAS Redaktion / ASEAS Editing Board

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SEAS - Gesellschaft für Südostasienwissenschaften / Society for South-East Asian Studies - www.SEAS.at*

Param Cumaraswamy is a Malaysian member of the Regional Working Group for an ASEAN Human Rights Mechanism. He is also the former UN Rapporteur on the Independence of Judges and Lawyers. Together with his colleagues in the Regional Working Group, he worked on proposals and recommendations on the design of the projected human rights body, its principles, composition and powers. The Working Group describes itself as a coalition of national working groups from ASEAN states which are composed of representatives of government institutions, parliamentary human rights committees, academia and NGOs.¹

The interview consists of two parts: a first part was conducted in summer 2009 while the deliberation and negotiation on mandate and power of a to-be institutionalized human rights body was still in process. On October 23, 2009 in Cha-am & Hua Hin, Thailand, the ASEAN heads of states and governments concluded an agreement, i.e. the Terms of References and respectively inaugurated the so-called ASEAN Intergovernmental Commission on Human Rights (AICHR). This latter part of the interview therefore deals with the final outcome of this strongly politicized process.

¹ <http://www.aseanhrmech.org/aboutus.html> (20 Dec 2009)

PART 1 (JULY 2009)

BOTHE: Mr. Cumaraswamy, why does South-East Asia as a region need a human rights mechanism? Why are national human rights mechanisms not enough?

CUMARASWAMY: If we go back in history and if you look at the regions in the world, Asia is the only region which has no regional mechanism of human rights. With the Vienna Declaration of 1993 the United Nations member states agreed, that regions and sub-regions should try to set up regional mechanisms to address human rights violations in the particular region. Now insofar ASEAN is concerned – ASEAN, as you may recall was founded in 1967 as a very loose economic caucus by five ASEAN members: Singapore, Malaysia, Indonesia, Philippines and Thailand. They are what we call the senior ASEAN members. But it was a very loose economic arrangement. It was not rights-based. There was no formal institution as such, no charter, no treaty, no whatsoever. Subsequently ASEAN expanded. Now we have ten countries forming the ASEAN caucus. As a result of the Vienna Declaration in 1993 the ASEAN foreign ministers met in Singapore and said that ASEAN would consider setting up a human rights mechanism. But that was in 1993. It was in the period after this, that we formed a group of NGOs in that region, a grouping among ourselves, very informally, to realize a human rights mechanism for ASEAN. We call it regional Working Group for an ASEAN human rights mechanism. It formed in 1995. The process started gradually and this regional working group began to interact with state representatives, reminding them of their promise made in Singapore and following the Vienna Declaration. Finally it got materialized. What happened was that ASEAN realized that it needed to institutionalize itself as a rule-based body. So it needed a charter or a kind of treaty. Hence an eminent persons group was set up to draft a charter. First to study the contents of the charter and thereafter a group was set up to draft the charter. Finally the charter was adopted by the heads of governments of ASEAN in 2008. It is now in force. But this regional working group of NGOs calling for an ASEAN human rights mechanism interacted with this eminent persons group and the people who drafted the charter to already provide in the charter for the establishment of a human rights mechanism.

BOTHE: So the establishment of the human rights mechanism would go hand in hand with a steady process of political integration?

CUMARASWAMY: ASEAN is already a political institution as such. The charter provides for a real political institution, as a rule-based body now. It can now speak with one voice in international forums. Before this, ASEAN did not have a single voice. They had to speak individually. Now they can speak as ASEAN, under the ASEAN umbrella. The charter provides among its purposes and principles for recognition of democratic values and good governance, rule of law and especially international humanitarian law. It is due to these notions in the charter for strengthening democracy, and the notion and protection of human rights that a human rights body is now going to be set up. For that purpose, last year a ten member group, one from each country was set up to draft the terms of reference. And those terms of reference are now finished. Next week we will have a meeting in Bangkok. The foreign ministers will be meeting one week later and it is expected, that the terms of references for the human rights mechanism body will be approved by the ten foreign ministers and then by the heads of government in September or November. Thereafter the body will be set up. For the purpose of the human rights mechanism, the two groups, the eminent persons group and the group who drafted the charter, had a lot of access to the European Commission in Brussels and also in Strassbourg and recently they also went to Geneva to the Human Rights High Commissioner's Office to discuss various matters, related to the setting up of this body. Hence, there is some European influence in this whole process and we expect the human rights body to be established by the end of the year. Unfortunately, it will not be the kind of body that we would like to see. Though the charter provides a notion of promotion and protection of human rights we feel that it is just going to start off as a promotional body. With for instance educational programmes to be integrated but without the power to investigate. That is our concern. But some of the ASEAN governments like Burma, Laos or Vietnam, they feel that they will not reach a comfort level as the others, Malaysia, Singapore and so on.

BOTHE: Do you think that considering the human rights situation in countries such as you mentioned, the human rights mechanism can still be regarded as a success?

CUMARASWAMY: I think we need to start off. What we see is that, if we, if the civil society groups oppose this, because it does not have investigative powers or protective powers as such, we will not be able to further keep a foot in the door. It took a long time for this body to be set-up. It has been established now and we will over the years give it the teeth. The charter also provides that the body and its processes will be reviewed after five years. Hence, we will see how it functions, we will see how the appointment processes will be made, who will be the commissioners, whether they will develop credibility, whether they will have a human rights background and not be diplomats or civil servants sitting there keeping the seats warm. Hence we feel that this process – using the ASEAN language – will be implemented “step by step”. But it is indeed a step forward, because human rights were never on the agenda of ASEAN for nearly 45 years. Different from its founding in 1967, ASEAN is now a rule-based body, and has a human rights body, which is rule-based as well, with proper terms of reference. And in addition to this, what is going to emerge is also a commission on women and children because the ten ASEAN countries feel a little uncomfortable on the rights of women and children because they all have ratified the UN treaty on women and also the convention of the rights of the child. Whereas many of the ten have not ratified the convention against torture, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights [i.e. two of the most basic human rights conventions; C.B.].

BOTHE: Taking in mind the overall very inhomogeneous human rights situation in the region, could we expect that some nations would bi- or multilaterally expand their human rights commitments, in other words form a coalition of the willing? ASEAN also has its formula for this, the “3plusX”.

CUMARASWAMY: No, that will not be acceptable to ASEAN. ASEAN goes by consensus – also for human rights. I cannot possibly imagine them going in any other way. As far as ASEAN is concerned till now, everything has to be by consensus. And we heard that even over the terms of reference for the body there has been a lot of what you call

horse-trading which went on. Some governments are very firm and you can imagine that Burma will never do certain things. And if Burma does not agree, there is no ASEAN agreement as well, because there is no consensus. This is a small set-back with regard to decision making processes. The suggestion that those who are ready to start a process and others catch up later is not an option for ASEAN. But if there are serious shortcomings they will be exposed by the civil society. And there is one good thing that is happening now: there is consultation with civil society groups. Though, many of the civil society groups are not very happy with the kind of body that is going to be set up. And as you see in the charter, this document provides promotion and protection, and I say there can be no protection without investigation because without investigation, we do not know, whom to protect. Gradually there will be a process that the human rights body will write to the governments concerned and asking for an explanation. This is of course a very diplomatic way of calling for some accountability of the governments but this is how it will start. I do not think that this will be made public so we will only partly see how it will develop. But the important thing is that it takes off.

PART 2 (DECEMBER 2009)

BOTHE: For the first time in its history ASEAN institutionalized a human rights body, called the ASEAN Intergovernmental Commission of Human Rights (AICHR). Much attention has been drawn to the final decisions on the Terms of Reference (ToR)², the working guidelines of this Commission, which specify its mandate and powers. How pleased are you with the outcome?

CUMARASWAMY: Though the ToR is not a perfect document to meet the needs of such a regional mechanism, yet in the context of ASEAN it is a beginning. I am quite pleased.

² ASEAN. (2009, September 09). Terms of Reference of ASEAN Intergovernmental Commission on Human Rights. Retrieved December 22, 2009, from <http://www.aseansec.org/DOC-TOR-AHRB.pdf>

BOTHE: Although the preceded ASEAN Charter, which in its Art.1 specifically identifies “respect for and protection of human rights” as one of its core purposes and “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion and protection of social justice” as a core principle under Art.2, the AICHR has not given powers to monitor, investigate or report on human rights records, it rather has a mandate to “promote” than to protect human rights. Its role is therewith in a way limited to an advisory body for the ASEAN Secretariat, its influence and work will presumably be conducted on an informal level and behind closed doors
Hence, how much the issue of human rights will be strengthened will depend on the personal skills and endeavour of the Commission’s members who will be selected by the ASEAN member states. What can you say about the way the selection process was done and the credibility these representatives will receive?

CUMARASWAMY: Yes, the ToR does not provide for investigation and protection. However, the terms of the charter could over the years be read into the ToR. That will depend on the quality, character and personality of the commissioners. The selection of commissioners was left entirely to the states with no uniform guidelines on the process. Save for Thailand and Indonesia, the process of selection was not transparent and credible.

BOTHE: Considering the Commission’s present mandate and powers, its budget, its routine of only meeting twice a year and its consensus-based approach to any decision-making, what can be expected as likely matters the Commission will deal with and what would you suggest as a focus for its start?

CUMARASWAMY: The initial focus will largely be on promotion which will be more educational and creating awareness of rights and responsibilities.

BOTHE: Due to several unique provisions deriving from the ASEAN Charter and the AICHR Terms of Reference, the mode of operating of the AICHR will be quite different to other regional or global human rights mechanism. How do you expect cooperation between the AICHR and other institutions will take place and how much interaction or influence with and from other bodies can be expected?

CUMARASWAMY: Despite the shortcomings in the AICHR, yet I am quite positive that there will be considerable interactions with other regional mechanisms and the UN. AICHR has a lot to learn from the other regions and the UN.

BOTHE: How is the mood and stance of the majority of the South-East Asian Human Right Civil Society towards this body? Will they consider it a credible partner and will there be enough venues for cooperation or can it rather be assumed that the Commission as in its present form will be largely conceived as an object of criticism and opposition? What could however be strategies for the civil society to strengthen the commission?

CUMARASWAMY: It is the civil society organizations (CSOs) in the region who will be the key players in giving teeth to the AICHR. Though the ToR does not meet with the expectations of the CSOs in the region yet, there will be space for the CSOs to express and work with the AICHR. The commissioners who ignore CSOs' concerns will do damage to the credibility and integrity of the AICHR.

BOTHE: Could you imagine a possible link between the dogma of economic development and cooperation, which is still by far the most prominent driving force in the ASEAN integration process and on the other hand the strengthening of a human rights regime? A situation when one becomes crucial or at least spurring for the other?

CUMARASWAMY: No doubt economic development will continue to have priority among the governments. However, with the establishment of AICHR there will be attention drawn to indivisibility, interdependence and interrelatedness to all human rights. Hence promotion of political and civil rights will have to be given equal importance with promotion of economic rights.

BOTHE: Although the set-up of a human rights mechanism and therewith securing the issue of human rights on ASEAN's agenda can be regarded an important step forward, many observers are reluctant to cheer the new Commission, describing it as a toothless tiger. Even Thai Prime Minister and ASEAN chair Abhisit Vejjajiva called

it (only) “a start” and said the commission’s “teeth” would be strengthened down the road. What would be your hope for the development over the next years? How could the council become a tiger with teeth? What would be future milestones in the development of this commission to establish itself as a credible regional mechanism and help close the gap between human rights rhetoric and the reality on the ground?

CUMARASWAMY: The ToR does not provide any negative terms. In five years it can be reviewed. In the meantime, the vibrant CSOs in the region would remain vigilant and eventually give the required teeth to the toothless tiger. Remember, the first preamble to the charter describes it as the peoples’ charter. Though intergovernmental, yet governments must meet with the aspirations of the ASEAN people.

BOTHE: Mr. Cumaraswamy, thank you for this interview.