

INSTITUTIONALIZING HUMAN RIGHTS IN SOUTHEAST ASIA

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In 2007, the heads of the ten states comprising the Association of Southeast Asian Nations (ASEAN) signed the organization's first-ever Charter. After years of internal discord and external pressure, leaders ultimately agreed to include an article directing their subordinates to create a new body for the "promotion and protection of human rights" in the region. That led to the 2010 establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR). These developments were noteworthy for an association that has generally sought to steer clear of touchy issues related to fundamental freedoms and democracy. Nevertheless, it has been condemned as toothless by some human rights advocates and analysts and garnered faint or cautious praise from others, who see it as a minor step forward at best.¹

This paper examines how and why Southeast Asian leaders have decided to embed human rights in ASEAN's structure through the creation of the AICHR. The argument advanced here is that the Commission represents an effort to "institutionalize" human rights in two different senses of the word. To some degree, the AICHR helps institutionalize human rights in the sense of confining them to a controlled environment. Its design deliberately gives Southeast Asian governments a high degree of political control over the management of a sensitive issue, helping to shield them from critiques. From another vantage point, however, the AICHR reflects a push toward institutionalizing human rights in the sense of solidifying norms and the regimes responsible for their enforcement.

The Janus-faced new entity captures the normative and political tensions that pervade ASEAN's struggle over how to handle human rights. In this paper, I briefly discuss the emergence of human rights in ASEAN diplomatic discourse and practice, highlighting some key normative and conceptual struggles surrounding the Association's engagement in human rights. I then discuss how the Commission came to be, examine the basic institutional features of the AICHR, and analyze how those features constrain its functional capacity. Finally, I

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¹ Amnesty International, Human Rights Watch, and others worry that ASEAN gave the Commission too few teeth and too little independence to make a meaningful near-term difference. *ASEAN's New Body Must Protect and Promote Human Rights*, Amnesty International, July 21, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/asean-new-body-must-protect-promote-human-rights-20090721>; Sylvia Escobar and Rolf Timans, "Letter to EU Delegates Regarding the EU-Indonesia Human Rights Dialogue," Human Rights Watch, June 23, 2010, available at <http://www.hrw.org/en/news/2010/06/25/letter-eu-delegates-regarding-eu-indonesia-human-rights-dialogue>. Others regard the Commission as a potentially useful first step but question its ability to contribute meaningfully in the short term or in its present form. See Hao Duy Phan, *The ASEAN Intergovernmental Commission on Human Rights and Beyond*, ASIA-PACIFIC BULLETIN No. 40 (July 2009); Michelle Staggs Kelsall, *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?* ASIA-PACIFIC ISSUES No. 90 (Sept. 2009).

explore possible mechanisms for change if the AICHR is to develop a more meaningful role going forward.

TOWARD AN ASEAN HUMAN RIGHTS BODY

The idea for an ASEAN human rights body was not particularly new. It emerged in 1993, after the UN World Conference on Human Rights adopted the Vienna Declaration and Programme of Action and called on member states to establish regional human rights bodies where they did not already exist.² ASEAN Foreign Ministers convened soon afterward and agreed that “ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.”³ Nevertheless, a regional human rights body took 16 years to come to fruition in Southeast Asia. It followed numerous rounds of debate, both within the region and between ASEAN and its major extra-regional partners, on the role that the Association should play in advancing various types of human rights and fundamental freedoms. Developing an institution dedicated to human rights was challenging in an institution with a long-standing commitment to strong state sovereignty and a weak record of human rights enforcement.

An Uphill Normative Battle

From a human rights perspective, ASEAN had decidedly inauspicious beginnings. Human rights were low on ASEAN’s agenda during its formative Cold War years, when conservative Southeast Asian governments came together to manage neighborly feuds and ward off communist advances.⁴ Rather than peering into one another’s domestic practices, the Association developed a set of diplomatic norms and practices designed to discourage political interference.⁵ In exchange for a degree of regional cooperation and restraint, member governments would enjoy relatively free hands in their home jurisdictions, contributing to what Erik Kuhonta has dubbed an “illiberal peace”⁶—a state of affairs admittedly preferable to an illiberal war but too easily used to justify repressive internal practices.

To the extent that ASEAN members addressed human rights in the early years, they tended to focus on socio-economic rights entitling their citizens to safety and basic material necessities. Acknowledging some “positive” rights—rights that oblige some form of state

² Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, A/CONF. 157/23, art. 37.

³ Joint Communiqué of the 26th ASEAN Ministerial Meeting, Singapore, July 23-24, 1993, *available at* <http://www.aseansec.org/3666.htm> [hereinafter 26th ASEAN-AMM Communiqué], ¶ 18.

⁴ The five original members of ASEAN were Indonesia, Malaysia, the Philippines, Singapore, and Thailand, which issued a declaration of their new Association in Bangkok in August 1967. Brunei Darussalam acceded to ASEAN in 1984, following its independence from British rule.

⁵ For a discussion of the evolution of the norm of non-interference and the “ASEAN Way” of diplomacy, see AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA* 57-79 (2001).

⁶ Erik Martinez Kuhonta, *Walking a tightrope: democracy versus sovereignty in ASEAN’s illiberal peace*, 19 *PACIFIC REV.* 337, 339 (2006).

action⁷—was palatable to most Southeast Asian governments, because it helped justify their leadership in managing national development and their decisions to open their economies to increased foreign trade and investment. The Association’s seminal document, the 1976 Treaty of Amity and Cooperation, includes one indirect reference to such rights, a reference to social justice and ties it closely to economic development, saying that: “The High Contracting Parties, in order to achieve social justice and to raise the standards of living of the peoples of the region, shall intensify economic cooperation.”⁸ A focus on positive rights also implied a certain obligation on the part of the developed world to assist developing countries as they struggled to raise their standards of living.

By contrast, the Association carefully steered away from advancing “negative” civil and political rights—basic freedoms such as the freedom of speech, press, and assembly that restrain government action. The 1967 Bangkok Declaration, Treaty of Amity and Cooperation, and other key ASEAN agreements said nothing on those subjects. Governments faced occasional pressure from their constituents and from Western capitals (particularly when left-leaning parties were in power), but official pressure was generally weak. The greater concern of ASEAN states and their Western partners was usually to batten down the hatches against communist foes amid festering insurgencies and the Second and Third Indochina Wars.

Bones of Normative Contention

A greater official focus on negative human rights emerged in the 1990s, when Cold War threats receded. Heavy-handed security tactics became more difficult to justify in some Southeast Asian countries, and Western leaders looked anew at old ASEAN partners such as Suharto, Mahathir bin Mohamad, Lee Kuan Yew, and the Thai generals. A series of events—including the imprisonment of Aung San Suu Kyi, the Santa Cruz massacre in East Timor, and Black May in Thailand—drew international attention to human rights abuses in the region. The United States cut off certain military ties with Bangkok and Jakarta, and non-governmental groups mobilized in unprecedented numbers. It was in that context that ASEAN Foreign Ministers expressed their “commitment to and respect for human rights and fundamental freedoms” in 1993 and voiced their support for a regional human rights mechanism in keeping with the Vienna Declaration.⁹

At that stage, however, ASEAN leaders were far from granting the Association an expansive role in human rights. Instead, some fought back. Tougher Western critiques—

⁷ See Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122-44 (1969). Berlin sets forth what has become a conventional—though by no means universally accepted—distinction between positive and negative rights, used in this article as shorthand for clusters of rights related to economic and social entitlements and expressive political freedoms, respectively. To some degree, that distinction is made in international human rights law between the 1966 International Covenant on Economic, Social and Cultural Rights (focusing more on positive rights) and International Covenant on Civil and Political Rights (tending toward negative rights). Most ASEAN members have ratified both instruments, though their adherence to the conventions’ provisions varies widely.

⁸ Treaty of Amity and Cooperation in Southeast Asia, concluded on Feb. 24, 1976, Denpasar, Bali, Indonesia, art. 7.

⁹ 26th ASEAN-AMM Communiqué, *supra* note 3, ¶ 16.

particularly by the Clinton Administration—provoked the well-known “Asian values” debate. That debate sometimes descended into blunt culturalist sound bites but did draw attention to another important aspect of conceptual contestation over human rights in Southeast Asia. In addition to putting stress on basic freedoms (as opposed to distributive justice), advocacy groups and Western governments tended to emphasize the “natural” and indelible character of human rights as checks on government overreach.¹⁰

Mahathir, Lee, and others essentially retorted that rights were constructed in culturally and economically diverse polities and that their societies simply had different orders of priority, favoring stability and economic development over certain types of civil and political liberties.¹¹ Given the relative success of their national development strategies, these arguments were not entirely without merit; even many liberal human rights scholars and advocates would agree that human rights must be justified largely in relation to the societal goals that emerge from genuine deliberation.¹² The principal fault of Asian values proponents has been more a matter of degree than kind, as “soft authoritarian” regimes invoke the notion of socially agreed norms too readily to forestall the emergence of multiparty systems that would enable a broader societal deliberative process about human rights.¹³

Naturalist hues appeared in the discourse surrounding Southeast Asia, infusing the work of activists and scholars in particular, but the dominant view among ASEAN’s political decision-makers was (and remains) that human rights are contextual, contingent, and subject to deliberation. From a policy perspective, this is an unsurprising position for Southeast Asian governments to take. A naturalist conception of human rights removes issues from official discretion, whereas a constructivist approach enables governments to lead—or in extreme cases dictate—the discussion of what rights are to be recognized, and to what extent.

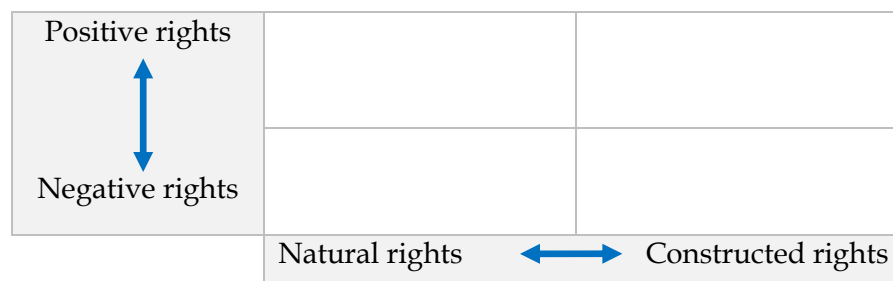
Figure 1 presents a stylized spectrum of human rights conceptions along two axes: from “positive” to “negative” rights and from natural to socially constructed rights. Southeast Asian governments have generally been most comfortable in the upper right quadrant, in which polities construct rights and corresponding obligations with an emphasis on basic social welfare, and most wary of the bottom left quadrant, in which human rights are conceived as inherent entitlements to political freedoms—including the freedom to challenge incumbents.

¹⁰ According to the “naturalist” school of thought, individuals are entitled to certain rights by virtue of being human, and laws protecting such rights are evidence of widely understood obligations that exist even in the absence of formal declarations or relative public consensus. This differs considerably from the view that human rights are socially constructed norms that emerge from deliberation about the requirements of a just and desirable society.

¹¹ See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to keep and miles to go before I sleep,”* 2 YALE HUM. RTS. & DEV. L.J. 1, 15-25 (1999).

¹² The naturalist school has had a strong influence on human rights scholarship and advocacy, though the “deliberative” approach—whereby rights are socially constructed—is increasingly prominent among liberal scholars. See Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1, 2-12 (2010); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 84-86 (2001).

¹³ Numerous critics of the “Asian values” approach have made this point in the literature on democracy. See, e.g., LARRY DIAMOND, THE SPIRIT OF DEMOCRACY 28-34 (2008); Amartya Sen, *Democracy as a Universal Value*, in *The Global Divergence of Democracies* (Larry Diamond and Marc F. Plattner, eds., 2001).

Fig.1 - A Spectrum of Human Rights Conceptions

To some extent, human rights activism in Southeast Asia has entailed an effort to drag regional discourse and practice in a “southwesterly” direction on the diagram above, pushing governments to acknowledge and respect basic freedoms of expression, association, and the like and to limit the scope for self-serving elite conceptions of social consensus.

As noted, the evolution of human rights in Southeast Asia has been intimately related to the question of democracy, because pluralistic systems and democratic norms and institutions constrain incumbents’ capacity to drive the process of social construction.¹⁴ For many Southeast Asian states, the absence of serious domestic challengers and relatively weak protection of political rights has been a chicken-and-egg phenomenon. When ASEAN added four illiberal states to its membership roster in the late 1990s—the “CMLV” countries of Cambodia, Myanmar, Laos, and Vietnam—the ideational balance within the Association tilted even further away from an expansive interpretation of political rights and freedoms.

Emergence of Human Rights in ASEAN Discourse

Southeast Asia’s normative landscape did not augur well for the development of a human rights mechanism in the 1990s. Nevertheless, several factors provided impetus for ASEAN to address human rights concerns in some fashion and led to the creation of the AICHR. External—primarily Western—political pressure helped motivate ASEAN’s interest in an ASEAN human rights mechanism in two ways. First, the United States, European Union, and others sought to impose direct material costs on ASEAN members for failure to deal with human rights issues. Clear examples included U.S. and EU pronouncements that ASEAN-wide free trade agreements were off the table until the Association dealt more assertively with the Burmese junta.¹⁵ Bilaterally, U.S. suspension of military ties with Indonesia after the 1999 East Timor crisis and 2003 Papua killings were key examples. The importance of these carrots and sticks should not be exaggerated, however. Western states applied pressure unevenly across the region, tending to single out adversaries—particularly Myanmar. Concerns about terrorism

¹⁴ Most Southeast Asian states are dominated by a single party (Vietnam, Laos, Cambodia, Singapore, and until quite recently Malaysia) or by military or monarchical rule (Myanmar and Brunei). Even in the Philippines, Thailand, and contemporary Indonesia, the ideological distance between the leading parties has been slim. See Allen Hicken, *Developing Democracies in Southeast Asia: Theorizing the Roles of Parties and Elections*, in *SOUTHEAST ASIA AND POLITICAL SCIENCE* (Erik Kuhonta, Dan Slater & Tuong Vu, eds., 2008), at 99-101. The absence of robust parties on the left may limit the scope of deliberation on human rights.

¹⁵ Reme Ahmad, *Myanmar a Hurdle to US-Asean trade pact: Schwab*, STRAITS TIMES (Singapore), Nov. 20, 2007; *Burma political issue holding up EU-Asean free-trade talks*, THE NATION (Thailand), July 29, 2006.

and waxing Chinese influence sometimes led the United States and others to coddle key bilateral partners, pursue selected trade and military ties energetically, and demote human rights concerns when broader strategic and economic interests were at stake. Moreover, U.S. rights abuses in the “war on terror” sapped some of the force from its human rights critiques.¹⁶

Perhaps more important than forsaken trade or military assistance was the reputational impact that Western invective had upon ASEAN. The Association is comprised at least partly of governments that aspire to high status as “developed” members of international society. It also engages hundreds of individual officials who seek to build ASEAN’s reputation in diplomatic circles. Being labeled a laggard on human rights was a form of social ostracism by the West and incentivized some ASEAN officials to take action.¹⁷

Following the Saffron Revolution in Myanmar in 2007, when a brutal Burmese crackdown on unarmed demonstrators sparked intense international criticism, ASEAN’s more progressive governments and Western critics spoke about the importance of the Association’s “relevance” and “credibility.”¹⁸ Neither term has been well-defined, but both carry strong reputational elements. In the diplomatic discourse surrounding ASEAN, being “relevant” generally has meant being viewed as an institution with the capacity to address some of Southeast Asia’s most difficult challenges. Being “credible” usually has meant possessing the apparent collective political will to pursue ASEAN’s lofty espoused aims. Implicit in these terms was a threat to ASEAN’s international social standing; extra-regional diplomats only spend time and resources on organizations they see as relevant and credible.

Regional dynamics were also very much at play. As suggested by ASEAN officials’ discourse with the West, some Southeast Asian governments came to the view that the Association should play a stronger role in defending human rights. By the late 1990s, comparatively liberal Southeast Asian officials began to challenge the norm of non-interference, as when then-Thai Foreign Minister (and now ASEAN Secretary-General) Surin Pitsuwan advocated a policy of “flexible engagement” with Myanmar. The albatross of Burmese abuses has been a key factor in mobilizing regional opposition to a strong shield of sovereignty, leading most notably to the 2004 creation of an ASEAN Inter-Parliamentary Myanmar Caucus composed of legislators committed to human rights reform by the junta.

Another important regional dynamic has been a domestic shift within the “core” ASEAN states of Indonesia, Malaysia, and Singapore. The most important change in this regard was the “flip” of Indonesia from a heavy-handed military regime in the late 1990s to a more liberal and democratic government. The passing of the torch from Mahathir and Lee Kuan Yew

¹⁶ See Rosemary Foot, *Human Rights and Counter-Terrorism in America’s Asia Policy*, ADELPHI PAPER (May 2004), at 45-60.

¹⁷ For an argument and further evidence to this effect, see Hiro Katsumata, *ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?* 22 *PACIFIC REV.* 623-28 (2009) (contending that ASEAN has engaged in “mimetic” adoption of human rights and certain other liberal norms).

¹⁸ For example, ASEAN Secretary-General Ong Keng Yong said in 2006 that “ASEAN is concerned about the impact of this [Myanmar] issue...on our credibility and standing.” Heda Bayron, *ASEAN Losing Patience with Burma*, *VOICE OF AMERICA*, July 25, 2006. Malaysian Prime Minister Abdullah Badawi added that “the situation in Myanmar is impacting on the image and credibility of ASEAN.” Heda Bayron, *Southeast Asian Foreign Ministers Say Burma Situation Hurts ASEAN’s Credibility*, *VOICE OF AMERICA*, July 25, 2006.

to their successors, the increasing wealth and global exposure of Malaysian and Singaporean citizens, and the ebbing dominance of the United Malays National Organization in Malaysia all opened space for modest but perceptible shifts in those governments' approaches to human rights in the region.

Further impetus for ASEAN to address human rights more seriously came from civil society groups, sometimes acting in partnership with individual parliamentarians or executive officials. In 1995, the group LAWASIA—an international organization largely composed of lawyers, judges, and legal academics—set up the Working Group for an ASEAN Human Rights Mechanism. The Working Group's members, drawn from government, academia, and NGOs, began to press for a human rights body. In 1998, ASEAN formally cited the Working Group as an important partner, and the Working Group inaugurated a series of meetings involving civil society and government actors. In the years that followed, four ASEAN states—Indonesia, Malaysia, the Philippines, and Thailand—set up national human rights commissions. In 2001, the ASEAN People's Assembly (APA) was also established. The APA provided a forum in which civil society leaders convened, produced collaborative reports like a new ASEAN Human Rights Scorecard, and passed recommendations to ASEAN leaders—including recommendations to establish a regional mechanism for promoting and protecting human rights.¹⁹

By 2003, human rights were by no means uncontroversial in ASEAN but had become increasingly entrenched in the discourse surrounding the Association, with Indonesia often leading the charge. The Association's goals for human rights also became slightly more ambitious and concrete. In the 1998-2003 Hanoi Plan of Action—the first of a series of five-year plans to reach ASEAN's goal of a region of “peace, stability, and prosperity” by 2020—members agreed only to “enhance exchange of information in the field of human rights” and work toward implementation of international conventions on the rights of women and children.²⁰ In the 2004-09 Vientiane Action Programme, members agreed to “promote human rights,” complete a stock-taking of existing human rights mechanisms, formulate an MOU to facilitate cooperation between them, promote human rights education, “elaborat[e] an instrument on the protection and promotion of the rights of migrant workers,” and “establish an ASEAN commission on the promotion and protection of the rights of women and children.”²¹

Between 2004 and 2007, ASEAN members concluded a trio of regional declarations underscoring their commitment to eliminate violence against women, prevent human

¹⁹ Mely Caballero-Anthony, *Revisioning Human Security in Southeast Asia*, 28 *ASIAN PERSPECTIVE* 155, 181-83 (2004); Report of the Chairman of the 5th ASEAN People's Assembly to the 12th ASEAN Summit, Cebu, Philippines, Jan. 13, 2007, available at http://www.forum-asia.org/news/in_the_news/pdfs/2007/chairman_report_5th_apa%20.pdf.

²⁰ *Hanoi Plan of Action* (Jakarta: ASEAN Secretariat, 1999), available at <http://www.aseansec.org/8754.htm>, ¶¶ 4.8, 4.9.

²¹ *Vientiane Action Programme* (Jakarta: ASEAN Secretariat, 2004), available at <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>, § 1.1.4. The Indonesian government was reportedly the primary proponent of including human rights as part of the concept of an ASEAN Security Community in the 2003 Bali Concord II, an agreement to which the Vientiane Plan of Action was attached. Dewi Fortuna Anwar, *The ASEAN Charter: The Case for Ratification*, *THE ROAD TO RATIFICATION AND IMPLEMENTATION OF THE ASEAN CHARTER* (Pavin Chachavalpongpun, Ed., 2009), at 35.

trafficking—particularly of women and children—and uphold the rights of migrant workers.²² The human rights mechanism also became a major topic of discussion as the Association began work on drafting its first Charter. ASEAN leaders appointed an Eminent Persons Group (EPG) to review the Association and issue recommendations for the drafting of the Charter. The EPG report consisted largely of retired officials, giving them a different set of incentives with respect to human rights than the incumbent leaders who had appointed them. The EPG report put considerable emphasis on “human rights and fundamental freedoms” and on the establishment of regular official consultations with human rights groups.²³

Human Rights in the ASEAN Charter

While human rights became more prominent in ASEAN discourse and became more formally embedded in some domestic systems, the human rights conditions in most Southeast Asian countries showed little improvement during the 1990s and early 2000s. Freedom House scores and qualitative metrics from the U.S. State Department and Amnesty International suggested significant progress in Indonesia, stasis in much of the region, and backsliding in a few key cases (namely Thailand and the Philippines). By some metrics, the region looked remarkably similar to how it had appeared in 1976.²⁴ Many of the same regional dynamics remained in place, and several ASEAN member governments—especially the CMLV countries—were unenthused about the pride of place accorded to human rights (and democracy) in the report.

Thus, when the EPG report arrived on the desks of ASEAN leaders, the Association clawed back some of the more ambitious recommendations of the eminent persons. Officials on the High Level Task Force appointed to draft the Charter debated whether to maintain references to human rights.²⁵ Ultimately, the Charter did incorporate multiple references, referring on four occasions to “human rights and fundamental freedoms”—a synonym for the negative rights ASEAN had traditionally been shy about legitimating. This was a significant step given ASEAN’s historical origins.

However, more clearly than the EPG report, the Charter emphasized the contextual and contingent nature of human rights. Provisions relating to human rights are consistently “balanced” by commitments to uphold established frameworks of non-interference and the “ASEAN Way.” For example, the preamble describes the Charter’s signatories as “adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.” However, that phrase’s immediate antecedent

²² Declaration on the Elimination of Violence Against Women in the ASEAN Region, concluded in Jakarta, Indonesia, June 30, 2004; ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Vientiane, Laos, Nov. 29, 2004; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, concluded in Cebu, Philippines, Jan. 13, 2007.

²³ *Report of the Eminent Persons Group on the ASEAN Charter* (Jakarta: ASEAN Secretariat, 2006), available at <http://www.aseansec.org/19247.pdf>, ¶¶ 3, 9, 12, 23, 27, 47, 55, 60, 62.

²⁴ Donald K. Emmerson, *Challenging ASEAN: A “Topological” View*, 29 CONTEMPORARY SOUTHEAST ASIA 424, 433 (2007).

²⁵ Rizal Sukma, *Political Development: A Democracy Agenda for ASEAN?*, in *HARD CHOICES* (Donald K. Emmerson, ed., 2008), at 141.

emphasizes “respecting the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus, and unity in diversity.”²⁶

Article 1(7) identifies human rights as an explicit goal of the Association but again places that objective in dynamic tension with the rights of sovereign member states. The espoused goal is: “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.”²⁷ Thus, the provision treats human rights as norms to be reconciled with and sometimes balanced against norms of sovereignty and non-interference. The Charter’s carefully chosen words do not paint a picture in which rights rest on one scale and national interests or security imperatives rest on the other. Instead, they depict a struggle of rights against rights.²⁸

The Charter also framed human rights as goals of the Association but did not specify the concrete means by which those goals would be achieved or the sanctions that would follow non-compliance.²⁹ The issue of a human rights body was hotly contested in the drafting process,³⁰ and ultimately the drafters punted to a considerable degree. The Charter merely stated that ASEAN would establish a “human rights body,” leaving the specific features of that body to be negotiated by ASEAN foreign ministers.³¹

THE AICHR’S INSTITUTIONAL HANDICAPS

In July 2008, ASEAN Foreign Ministers appointed a group of government officials to hammer out the details of the human rights body envisioned in the Charter. The name of the

²⁶ Charter of the Association of Southeast Asian Nations, concluded in Singapore, Nov. 20, 2007 [hereinafter ASEAN Charter], preamble. Indonesia reportedly suggested referring to human rights in the preamble. Anwar, *supra* note 21, at 35.

²⁷ *Id.* art. 1(7). This provision comes seventh, following a number of ASEAN goals relating to security, development, poverty reduction, and the environment. There are numerous other examples. Article 1(11) sets forth the goal of providing “the peoples of ASEAN” with “access to opportunities” for justice. In article 2(2)(i-j), ASEAN and its member states commit to acting in accordance with “respect for fundamental freedoms, the promotion and protection of human rights,” and related principles of social justice and international law. However, these provisions follow commitments to uphold norms of sovereignty, non-interference, external interference and coercion, and consultation. *Id.* arts. 1(11), 2(2).

²⁸ In addition, the clause suggests that states have the primary responsibility to deal with human rights, perhaps to address the debate within the region about the relationship between sovereignty and the emerging concept of a responsibility to protect. For a discussion of that principle in an ASEAN context, see Erik Kuhonta, *Toward Responsible Sovereignty: The Case for Intervention*, in *HARD CHOICES* (Donald K. Emmerson, ed., 2008), at 305-10.

²⁹ Sukma, *supra* note 25, at 141.

³⁰ According to a senior ASEAN official, “no satisfactory compromise could be reached on the nature of the proposed body, nor about the scope of its influence.” Termsak Chalermpananup, *Institutional Reform: One Charter, Three Communities, Many Challenges*, in *HARD CHOICES* (Donald K. Emmerson, ed., 2008), at 105.

³¹ ASEAN Charter, *supra* note **Error! Bookmark not defined.**, art. 14.

body was subject to considerable dispute, with members wrestling over nouns that would convey greater or lesser independent decision-making power; a “council” or “commission” would sound more authoritative than a “mechanism” or “forum.”³²

In October 2009, the appointed group and Foreign Ministers unveiled their product: the Terms of Reference (TOR) for an ASEAN Intergovernmental Commission on Human Rights. ASEAN heads of state, arrayed in Bangkok for the Association’s 15th summit, lauded the new Commission in a declaration calling the AICHR an “historic milestone,” a “vehicle for progressive social development and justice,” and the overarching institution responsible for the promotion and protection of human rights in ASEAN.³³ Behind the lofty rhetoric, however, the TOR established an institution with very limited reach.

The Terms of Reference set up the same basic normative tug-of-war that exists in the ASEAN Charter. Article 1 sets forth that the purpose of the AICHR is to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN.”³⁴ However, its work is part of a broader effort to “promote stability and harmony in the region” while “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.”³⁵ Article 2 proceeds to emphasize that the Commission will promote and protect human rights in a manner consistent with the norm of non-interference, with deference to the primary responsibility of states and “avoidance of double standards and politicization” (a possible swipe at the West).³⁶ Instead, ASEAN will pursue a “constructive and non-confrontational approach,” stress “cooperation,” and take an “evolutionary approach.”³⁷

The AICHR was also born with institutional features that impose serious constraints on its capacity to impact ASEAN human rights practices. In theory, regional human rights bodies can exert influence in a number of ways. They can serve as independent decision-making or judicial authorities, as forums in which member states or external actors lean on one another, as portals through which ordinary people and civil society representatives can pressure their governments for reform, or as hubs for norm incubation. ASEAN governments – and especially the least liberal in the Association – are well aware of the potential of a human rights body to generate unwanted pressure. The AICHR is thus designed in a manner that constrains its activities tightly and thus limits ASEAN governments’ exposure to unwanted pressure on human rights issues.

³² Termsek Chalermphanupap, *10 Facts about ASEAN Human Rights Cooperation*, ASEAN public memorandum, Mar. 2009, §3, available at <http://www.aseansec.org/HLP-OtherDoc-1.pdf>; Rizal Sukma, *The ASEAN Charter: Neither Bold Nor Visionary*, in *THE ROAD TO RATIFICATION AND IMPLEMENTATION OF THE ASEAN CHARTER* (Pavin Chachavalpongpun. Ed., 2009), at 48-52.

³³ Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights, adopted in Cha-am Hua Hin, Thailand, Oct. 23, 2009 [hereinafter Cha-am Hua Hin Declaration], arts. 4, 8.

³⁴ ASEAN Intergovernmental Commission on Human Rights (Terms of Reference) (Jakarta: ASEAN Secretariat, 2009) [hereinafter AICHR Terms of Reference], art. 1.1.

³⁵ *Id.* arts. 1.3-1.4.

³⁶ *Id.* arts. 2.1-2.2.

³⁷ *Id.* arts. 2.4-2.5.

Weak Independent Authority

When they are given sufficient autonomy and backed by enough political muscle, regional human rights bodies can serve as independent adjudicators and enforcement agencies. They can also serve as “norm incubators” that provide fertile institutional ground for the development and dissemination of human rights principles. The European Court of Human Rights and Inter-American Commission and Court of Human Rights are perhaps the best regional examples.³⁸ Both courts can investigate cases brought by private citizens and issues judgments against states. Some have argued that Southeast Asia merits a similar regional court that could offer Southeast Asian citizens fairer hearings than many could get at home.³⁹ However, the AICHR is far from that model, both in terms of political independence and institutional power.

Its architects pointedly labeled it an *intergovernmental* commission, reflecting the misgivings of some ASEAN members. A commission (sans adjective) might have sounded too independent without a reminder that it is, like ASEAN itself, a governments’ club. Under the TOR, the AICHR is a “consultative body” in which decisions are made based on the common ASEAN diplomatic practice of “consultation and consensus.”⁴⁰ In other words, each member state has an effective veto over the Commission’s decisions, even when the decisions pertain to that state’s malfeasance.

The consensus requirement is particularly important, because the officials who comprise the commission are government appointees (normally from foreign ministries) and accountable to their host governments.⁴¹ They are called “Representatives” rather than “commissioners,” which puts emphasis on their loyalty to home capitals.⁴² Two of the Representatives—Indonesian Rafendi Djamin and Thai Sriprapha Petcheramesree—were elected by independent teams in their host countries, but others were simply appointed by their governments. The Representatives have neither a permanent brick-and-mortar home nor a dedicated bureaucracy. Instead, most work from offices in their home ministries and report to Foreign Ministers, and most appear to have relatively short leashes. They convene at least twice a year at the ASEAN secretariat in Jakarta or in the capital of the annual ASEAN country chair.⁴³ This setup makes it less likely that Representatives or their staff members will be able to develop the sense of independent institutional identity and interpersonal bonds required to serve a strong norm-incubating function.

³⁸ Two other regional human rights bodies also exist—the African Commission and Court of Human and Peoples’ Rights, founded in 2004, and the Arabic Commission for Human Rights, established in 1968 and furnished with a new charter in 2004.

³⁹ Hao Duy Phan, *Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report*, 31 CONTEMPORARY SOUTHEAST ASIA 468, 481-99 (2009).

⁴⁰ AICHR Terms of Reference, *supra* note 40, arts. 3, 6.

⁴¹ AICHR Terms of Reference, *supra* note 40, art. 5.2.

⁴² Cha-am Hua Hin Declaration, *supra* note 33, art. 3; AICHR Terms of Reference, *supra* note 40, art. 5. This appears to have been a compromise during the discussions over whether to call the human rights body a commission. *Life After the Charter*, paper by the ASEAN Studies Centre (Singapore: Institute of Southeast Asian Studies, Aug. 2009), at 9.

⁴³ Cha-am Hua Hin Declaration, *supra* note 33, arts. 6.2-6.5.

The AICHR also has weak formal powers. It reports up to senior government officials and thus sits well below the metaphorical plane defined by the Association's sovereign leaders.⁴⁴ It lacks the ability to hear cases or initiate independent investigations of particular alleged rights abuses. Rather, its mandate includes a list of politically inoffensive goals. These include developing collaborative strategies, developing a regional human rights declaration, educating the public, providing technical assistance and aid for capacity building, promoting international human rights principles and instruments, obtaining information, and engaging in dialogue with governments and civil society to develop "common approaches and positions."⁴⁵

The Commission's focus is decidedly on human rights *promotion* rather than *protection*. This conscious choice reflected an effort to keep all members on board. "ASEAN is operating in the real world," explained senior ASEAN official Termsak Chalermphanup, "and has to be realistic...it is not desirable to try to [foster human rights cooperation] on the basis of 'ASEAN minus X.'"⁴⁶

Robust protection would entail exercising authority vis-à-vis member states to enforce human rights obligations and defend individual rights. ASEAN states have agreed to some important human rights norms. All ten states have ratified the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (albeit with reservations in some cases). These instruments could provide useful starting points for protecting the human rights of some of the region's most vulnerable populations. In fact, since 2004 ASEAN members have concluded regional declarations underscoring their commitment to eliminate violence against women, prevent human trafficking—particularly of women and children—and uphold the rights of migrant workers.⁴⁷ However, the AICHR Terms of Reference notably grant the Commission no explicit enforcement powers. Instead, the Commission's activities will likely focus on drafting a regional declaration and issuing reports about regional human rights conditions—which can be expected to pull punches given the need for consensus approval.

Narrow Channels for Lateral Pressure

A second way in which a regional body can help to drive human rights reforms is by serving as a forum for the application of "lateral" pressure from other governments, inside and outside of the region. The AICHR (like ASEAN itself) is designed—normatively and structurally—to head off both types of lateral pressure. The TOR authorizes AICHR representatives to consult with other national, regional, and international human rights bodies, where they could come under attack. Many ASEAN members are wary of such criticism,

⁴⁴ Emerson thus analogizes ASEAN and its constituent organs to a basin surrounded by mountain peaks. Emerson, *supra* note 24, at 436-37.

⁴⁵ Cha-am Hua Hin Declaration, *supra* note 33, art. 4.

⁴⁶ Termsak, *supra* note 32, at §7.

⁴⁷ Declaration on the Elimination of Violence Against Women in the ASEAN Region, concluded in Jakarta, Indonesia, June 30, 2004; ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Vientiane, Laos, Nov. 29, 2004; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, concluded in Cebu, Philippines, Jan. 13, 2007.

however, and have felt the brunt of Western opprobrium in the past. AICHR representatives will almost certainly approach international forums with caution.

The AICHR limits the scope for external influence through funding channels. Some of ASEAN's existing programs related to human rights have been funded by Western donors, but the TOR notably contains a provision that "funding and other resources from non-ASEAN Member States shall be solely for human rights promotion, capacity building and education."⁴⁸ Thus, external (read: Western) funds cannot be channeled into the more controversial efforts to *protect* human rights.

Southeast Asian states could apply lateral pressure in the form of persuasion or incentives if groups of like-minded states—including Indonesia and perhaps Thailand and the Philippines—gang up and put human rights near the top of their agenda. In the near term, it is more likely that they will stick to a gentle (or even meek) form of persuasion in dealing with human rights. On introducing the AICHR, Thai Prime Minister Abhisit Vejjajiva said: "the issue of human rights is not about condemnation but about awareness, empowerment and improvement."⁴⁹ Other priorities usually trump human rights concerns, and ASEAN is usually apt to resort to a Indonesia's more liberal outlook is an important shift but has been largely offset in recent years by backslides in Thailand and the Philippines. The shadow that China increasingly casts over the region also helps insulate members from criticism, as Beijing seeks strategic gains by opening its arms to regimes spurned by liberal neighbors and the West.

Lateral pressure also depends on prevailing norms. ASEAN's strong norm of non-interference and consensus-based diplomacy are still formidable barriers to interstate human rights advocacy.⁵⁰ The AICHR adopts these norms, usefully drawing illiberal states into dialogue but regrettably protecting them from opprobrium. To some extent, ASEAN leaders have been justified in trying to avoid unduly poking one another and have benefitted from banding together and maintaining peaceful relations. Too often, however, this approach simply becomes a way for elites to shield themselves from criticism and scratch one another's backs. The possibility of group pressure will depend heavily on the correlation of ideational forces in the region over time.⁵¹

Limited Exposure to Public Demands

A third mechanism for policy change could come from the bottom up. A regional human rights body can serve as a portal through which civil society and members of the public apply pressure on the government. Local civil society groups and other citizens or collectives

⁴⁸ ASEAN Terms of Reference, *supra* note 34, art. 8.6.

⁴⁹ Thomas Fuller, *Quarelling over rights clouds Asean gathering*, INT'L HERALD TRIBUNE, Oct. 24, 2009.

⁵⁰ In a recent survey, Southeast Asian respondents working in the human rights field cited non-interference and the "ASEAN Way" of diplomacy as the principal obstacles to AICHR effectiveness. Phan, *supra* note 39, at 480.

⁵¹ See Anwar, *supra* note 21, at 38 (analogizing ASEAN to the fictional two-headed creature "Pushmi-Pullyu" in Dr. Doolittle cartoons, with liberal governments pushing the Association and its Charter in one direction as their illiberal peers tug in the opposite direction.)

could change the cost-benefit calculation of their national leaders even if reshaping their leaders' normative beliefs proves too formidable a task.

The ASEAN Charter includes the goal of establishing a "people-centered Association,"⁵² and the AICHR is entrusted with engaging in "dialogue and consultation" with other ASEAN bodies and accredited civil society organizations.⁵³ However, strong civil society pressure is anathema to the short-term self-preservation interests of the region's more illiberal leaders. That helps explain why the AICHR's institutional engagement with civil society and the public has been limited and could amount to little more than window-dressing.

The AICHR rebuffed petitions by civil society groups to be involved in discussing the Commission's rules of procedure. At the ASEAN summit announcing the AICHR's creation in October 2009, several groups walked out of the meeting, arguing that the Commission lacked independence, teeth, and transparency.⁵⁴ Some human rights watchdogs also heaped scorn on the AICHR's limited connection to civil society. Brad Abrams of Human Rights Watch lamented that "an intergovernmental body has always been second best, but an intergovernmental body that won't even talk to its citizens is a joke, and worthless."⁵⁵

Its inability to receive and act upon complaints directly from individual victims is the most important obstacle to the Commission's civil society engagement. That feature has already begun to undermine the Commission's reputation. In late 2009, 56 people were massacred in the southern Philippine province of Maguindanao, including a large number of journalists and family members of a local opposition political candidate. Families of the victims petitioned the AICHR to help them seek justice and compensation from the Philippine government. The Philippine government insisted that the matter was an internal affair, and the AICHR did not seize the issue. Indonesian commissioner Rafendi Djamin expressed his regret and explained:

If it were up to me, I [would] take it up immediately. But AICHR is composed of 10 countries. This will have to be discussed, especially how we are going to deal with the complaints. I can only say that I will do my best to really strengthen the position of AICHR—our power and mandate. It will take a bit long time [sic].⁵⁶

Advocates for the Philippine victims argued that the Philippine government's invocation of immunity would prevent a domestic legal suit and that the AICHR's decision left them with no recourse. Amnesty International issued a scathing critique of AICHR's response to the Maguindanao petitioners, urging the Commission to "apply its mandate, which includes protection of human rights, in line with international law and standards. Otherwise AICHR risks reducing itself to an irrelevant and futile exercise in public relations."⁵⁷ Even worse, if the

⁵² ASEAN Charter, *supra* note **Error! Bookmark not defined.**, art. 1.13.

⁵³ AICHR Terms of Reference, *supra* note 34, art. 4.8. Chapter V of the ASEAN Charter refers to an annex of accredited civil society organizations. ASEAN Charter, *supra* note **Error! Bookmark not defined.**, art. 16 and annex 2.

⁵⁴ Ben Doherty, *Asian rights body draws flak*, SUNDAY AGE (Melbourne), Oct. 25, 2009.

⁵⁵ Sri Wahyuni, *ASEAN Human Rights Body Deemed "Toothless,"* JAKARTA POST, Oct. 24, 2009.

⁵⁶ Carmela Fonbuena, *ASEAN Human Rights Body Fails Kin of Massacred Journalists*, ABS-CBN NEWS ONLINE, Mar. 29, 2010.

⁵⁷ Amnesty International, Statement on the AICHR, Mar. 30, 2010, AI Index: IOR 64/001/2010.

Commission does just enough to placate some constituencies and outside observers, it may actually provide a thin layer of added political cover for continued abuses. This is the sense in which “institutionalizing” human rights can mean something more akin to imprisonment than reification.

WAYS THE AICHR COULD EVOLVE

The preceding discussion cast the AICHR’s prospects in a relatively grim light. Its institutional structure and decision-making rules essentially foreclose “top-down” organizational mandates and impose serious constraints on “lateral” peer pressure or “bottom-up” challenges from civil society and the public. Thus, in the immediate future, the AICHR has only a modest amount to offer in advancing human rights in Southeast Asia. It is nevertheless a step to be welcomed. It is a concrete acknowledgment by ASEAN heads of state that their citizens are entitled to certain protections, and it opens the door for positive incremental change and is an important step to be welcomed. There are several steps that reform-minded AICHR Representatives and their allies can take to help the Commission become more influential.

Pursuing Public Education

An agreed part of AICHR’s mission is to promote human rights. The Commission is also tasked with “keep[ing] the public periodically informed” by producing “appropriate public information materials.”⁵⁸ One of the most promising ways for the AICHR to develop relevance for ordinary Southeast Asian people is to lead educational campaigns. These need not tackle the most sensitive issues. Posters of a beleaguered Aung San Suu Kyi or presentations on jailed Vietnamese dissidents are certainly not in the offing, and they would likely backfire on a Commission still trying to find its political footing.

Rather, an educational campaign should start by disseminating information on which all ASEAN states have agreed, such as key provisions on the rights of women, children, and migrant workers. Educating ordinary people about their rights will not guarantee seismic change, but it is a vital step in shifting the dynamics in any state toward a greater respect for basic freedoms. A competent educational campaign—which ASEAN’s more liberal members should offer to launch on their soil—can also build the Commission some public credibility and sufficient trust from member governments to do its work in less hospitable environs.

Partnering with National and International Organizations

The AICHR is not operating in an institutional vacuum. Many of the types of activities that the AICHR will perform are already underway in Southeast Asia, and the Commission’s effectiveness will depend partly on its collaboration with national and international organizations. The national commissions of Malaysia, Indonesia, the Philippines, and Thailand have already plugged into an Asia-Pacific Forum of National Human Rights Institutions. That forum encourages cross-linkages to help national bodies learn from one another and develop

⁵⁸ AICHR Terms of Reference, *supra* note 34, art. 6.7.

regional networks and programs.⁵⁹ The AICHR and national commissions have different institutional capacities and face different constraints, making it possible for them to perform some complementary functions.

United Nations bodies offer another venue through which AICHR Representatives—who are authorized to consult with them—can seek allies and raise human rights on the agenda. The UN Office for the High Commissioner on Human Rights has a regional office in Bangkok, and two Southeast Asian states—Malaysia and Thailand—will soon occupy seats on the UN Human Rights Council. The AICHR can also build its competence by partnering with other regional bodies from the Global South, such as the Inter-American Human Rights Commission, which developed incrementally after its founding in 1959. Such ties will not fundamentally change the AICHR's nature but can raise its stature and feed Representatives' interest in expanding the scope and independence of their work.

Opening to Civil Society

AICHR Representatives have limited authority to engage with civil society but are allowed to consult. Doing so can help build momentum for change even in the absence of formal institutional action. The AICHR provides a forum in which national advocates can lobby for human rights concerns at the regional level—and in some cases get a more sympathetic ear than they would at home. Its meetings and reports need not produce decisions that bind member states to be useful instruments in nourishing grassroots movements and catalyzing reform, which will often be instigated by civil society actors and politicians in domestic Southeast Asian systems.⁶⁰ Ultimately, these bottom-up pressures may be the most important drivers for change in human rights practices in Southeast Asia, as they have been elsewhere.

Seeking Leadership

Reform-minded AICHR Representatives should also seek opportunities for key countries to develop a leadership stake in regional human rights affairs. ASEAN is often described as an organization that needs to move slowly to keep lagging members on board. However, as some Southeast Asian states become more secure in their neighborhood and more confident in their international roles, there is also a credible threat that the organization will lose importance to key members by moving too slowly. Indonesia—which accounts for roughly 40% of the region's population—is now the country most assertively pushing the bounds of consensus on human rights, prompting one regional expert to ask if it is “outgrowing ASEAN.”⁶¹ Laos probably cannot drag its neighbors far along a normative spectrum, but Indonesia can make a difference—especially if it partners with others.

Individual ASEAN states could exercise leadership by inviting the AICHR to conduct studies (if not full-throttle “investigations”) of selected cases. For example, allegations of abuse

⁵⁹ Andrea Durbach et al, “A Tongue but No Teeth?”, 31 SYDNEY L. REV. 211 (2008).

⁶⁰ Kelsall, *supra* note 1, at 6.

⁶¹ Barry Desker, *Is Indonesia outgrowing Asean?*, STRAITS TIMES (Singapore), Sept. 29, 2010.

in parts of Papua, Pattaya, or Mindanao offer opportunities for the governments of the respective countries to convince constituents and foreign partners that they are serious about human rights. The resulting reports would not need to carry legal force to be effective; they would merely need to be credible and avoid whitewashing.

ASEAN officials committed to human rights can also encourage countries to vie for leadership by pushing for a permanent AICHR Secretariat and inviting states to compete for the right to reap the reputational gains of hosting it. The Philippine government has already offered to host an AICHR Secretariat—an offer made by Gloria Macapagal Arroyo and affirmed by her successor, Noynoy Aquino.⁶² The Indonesian government under Susilo Bambang Yudhoyono has also taken pride in developing its human rights commission and has expressed an interest in hosting the AICHR,⁶³ and Surin Pitsuwan is known to be committed to the cause. A race among three or four of ASEAN's most influential states to develop a model institution would be the type of rivalry the region needs.

Drafting a Strong Declaration

AICHR representatives are currently in the midst of drafting a regional human rights declaration. Certain principles are well agreed-upon in the region—namely rights related to women, children, and migrant workers—and can be detailed with some measure of specificity. Including strong language about broader civil and political liberties will not be easy, even though the resulting instrument will not have binding legal force.

Even more crucial than declaratory language about new norms may be provisions expressing agreement on the means of enforcing existing ones. Expecting ASEAN states to agree to cross-border or supranational enforcement mechanisms would be unrealistic and probably undesirable, as illiberal regimes would surely shrink into their shells. A more appropriate objective would be to secure agreement from all ASEAN members to form national human rights commissions with reasonable indicia of independence. A national commission in an opinion-leading state like Singapore—often seen as the intellectual vanguard for the “Asian values” position—would have particular demonstration effect.⁶⁴ The dubious interpretations that some members would give to the term “independent” would be more than offset by the benefit of planting the organizational seeds for human rights protection.

CONCLUSION: LOOKING TOWARD THE FIVE-YEAR MARK

The concept of institutionalization captures two salient dimensions of ASEAN's struggle over how to handle human rights—as a potential threat to incumbent interests and as a set of norms that could help the Association develop better lives for its citizens. Both of these lenses reflect important aspects of the truth. The conceptual ambiguities and structural weakness of

⁶² *PGMA Off to Vietnam for 16th ASEAN Summit*, PHILIPPINE INFORMATION AGENCY, Apr. 7, 2010; Purple S. Romero, *President Aquino wants AICHR office in RP*, NEWSBREAK (Philippines), July 21, 2010.

⁶³ Author's conversation with Indonesian Representative Rafendi Djamin, Jakarta, May 20, 2010.

⁶⁴ Professor Tommy Koh, a senior Singaporean statesman, notably disagreed with Lee Kuan Yew and argued for the creation of a national commission. See Clarissa Oon, *Major task to find next “A team” from small talent pool*, STRAITS TIMES (Singapore), Feb. 2, 2008.

ASEAN's human rights regime reflect varying degrees of ambivalence among its constituent member governments, as well as an effort to manage relations with civil society and the West.

In the short term, the path of least political resistance for the AICHR is to be an organization of little practical significance, espousing broad human rights objectives while dodging specific issues. However, dynamics within ASEAN leave open the possibility for the Commission to play a much more significant institutional role. The coming four years constitute the relevant near-term time horizon. Under the TOR, the Commission will be reviewed and reassessed by Foreign Ministers on its fifth birthday in 2014.⁶⁵ Secretary-General Surin Pitsuwan, an important advocate of the Commission, will soon conclude his term, and his successor's disposition will be an important variable. Also relevant will be the rotating country chairmanship of ASEAN. Indonesia has the 2011 chair – an auspicious period for the AICHR – but is followed by Cambodia and Brunei, two countries likely to approach the issue with greater caution.

Change will not happen overnight; regional institutions cannot soar too far above the plane of relevant political will without getting their wings clipped. Those that have developed real teeth – such as the European Court of Human Justice and increasingly the Inter-American Commission and Court of Human Rights – earned their influence gradually. If the AICHR is to build influence, it will have to do the same.

⁶⁵ AICHR Terms of Reference, *supra* note 34, arts. 9.6-7.