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Summer 9-1-2018

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### Recommended Citation

Mariam, Note, Human Rights the "ASEAN Way": Exploring the Possibilities for a Regional ADR and Adjudicative Body in Southeast Asia, 52 Loy. L.A. L. Rev. 27 (2018).

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# HUMAN RIGHTS THE “ASEAN WAY”: EXPLORING THE POSSIBILITIES FOR A REGIONAL ADR AND ADJUDICATIVE BODY IN SOUTHEAST ASIA

*Mariam Sarwar\**

## I. INTRODUCTION

With regards to international human rights law, academics have described Asia as a “black hole,”<sup>1</sup> or “the last frontier”<sup>2</sup> in regional human rights cooperation, and perhaps with good reason. Whereas Europe, Africa, and the Americas have had regional legal systems for human rights enforcement for years, Asia has yet to establish a concrete and legally binding regional mechanism to redress human rights violations. This may, however, be poised to change. Within the last decade, the Association of Southeast Asian<sup>3</sup> Nations (“ASEAN” or “Association”) has increasingly made human rights a priority in their regional operations. The Association created a human rights

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1. Nicholas Doyle, *The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting*, 63 INT’L & COMP. L.Q. 67, 70 (2014) (“When considering the architecture of the international human rights system, Asia seems to be something of a ‘black hole’.”).

2. Ben Saul et al., *The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific*, 18 AUSTL. INT’L L.J. 23, 23–24 (2011) (“While regional mechanisms for human rights protection were established in Europe in 1950, the Americas from 1959, Africa from 1981, and among Arab States from 2004, the Asia-Pacific has long been the last frontier of regional cooperation.”).

3. Hao Duy Phan, a legal expert in international law, has described “Southeast Asia” as geographically comprising of “the area south of China and to the east and southeast of India, covering the continental Southeast Asia (Myanmar, Vietnam, Laos, Thailand, Cambodia, Singapore, and Malaysia) and archipelagic Southeast Asia (Malaysian Sabah, Brunei, Indonesia, the Philippines, and Timor-Leste).” Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights*, in 29 PROCEDURAL ASPECTS OF INTERNATIONAL LAW MONOGRAPH SERIES 2 n.8 (Roger S. Clark eds., 2012).

commission in 2009, adopted a human rights declaration in 2012, and has begun to develop initiatives with member state judiciaries to improve human rights enforcement in domestic courts.<sup>4</sup>

The primary roadblock to ASEAN's regional human rights development has been its adherence to an ideology known as the "ASEAN Way," which is enshrined in many of ASEAN's legal instruments and continues to shape the ways in which member states interact with each other. The "ASEAN Way" is primarily characterized by the principle of non-interference—states are highly deferent to domestic sovereignty, reluctant to meddle in the internal affairs of other member states, and can only enact change with the consensus of all members.<sup>5</sup> Though this ideology has served to maintain a level of peace and harmony amongst ASEAN states, it has also fostered an environment in which ASEAN members do not hold each other accountable for human rights violations.

For example, ASEAN has hardly even condemned the ongoing Rohingya crisis within the member state of Myanmar, let alone taken steps to stop the persecution and exile of the Rohingya population.<sup>6</sup> ASEAN's actions (or lack thereof) in the face of human rights violations in the region highlights the persistent nature of the "ASEAN Way," and reinforces the need for an examination into how ASEAN can improve their mechanisms for addressing human rights violations.

This Note explores ways in which ASEAN can strengthen its legal capacity to provide redress for human rights violations in Southeast Asia, and proposes that Alternative Dispute Resolution

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4. See Yvonne Xin Wang, *Contextualizing Universal Human Rights: An Integrated Human Rights Framework for ASEAN*, 25 DUKE J. COMP. & INT'L L. 385, 387 (2015); *Council of ASEAN Chief Justices (CACJ)*, PEJABAT KETUA PENDAFTAR MAHKAMAH, PERSEKUTUAN MALAYSIA [Chief Registrar's Office of the Court, Federation of Malaysia], <http://www.kehakiman.gov.my/ms/mengenai-kami/hubungan-kehakiman-antarabangsa/council-asean-chief-justices-cacj> (last visited Mar. 14, 2018).

5. Phan, *supra* note 3, at 113.

6. See, e.g., Anis Shakirah Mohd Muslimin, ASEAN's Rohingya Response: Barely a Peep Outside of Malaysia, FORBES (Dec. 17, 2017, 7:00 PM), <https://www.forbes.com/sites/anismuslimin/2017/12/17/aseans-rohingya-response-barely-a-peep-outside-of-malaysia/#1ad7d65939de>; JC Gotinga, *ASEAN Summit Silence on Rohingya 'an Absolute Travesty'*, AL JAZEERA (Nov. 14, 2017), <http://www.aljazeera.com/news/2017/11/asean-summit-silence-rohingya-absolute-travesty-171114211156144.html>; John Chalmers, *Southeast Asia Summit Draft Statement Skips Over Rohingya Crisis*, REUTERS (Nov. 12, 2017, 8:13 PM), <https://www.reuters.com/article/us-asean-summit-myanmar/southeast-asia-summit-draft-statement-skips-over-rohingya-crisis-idUSKBN1DD0CP>.

(ADR) is a promising and realistic means for the Association to improve its human rights enforcement.

Part II of this Note discusses ASEAN as an organization and outlines the two interconnected ideologies which pervade ASEAN’s actions and severely stagnate its ability to protect human rights. Part III evaluates some of ASEAN’s key human rights instruments and initiatives for the purpose of outlining deficiencies that merit changing to better protect human rights in member states. Finally, Part IV discusses how ASEAN can strengthen its legal ability to address human rights violations through alternative dispute resolutions, with the ultimate goal of establishing a regional human rights court to provide binding adjudicative decisions.

## II. BACKGROUND

ASEAN was first established in 1967 when Indonesia, Singapore, the Philippines, Malaysia and Thailand signed the Association into existence through the Bangkok Declaration.<sup>7</sup> ASEAN membership grew over the years to include Brunei in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999.<sup>8</sup> The Association was largely created as a security entity, both to prevent the proliferation of communist ideology in the region and to solidify alliances amongst the member states, many of whom were newly independent or in the process of decolonizing after years of oppressive colonial rule.<sup>9</sup> According to the 1967 Bangkok Declaration, the main aims of the Association were to “accelerate the economic growth, social progress and cultural development in the region,” as well as to promote “regional peace and stability” and “active collaboration and mutual assistance.”<sup>10</sup>

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7. Association of Southeast Asian Nations [ASEAN] Declaration, Aug. 8, 1967, I.L.M. 1233, 1233 (1967) [hereinafter ASEAN Declaration]. The ASEAN Declaration is also known as the Bangkok Declaration.

8. ASEAN INTERGOVERNMENTAL COMM’N ON HUMAN RIGHTS, WHAT YOU NEED TO KNOW: ASEAN 50TH ANNIVERSARY EDITION, A COMPENDIUM 4 (2017), <http://asean.org/storage/2017/08/12.-July-2017-AICHR-What-You-Need-to-Know-Compendium-FINAL.pdf>

9. AM. BAR ASS’N RULE OF LAW INITIATIVE, THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS, 2, (2014), <https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>.

10. ASEAN Declaration, *supra* note 7, at 1234.

### A. *The ASEAN Way*

At its inception, ASEAN did not purport to have any mandate regarding the protection of human rights in Southeast Asia.<sup>11</sup> To the contrary, member states pledged to uphold principles of state sovereignty and non-interference in internal state affairs.<sup>12</sup> This ideology was officially enshrined as a “guiding principle for ASEAN”<sup>13</sup> with the signing of the Treaty of Amity and Cooperation in Southeast Asia in 1976.<sup>14</sup> Article 2 of the treaty reads:

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

- (a) Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- (b) The right of every State to lead its national existence free from external interference, subversion or coercion [sic];
- (c) Non-interference in the internal affairs of one another;
- (d) Settlement of differences or disputes by peaceful means;
- (e) Renunciation of the threat or use of force;
- (f) Effective cooperation among themselves.<sup>15</sup>

Though not explicitly stated as such in the treaty, this ideology has become widely known as the “ASEAN Way” and is considered

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11. Yuval Ginbar, *Human Rights in ASEAN—Setting Sail or Treading Water?*, 10 HUMAN RIGHTS L. REV. 504, 505–06 (2010) (“When Indonesia, Singapore, the Philippines, Malaysia and Thailand established ASEAN in 1967, regional stability and economic cooperation were at the forefront of both their motives and declared aims. To a large extent this remains the case today. Human rights, on the other hand, were not even mentioned in ASEAN’s constitutive Declaration.”).

12. Phan, *supra* note 3, at 108–09.

13. *Id.* at 108.

14. Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 27 I.L.M. 610 (1988).

15. *Id.* at art. 2.

“the oldest and most important norm adopted and internalized by ASEAN states which has been central to the conduct of ASEAN relations so far.”<sup>16</sup>

Given the historical context in which ASEAN was conceived, this approach made sense—in the aftermath of colonial intervention and the Cold War, member states sought to maintain control over their nations while facing ongoing threats of external encroachment, border disputes, and internal secessionism.<sup>17</sup> However, the “ASEAN Way” also favored those ASEAN state governments still exercising autocratic rule and arguably made it even easier for human rights violations within the region to go unaddressed.

### *B. Dissonance Between the “ASEAN Way” and Human Rights*

According to Dr. Hao Duy Phan, a legal expert in international law, the “ASEAN Way” represents a vestige of traditional village decision-making processes and is characterized by four main elements: “(1) respect for the internal affairs of other members; (2) non-confrontation and quiet diplomacy; (3) non-recourse to use or threat to use of force; and (4) decision-making through consensus, which is unique to ASEAN.”<sup>18</sup> The “ASEAN Way” ideology has been successful in certain respects for the Association, as it helped to maintain stability in the region, reduce conflicts, strengthen cooperation, and build trust among the member states.<sup>19</sup> The amity furnished by adherence to this principle, in turn, allowed for ASEAN to focus their efforts on economic development and attracting foreign investment.<sup>20</sup>

In terms of human rights, however, the “ASEAN Way” is inherently problematic. By following tenets of non-confrontation and “quiet diplomacy,” states are dissuaded from criticizing the policies or actions of other states.<sup>21</sup> ASEAN states are thus reluctant to hold each

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16. Doyle, *supra* note 1, at 71; Phan, *supra* note 3, at 108.

17. Amrita Kapur, *Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court*, 11 J. INT’L CRIM. JUST. 1059, 1063 (2013); *see also* Phan, *supra* note 3, at 114 (“[‘The ASEAN Way’] was relevant during the Cold War period when security was traditionally defined as security of territory from external aggression or as protection of national interests in foreign policy.”).

18. Phan, *supra* note 3, at 113.

19. *Id.* at 114.

20. Daniel Aguirre & Irene Pietropaoli, *Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Rights System*, 1 INT’L HUM. RTS. L. REV. 276, 278 (2012).

21. Phan, *supra* note 3, at 113–14.

other accountable for the numerous human rights abuses committed within the region.<sup>22</sup> This, coupled with ineffective domestic remedies to address human rights violations, gives victims of human rights abuses few avenues of recourse for their plights.<sup>23</sup>

Furthermore, ASEAN's requirements of a consensus for decision-making essentially amounts to giving each member state veto authority, such that "ASEAN decisions could not be adopted if even one member country consistently rejects it."<sup>24</sup> This severely hinders ASEAN's decision-making process, particularly because "[d]iverse political, cultural, and economic positions within the region make forming consensus around norms difficult."<sup>25</sup> Thus, despite the stability that adherence to the "ASEAN Way" brought to Southeast Asia for the newly-independent member states, the principle as a whole does not facilitate the establishment of external legally-binding mechanisms enforceable within each state's domestic legal system.

### C. *Resistance to the Rise of Human Rights in Asia*

Human rights law gained increasing international support in the 1990s, culminating in the Vienna Declaration and Programme of Action at the World Conference of Human Rights in 1993 which reasserted the need for states to promote and protect human rights.<sup>26</sup> The declaration states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems,

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22. See Hien Bui, *The ASEAN Human Rights System: A Critical Analysis*, 11 ASIAN J. COMP. L. 111, 114 (2016) ("ASEAN has been consistently unenthusiastic in reacting to violations committed by its member states, choosing to 'remain[] silent' and 'powerless' in the face of the many human rights abuses in the region.").

23. See Aguirre & Pietropaoli, *supra* note 20, at 281–82.

24. Phan, *supra* note 3, at 114.

25. Wang, *supra* note 4, at 398.

26. G.A. Res. 48/121, (Feb. 14, 1994).

to promote and protect all human rights and fundamental freedoms.<sup>27</sup>

Around the same time that the international human rights movement was gaining momentum in the West, a new opposing ideology began to gain popularity in parts of Asia. What became known as the “Asian Values” theory was largely a form of resistance to what was deemed to be an imposition of Western human rights norms on Asia.<sup>28</sup> The debate about “Asian Values” was “shaped by the juxtaposition of cultural relativism against developmental universalism and ‘Western’ human rights.”<sup>29</sup> The ideology espoused that allegedly “Asian” beliefs and values were incompatible with “Western” ideas of human rights, and that the attempt to spread “Western” values was a “modern extension of imperialism.”<sup>30</sup>

According to Dr. Chang-Yau Hoon, a professor and researcher specializing in Asian studies, the rise of the “Asian Values” debate occurred because Asia’s economic prosperity at the time bolstered enough confidence in the region to challenge the Western hegemony. Moreover, many countries in the region still harbored a deep-seated resentment against the West for decades of colonialist rule and oppression in the region.<sup>31</sup>

Hoon describes four main beliefs that underpin the “Asian Values” ideology: 1) Human rights are not universal and thus cannot be universally applied. The form that human rights take depends on “particular social, economic, cultural and political conditions”; 2) society should focus on the family rather than the individual, thereby justifying the view that the interest of the country (as a “family”) can and should override that of a single citizen; 3) social and economic rights take precedence over the rights of the individual; and 4) part of a country’s right to self-determination is the ability to exercise

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27. ASEAN, ASEAN HUMAN RIGHTS DECLARATION AND THE PHNOM PENH STATEMENT OF THE ADOPTION OF THE ASEAN HUMAN RIGHTS DECLARATION (AHRD), art. 7, (2012), [http://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf) [hereinafter ASEAN Human Rights Declaration].

28. Chang Yau Hoon, *Revisiting the ‘Asian Values’ Argument Used by Asian Political Leaders and Its Validity*, 32 *INDONESIAN Q.* 154, 154–55 (2004) (“After the end of the Cold War, the United States had enlarged its scope of democracy and the promotion of human rights in its foreign policy. This universalistic claim of human rights was seen by the economically dynamic and increasingly self-assertive East Asian regimes as an ideological compliment to Western domination.”).

29. Kapur, *supra* note 17, at 1063.

30. Saul et al., *supra* note 2, at 30.

31. Hoon, *supra* note 28, at 155.



domestic jurisdiction over human rights without outside interference.<sup>32</sup>

These ideas were most vocally championed by former Malaysian Prime Minister Dr. Mahathir Mohamad and former Singaporean Prime Minister Lee Kuan Yew.<sup>33</sup> In a famous interview with journalist and CNN anchor Fareed Zakaria, Yew stated:

Asian societies are unlike Western ones. The fundamental difference between Western concepts of society and government and East Asian concepts . . . is that Eastern societies believe that the individual exists in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society.<sup>34</sup>

Yew criticized democracy as leading to “undisciplined and disorderly conditions which are inimical to development,” and boasted that Eastern cultures maintained order by placing more value in economic growth and national security than human rights.<sup>35</sup>

Indeed, the “Asian Values” ideology supported paternalistic forms of state authority in which “a nation is like a big family, the government is seen as the unchallengeable ‘father’ who is obliged to exercise both the disciplinarian and custodial roles, and the society is deemed to be the children who ought to obey the father in all circumstances.”<sup>36</sup> As a consequence of this paternalistic leadership, however, states were able to justify intrusive and oppressive policies in the name of the greater good of the nation, and to keep governmental affairs largely shrouded in secrecy and thus vulnerable to corruption.<sup>37</sup> In contrast to what were deemed to be essential “Asian Values”—consensus, harmony, unity and community—the “Asian Values” movement largely served as an ideological tool to validate

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32. *Id.*

33. MICHAEL D. BARR, *CULTURAL POLITICS AND ASIAN VALUES: THE TEPID WAR* 3–4 (Routledge 2002).

34. Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, *FOREIGN AFF.*, Mar.–Apr. 1994, at 109, 113.

35. Ishaan Tharoor, *What Lee Kuan Yew Got Wrong About Asia*, *WASH. POST* (Mar. 23, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/03/23/what-lee-kuan-yew-got-wrong-about-asia/?utm\\_term=.428c51153714](https://www.washingtonpost.com/news/worldviews/wp/2015/03/23/what-lee-kuan-yew-got-wrong-about-asia/?utm_term=.428c51153714).

36. Hoon, *supra* note 28, at 156–57.

37. *Id.* at 160.

authoritarian rule and insulate states from criticism for human rights violations.<sup>38</sup>

The idea of “Asian Values” was “largely discredited” and ceased to be a driving force in Asian politics “after the 1997 Asian financial crisis exposed the fragility of some [Asian] governments.”<sup>39</sup> However, the effects of the “Asian Values” ideology remain enshrined in ASEAN’s actions relating to human rights, as tensions endure between ASEAN’s “[c]ollectivist notions of rights” and “western societies’ individualist framework.”<sup>40</sup> “Asian Values” ideas are still adopted by some ASEAN countries to justify human rights abuses.<sup>41</sup>

In summary, the “Asian Values” ideology fell in line with the principles of sovereignty and non-intervention espoused by the “ASEAN Way”: “Asian Values” effectively contributed to the “ASEAN Way” ideology and helped to create an opposition between the principle of non-intervention and that of universal human rights. Together, the “ASEAN Way” and “Asian Values” ideals severely stagnated ASEAN’s willingness to adopt human rights norms.

In the midst of the rise of human rights initiatives and the “Asian Values” debate, the UN General Assembly and UN Human Rights Commission began to pass resolutions pressuring states in Asia to establish a regional mechanism for human rights.<sup>42</sup> Under this mounting international scrutiny, ASEAN finally added human rights to its agenda in 1993.<sup>43</sup>

At the Twenty-Sixth ASEAN Ministerial Meeting, ASEAN Foreign Ministers agreed to “consider the establishment of an appropriate regional mechanism on human rights.”<sup>44</sup> However, they undermined this reluctant concession by reasserting the familiar norms which underpin the “ASEAN Way”: “[The Foreign Ministers] emphasized that the protection and promotion of human rights in the

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38. *Id.* at 155–56.

39. Tharoor, *supra* note 35.

40. James Gomez & Robin Ramcharan, *Evaluating Competing “Democratic” Discourses: The Impact on Human Rights Protection in Southeast Asia*, 33 J. CURRENT SOUTHEAST ASIAN AFF., no. 3, 2014, at 49, 54.

41. Phan, *supra* note 3, at 79 (“Countries such as Myanmar, Laos, Cambodia and Vietnam still rely on [the “Asian Values”] idea to counter criticisms of their human rights records, or argue against what they call Western imposition of human rights values.”).

42. *See, e.g.*, G.A. Res. 45/168 (Dec. 18, 1990); G.A. Res. 43/140 (Dec. 8, 1988); G.A. Res. 41/153 (Dec. 4, 1986).

43. Phan, *supra* note 3, at 2.

44. Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting (July 23–24, 1993), ASEAN.

international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states.”<sup>45</sup> Perhaps unsurprisingly then, it would be another fifteen years before ASEAN would take action to establish an ASEAN regional human rights mechanism by ratifying the ASEAN Charter.<sup>46</sup>

### III. ASEAN’S EXISTING LEGAL MECHANISMS AND INSTRUMENTS

#### A. *The ASEAN Charter and the Formation of the AICHR*

ASEAN member states adopted the ASEAN Charter in 2007, and it was subsequently ratified by all ten member states in 2008.<sup>47</sup> As stated in the ASEAN Kuala Lumpur Declaration of 2005, the Charter “serve[s] as a legal and institutional framework of ASEAN” and “codif[ies] all ASEAN norms, rules, and values.”<sup>48</sup> The adoption of the Charter was a watershed moment for ASEAN, as it turned “the hitherto loose ‘Association’ into a union consolidated by a legally binding treaty.”<sup>49</sup> In effect, the Charter invested ASEAN with a legal identity independent from its member states, thereby giving the Association the legal capacity to act on behalf of the region.<sup>50</sup>

The ASEAN Charter commits ASEAN to upholding human rights while conversely adding that such rights are to be considered in light of ASEAN’s principles of non-interference and state sovereignty.<sup>51</sup> The Charter’s section delineating ASEAN’s “Principles” illustrates this conflicting duality:

ASEAN and its Member States shall act in accordance with the following Principles:

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45. *Id.*

46. See Phan, *supra* note 3, at 3.

47. Ginbar, *supra* note 11, at 504.

48. The Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (Dec. 12, 2005), [http://asean.org/?static\\_post=kuala-lumpur-declaration-on-the-establishment-of-the-asean-charter-kuala-lumpur-12-december-2005](http://asean.org/?static_post=kuala-lumpur-declaration-on-the-establishment-of-the-asean-charter-kuala-lumpur-12-december-2005).

49. Ginbar, *supra* note 11, at 504.

50. Phan, *supra* note 3, at 103.

51. See ASEAN Charter art. 2.

(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member states;

....

(e) non-interference in the internal affairs of ASEAN Member States;

(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

....

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States . . . .<sup>52</sup>

The Charter further holds that the purpose of ASEAN is “[t]o 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.*”<sup>53</sup> As noted by Phan, the specific “rights and responsibilities” of states are not explained in the Charter, thus leaving the door open for human rights violations to be committed.<sup>54</sup> By qualifying its human rights commitments against a commitment to state rights, the Charter undermines the universality and inalienable nature of human rights<sup>55</sup> in a manner which is consistent with the

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52. *Id.*

53. *Id.* at art. 1 (emphasis added).

54. Phan, *supra* note 3, at 106.

55. *Id.*

“ASEAN Way” and shows vestiges of the so-called “Asian Values” arguments.

Of particular importance, Article 14 of the Charter committed ASEAN to create a human rights body. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was created in 2009 and consists of ten members, each appointed as a representative by each one of the member states.<sup>56</sup> The AICHR Terms of Reference commit the commission “[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN,”<sup>57</sup> but the document is still dominated by the familiar “culture-rights juxtaposition” which qualifies human rights against member state rights for sovereignty and non-interference.

For example, the document states that the AICHR must “promote human rights *within the regional context, bearing in mind national and regional particularities* and mutual respect for different historical, cultural and religious backgrounds, and taking into account the *balance between rights and responsibilities*.”<sup>58</sup> This echoes the ideas of state paternalism espoused by the “Asian Values” argument<sup>59</sup> by implying that State and communal responsibility can outweigh and override individual human rights.

The Terms of Reference commit the AICHR to promote human rights in a variety of ways, including by enhancing public awareness, initiating capacity building to implement international human rights treaty obligations, providing consultation and advisory services, and encouraging ASEAN states to ratify international human rights instruments. Notably, however, while *promoting* human rights is reiterated throughout the AICHR’s mandate and functions, means of actively *protecting* human rights are not addressed.<sup>60</sup> The document does “not envisage the AICHR having any judicial mandate nor providing any legal channel for the receiving and considering of complaints concerning alleged violations of human rights by member-States.”<sup>61</sup>

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56. Wang, *supra* note 4, at 389.

57. ASEAN, ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (TERMS OF REFERENCE), 3 (2009) [hereinafter Terms of Reference] <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>.

58. *Id.* at 4 (emphasis added).

59. Hoon, *supra* note 28, at 156–57.

60. See ASEAN Human Rights Declaration, *supra* note 27.

61. Doyle, *supra* note 1, at 73.

Perhaps as a result, the AICHR faced wide criticism for its inability to act and has been given the moniker of being “toothless.”<sup>62</sup> For example, in an article entitled *Asia’s Toothless Council*, The Wall Street Journal noted:

ASEAN’s commission will make decisions by consensus—meaning authoritarian regimes like Burma, Laos and Vietnam can wield veto power. Individual governments can appoint or remove commissioners as they see fit. Independent observers aren’t included on the commission. It wouldn’t be surprising to see ASEAN’s misfits use the group as an excuse to whitewash their own human-rights violations . . . .<sup>63</sup>

These concerns appear to have been founded. Indeed, the articles outlining basic principles in both the AICHR terms of reference and the ASEAN Charter place non-interference first and above conformity to human rights.

### *B. The ASEAN Human Rights Declaration*

In 2012, the AICHR appointed representatives from each member state to draft the ASEAN Human Rights Declaration (AHRD or the “Declaration”).<sup>64</sup> On its face, this seemed to be a big step for ASEAN towards becoming a regional enforcer of human rights.<sup>65</sup> The existing regional human rights systems in Europe, Africa, and the Americas are made of three key components: first, and central to the entire system, a legally binding human rights convention which outlines human rights commitments for the region; second, a commission,

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62. See, e.g., EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, ASEAN CITIZENS’ RIGHTS: RULE OF LAW, JUDICIARY AND LAW ENFORCEMENT 6 (2013), [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET\\_NT\(2013\)433716\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET_NT(2013)433716_EN.pdf) (“The ASEAN Intergovernmental Human Rights Commission (AICHR) is ‘toothless.’”); James Gomez & Robin Ramcharan, *The Protection of Human Rights in Southeast Asia: Improving the Effectiveness of Civil Society*, 13 ASIA-PAC. J. HUM. RTS. & L., no. 3, 2012, at 27 (“CSOs, who were sparingly consulted in the process of creation of the ASEAN Inter-Governmental Commission on Human Rights, have early on criticized its Terms of Reference (TORs) which provided for a ‘toothless’ mechanism that failed to provide for real ‘protection.’”); *Asean’s Toothless Council*, WALL STREET J.: OPINION (July 22, 2009 4:45 PM), <https://www.wsj.com/articles/SB10001424052970203517304574303592053848748>; Wang, *supra* note 4, at 392 (“Among commentators and human rights advocates, criticisms of the ASEAN Commission abound. It has been called ‘the world’s most toothless human-rights body,’ ‘a lame duck,’ and mere ‘window dressing.’”).

63. *Asean’s Toothless Council*, *supra* note 62.

64. AM. BAR ASS’N RULE OF LAW INITIATIVE, *supra* note 9, at 4.

65. Wang, *supra* note 4, at 396.

which monitors and applies the convention; and third, a court, which enforces obligations from the convention.<sup>66</sup> With the AICHR in place, the AHRD had the potential of being the binding convention central to ASEAN's regional human rights system. Unfortunately, the document fell short.

The AHRD drew criticism from its very inception.<sup>67</sup> The drafting process was controversial because it was largely done in secret and without any form of consultation outside of ASEAN.<sup>68</sup> Civil society organizations (“CSOs”), who sought to provide input to the document, were kept out of the highly secretive drafting process.<sup>69</sup> When finally adopted in 2012, the AHRD continued to disappoint.<sup>70</sup>

The Declaration fails to recognize certain basic rights, such as the right to self-determination, the right of freedom of association, and the rights of indigenous peoples.<sup>71</sup> Provisions within the AHRD also continue to espouse the idea of context-based rights, alluding that, under the appropriate circumstances, states do not have to adhere to human rights standards.

For example, Article 7 of the AHRD, while stating that “[a]ll human rights are universal, indivisible, interdependent and interrelated,” adds that “[a]t the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”<sup>72</sup> This clearly alludes to the “ASEAN Way” mentality and “leaves unresolved the awkward tension between the aspiration to endorse universal human rights and the reluctance to cede state sovereignty.”<sup>73</sup>

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66. *Id.* at 401.

67. *See, e.g., Coalition Slams Secrecy in Human Rights Declaration's Drafting*, JAKARTA GLOBE (June 12, 2012), <http://jakartaglobe.id/archive/coalition-slams-secrecy-in-human-rights-declarations-drafting/> (“‘The AICHR has really been secretive in dealing with a document that will impact the lives of the 580 million people who live in Asean,’ Yuyun told the Jakarta Globe on Sunday. She said that since July 21 when the first meeting of the drafting group was held, there had not been any consultations with stakeholders, including civil society representatives, victims of human rights violations or others. ‘There are grounds for suspicion and worries about the process,’ Yuyun said, adding that so far the AICHR had also never made any draft of the declaration public or even available to the stakeholders.”)

68. Wang, *supra* note 4, at 396.

69. *Id.*

70. *See* AM. BAR ASS'N RULE OF LAW INITIATIVE, *supra* note 9, at 4.

71. Wang, *supra* note 4, at 396.

72. ASEAN Human Rights Declaration, *supra* note 27, at art. 7.

73. Wang, *supra* note 4, at 397.

Perhaps the most problematic provision of the Declaration is in Article 8, which states:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.<sup>74</sup>

Article 8 does not recognize a fundamental principle in international human rights law: that certain human rights, such as the right to freedom from slavery or torture, are inviolable and non-derogable under *any* circumstances.<sup>75</sup> Instead, it implies that states can violate human rights in the name of “national security, public order, public health, public safety, public morality [and the] general welfare of the peoples.”<sup>76</sup> This, in practice, gives states wide latitude to justify human rights abuses by claiming it is for the purposes of something as nondescript as “public morality.”

As stated by the United Nations Human Rights Commission, “All rights are universal, indivisible, interdependent and interrelated. While international human rights law allows for legitimate limitations, derogations and reservations, they must be exercised under strict circumstances. Even in exceptional situations, *certain core human rights must apply at all times.*”<sup>77</sup> Accordingly, while other international agreements have similar provisions for suspending individual rights in situations of national security and safety, these

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74. ASEAN Human Rights Declaration, *supra* note 27, at art. 8.

75. AM. BAR ASS’N RULE OF LAW INITIATIVE, *supra* note 9, at 7.

76. ASEAN Human Rights Declaration, *supra* note 27, at art. 8.

77. U.N. High Comm’r of Human Rights, OHCHR Research and Right to Dev. Div., Core Human Rights in the Two Covenants (Sept. 2013), <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf> (listing examples of non-derogable human rights) (emphasis added); see U.N. Human Rights Comm., CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).



provisions explicitly state that even in times of crisis, certain human rights may not be suspended.<sup>78</sup>

Article 8 of the AHRD contains no such provision.<sup>79</sup> Furthermore, the article lacks provisions to ensure that any suspension or restriction of human rights is 1) legal under international law; 2) implemented to satisfy legitimate aims; and 3) proportionate in scope to the need for the suspension or restriction.<sup>80</sup>

For these reasons and more, the AHRD has drawn criticism from the international community. In response to the drafting of the AHRD, the UN Coordination Committee of the Special Procedures of the Human Rights Council (“UN Committee”) penned an open letter expressing their concern with the document.<sup>81</sup> With regards to Article 7, the UN Committee criticized the nature of this balancing of rights, asserting that “advocating a balance between human rights and duties creates much greater scope for Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights.”<sup>82</sup> The UN Committee noted that “[t]here should be no such provision in a human rights instrument, whose primary purpose is to protect individuals and groups against the misuse and abuse of State power.”<sup>83</sup>

The UN Committee also expressed concern over Article 8 of the AHRD, stating that “[w]ith regard to legitimate restrictions, under

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78. See, e.g., Org. of Am. States [OAS], American Convention on Human Rights: Pact of San Jose, Costa Rica (B-32) art. 27. Article 27(1) has a similar provision to Article 8 of the AHRD, stating that “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.” *Id.* However, this provision is followed by Article 27(2), which cautions that “*The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.*” *Id.* (emphasis added).

79. ASEAN Human Rights Declaration, *supra* note 27, at art. 8.

80. Bui, *supra* note 22, at 128.

81. ASEAN Human Rights Declaration Should Maintain International Standards, An Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration, [http://www.ohchr.org/Documents/HRBodies/SP/LetterASEAN\\_Nov2012.doc](http://www.ohchr.org/Documents/HRBodies/SP/LetterASEAN_Nov2012.doc) [hereinafter ASEAN Human Rights Declaration Should Maintain International Standards].

82. *Id.*

83. *Id.*

certain conditions, on the grounds of ‘morality’, ‘public order’ and ‘national security’, special procedures mandate holders are acutely aware of the risk of these terms being used as a pretext by Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights.”<sup>84</sup>

The American Bar Association’s Rule of Law Initiative (“Rule of Law Initiative”) wrote a legal analysis of the AHRD shortly after it was drafted under the assumption “that ASEAN will eventually develop a regional human rights convention similar to the American, African and European Conventions, and that the AHRD will form the basis of such a Convention,”<sup>85</sup> and also expressed concern over the omission of key human rights and limitations placed on human rights enforcement.<sup>86</sup> The Rule of Law Initiative theorized that Article 7 may be an attempt to “infuse the AHRD with a regional flavour,” but noted that “the language raises some concerns.”<sup>87</sup> They also noted that Article 8’s “limitation clause” could be used by member states to justify derogation from established human rights principles.<sup>88</sup>

Both the UN Committee and the Rule of Law Initiative concluded that ASEAN must redraft the document with input from CSOs and others in the region, and ensure that the document better mandates compliance with international human rights laws.<sup>89</sup> The Rule of Law Initiative added that before the AHRD can become a binding convention for the region, it must also establish “the machinery required to establish an effective treaty enforcement mechanism.”<sup>90</sup>

### C. *The Legal Effect of ASEAN Instruments and Mechanisms*

Thus far, all ASEAN human rights documents, including the ASEAN Charter, the AICHR Terms of Reference, and the AHRD, are non-binding on ASEAN states and constitute “soft law.”<sup>91</sup> As such, these documents have recommendatory status and nothing more.<sup>92</sup>

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84. *Id.*

85. AM. BAR ASS’N RULE OF LAW INITIATIVE, *supra* note 9, at 2.

86. *Id.* at 7–8.

87. *Id.* at 8.

88. *Id.* at 7.

89. ASEAN Human Rights Declaration Should Maintain International Standards, *supra* note 81, at 2; AM. BAR ASS’N RULE OF LAW INITIATIVE, *supra* note 9, at 9.

90. AM. BAR ASS’N RULE OF LAW INITIATIVE, *supra* note 9, at 9.

91. TAN HSIEN-LI, THE ASEAN INTER-GOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA 177 (2011).

92. *Id.*

The AICHR itself is only a consultative intergovernmental body which, unlike other regional human rights commissions, does not receive, analyze, or investigate claims of human rights abuses.<sup>93</sup> Though the AICHR's terms of reference decree that the AICHR must protect human rights, they lack a mandate to do more than conduct capacity building and awareness-raising initiatives.<sup>94</sup> None of ASEAN's human rights instruments or initiatives establish a complaints mechanism to allow for individuals to report human rights violations, nor do they posit a system for remedying for human rights abuses through any form of punishment on member states or human rights violators.<sup>95</sup>

In practice, the AICHR's activities have mainly taken the form of organizing conferences and seminars throughout the region related to human rights,<sup>96</sup> while ASEAN and the AICHR have remained largely silent in the face of actual human rights abuses in the region.<sup>97</sup> In fact, there is research to suggest that ASEAN has been as inactive in condemning and acting against human rights abuses since the formation of the AICHR as it was before the AICHR even existed.<sup>98</sup> Following a recent military coup in Thailand, the Thai military even lobbied ASEAN for support for their military regime and arbitrary exercises of power.<sup>99</sup>

For a more recent example of ASEAN and the AICHR's complacency towards human rights violations, one need look no further than the ongoing Rohingya crisis in ASEAN member state Myanmar. The Rohingya are a Muslim ethnic minority from the Rakhine State, one of the poorest states in Myanmar.<sup>100</sup> Though the Rohingya have faced discrimination for years at the hands of extremist and ultra-nationalist Buddhist groups,<sup>101</sup> “the recent level of violence

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93. Bui, *supra* note 22, at 131–32.

94. EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *supra* note 62.

95. *Id.*

96. *Id.*

97. *See id.*

98. Bui, *supra* note 22, at 118.

99. *Id.* at 117–18.

100. U.N. High Comm'r for Human Rights, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, ¶ 9, UN Doc. A/HRC/32/18 (June 28, 2016).

101. U.N. Office of High Comm'r for Human Rights, *Report of OHCHR Mission to Bangladesh: Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016*, 5 (Feb. 3, 2017).

is unprecedented.”<sup>102</sup> In what has been dubbed the “fastest growing refugee crisis in the world”<sup>103</sup> and “the biggest humanitarian crisis that we’re facing right now in the 21st century,”<sup>104</sup> the Rohingya population has been subject to “the killing of babies, toddlers, children, women and elderly; opening fire at people fleeing; burning of entire villages; massive detention; massive and systematic rape and sexual violence; [and] deliberate destruction of food and sources of food.”<sup>105</sup> The violence and destruction has been perpetrated by the Myanmar Armed Forces, the Border Guard Police Force of Myanmar, police forces of Myanmar, and non-Rohingya Rakhine forces recently integrated into the security forces,<sup>106</sup> and has resulted in over 600,000 Rohingya fleeing to nearby countries such as Bangladesh for refuge.<sup>107</sup>

With the exception of condemnation by Muslim-majority countries Malaysia and Indonesia, ASEAN has been predominantly silent in the face of this crisis.<sup>108</sup> For example, at a 2017 ASEAN Summit meeting, the “Chairman’s Statement,” which provides a summation of the group’s discussions, did not even mention the Rohingya.<sup>109</sup> The *sole* reference to the Rohingya crisis was a commendation for the delivery of relief items to “the affected communities in Northern Rakhine State, Myanmar.”<sup>110</sup> Even the AICHR has failed to respond to the crisis.<sup>111</sup> This is a glaring omission for a commission tasked with upholding human rights.

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102. *Id.* at 41.

103. Muslimin, *supra* note 6.

104. Gotinga, *supra* note 6.

105. U.N. Office of High Comm’r for Human Rights, *supra* note 101, at 41.

106. *Id.* at 11–12.

107. *Southeast Asia Summit Draft Statement Skips Over Rohingya Crisis*, *supra* note 6.

108. Muslimin, *supra* note 6.

109. Ass’n of Southeast Asian Nations [ASEAN] Chairman’s Statement of the Sixth Meeting of the Conference of the Parties to the ASEAN Agreement on Disaster Management and Emergency Response and the Fifth Ministerial Meeting on Disaster Management, ¶ 6, (Oct. 19, 2017), <http://asean.org/storage/2017/10/Final-Chairmans-Statement-5th-AMMDM-6th-COP-to-AADMER-19-Oct-2017.pdf>.

110. *Id.*

111. See Indah P. Amaritasari, *ASEAN Rights Body Absent in Massacre of Rohingya* JAKARTA POST (Sept. 12, 2017, 8:05 AM), <http://www.thejakartapost.com/academia/2017/09/12/asean-rights-body-absent-in-massacre-of-rohingya.html> (“The absence of any effective response on the part of the AICHR toward human rights violations of international human rights law amounts to ASEAN perpetuating the culture of impunity of its member states. . . . The AICHR’s lack of response to the situation of human rights of the Rohingya can foster organized criminal abuse of state power. The ASEAN human rights system does not have any such system of interim, precautionary or provisional measures in place to protect victims or those at imminent risk of being victimized.”).

#### *D. The Council of ASEAN Chief Justices*

Despite its clear shortcomings, ASEAN has made progress towards unifying judicial practices and institutionalizing human rights norms within the domestic judiciaries of its member states. Given the aversion that ASEAN members have traditionally had for outside intervention and change, these initiatives represent an important step for human rights within the region.

The Council of ASEAN Chief Justices (CACJ or the “Council”) was created in 2013, and has met annually since their inception.<sup>112</sup> As indicated by the name, the Council is comprised of the Chief Justices and Heads of the ten ASEAN domestic judiciaries.<sup>113</sup> The Council aims to establish “adherence to the rule of law and protection of human rights and fundamental freedoms, ensuring that ASEAN member states and denizens live in peace with the world at large in a just environment,”<sup>114</sup> and delineated the following objectives at their initial meeting:

- (a) Promote close relations and mutual understanding amongst the ASEAN judiciaries;
- (b) Provide a regular forum for the ASEAN Chief Justices to discuss and exchange views on common issues facing the ASEAN judiciaries; and
- (c) Facilitate judicial cooperation and collaboration among ASEAN judiciaries with a view to accelerate the economic growth and development of the ASEAN region.<sup>115</sup>

The CACJ submitted formal accreditation documentation to the ASEAN Secretary-General in 2016,<sup>116</sup> and became an official entity of ASEAN in January 2017 when the CACJ was added to Annex 2 of the ASEAN Charter.<sup>117</sup>

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112. *Council of ASEAN Chief Justices (CACJ)*, supra note 4.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See *ASEAN Chief Justices Meet in Brunei*, PEOPLE’S ARMY NEWSPAPER (Mar. 25, 2017), <http://en.qdnd.vn/asean-community/asean-news/asean-chief-justices-meet-in-brunei-479361>.

The CACJ has already taken several initiatives towards integrating judiciaries in ASEAN. At the third CACJ meeting in 2015, the Council pledged to create an English-language portal of laws across the region.<sup>118</sup> It is hoped that this portal will create more transparent judicial processes in the region and delineate understandable court regulations for litigants.<sup>119</sup> This portal, which is expected to be up and running by 2018, will be sponsored by the Norwegian government.<sup>120</sup> Additionally, each country has agreed to submit a report on legal regulations of civil procedure in their respective countries so that the Council’s working group can design a “model law” to serve as a reference for all member countries.<sup>121</sup> Countries will also submit reports on their case management procedures for the CACJ working group to create a referential procedure.<sup>122</sup>

Beyond unifying laws, the CACJ also seeks to integrate and enhance judicial training in the region. A working group headed by Indonesia and the Philippines has conducted annual workshops for ASEAN judges on various topics of the law, the third of which was held in 2017 and focused on international human rights.<sup>123</sup> Currently, few ASEAN countries train their judges on ASEAN instruments or international law. This relatively new initiative may significantly help increase awareness of international law norms (including international human rights law norms) amongst ASEAN members.

The CACJ collaborated with the AICHR to host the Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law (the “Colloquium”) in March of 2017.<sup>124</sup> The Colloquium “aimed to strengthen judicial cooperation and encourage greater peer-to-peer interaction between relevant stakeholders, and to provide a platform to share good practices and challenges in the

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118. *‘Rule of Law Must Prevail as ASEAN Integrates’*, RAPPLER (Mar. 3, 2015, 8:57 PM), <https://www.rappler.com/video/reports/85669-rule-of-law-asean-integration>.

119. Buena Bernal, SC: *Efficient Courts Vital to ASEAN Integration*, RAPPLER (Mar. 1, 2015, 6:20 PM), <https://www.rappler.com/nation/85403-sc-court-vital-asean-integration>.

120. *ASEAN Chief Justices Meet in Brunei*, *supra* note 117.

121. *Id.*

122. *Id.*

123. *Council of ASEAN Chief Justices (CACJ)*, *supra* note 4.

124. *ASEAN Shares Good Practices on International Human Rights Law*, ASEAN SECRETARIAT NEWS, (Mar. 20, 2017), <http://asean.org/asean-shares-good-practices-on-international-human-rights-law/>.

implementation of international human rights laws in ASEAN.”<sup>125</sup> Participants at the conference discussed ways in which to implement the AHRD in the region.<sup>126</sup>

In his opening speech, the Secretary General of the Ministry of Foreign Affairs in Malaysia stated that, “[t]he Judiciaries’ discussion on international and regional instruments in the Colloquium will serve to advance a greater understanding and acceptance of human rights norms in the region,” and further emphasized the key role played by the judiciary in serving as a means of check and balance on other branches of government.<sup>127</sup>

The three-day conference closed with the adoption of the Colloquium’s Conclusions and Recommendations for the AICHR.<sup>128</sup> These include:

- (1) conduct capacity-building programmes;
- (2) conduct greater peer-to-peer interaction between relevant stakeholders;
- (3) compile a regional reference guide in respect of the AHRD, CEDAW, CRC, CRPD, and the role of the judiciary in the promotion and protection of the rule of law and human rights;
- (4) enhance effective access to justice and legal remedies by strengthening the provision of legal aid in the region; and
- (5) consult and/or collaborate with other ASEAN bodies and entities associated with ASEAN, including civil society organisations, to realise these recommendations.<sup>129</sup>

While these initiatives all represent substantial strides for ASEAN, they are not being fully embraced without hesitation. For example, at the 2017 annual CACJ meeting held after the

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125. *AICHR’s First Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law*, HUM. RTS. RESOURCE CTR. (Mar. 15, 2017), <http://hrrca.org/aichrs-first-judicial-colloquium-on-the-sharing-of-good-practices-regarding-international-human-rights-law/>.

126. *Press Release: AICHR Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law 13-15 March 2017*, ASEAN INTERGOVERNMENTAL COMMISSION ON HUM. RTS. (Mar. 17, 2017), <http://aichr.org/press-release/press-release-aichr-judicial-colloquium-on-the-sharing-of-good-practices-regarding-international-human-rights-law-13-15-march-2017/>.

127. *AICHR’s First Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law*, *supra* note 125.

128. *Press Release: AICHR Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law 13-15 March 2017*, *supra* note 126.

129. *AICHR’s First Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law*, *supra* note 125.

AICHR/CACJ Colloquium, the Chief Justice of the Supreme Court of Brunei stated:

“We must keep an open mind on the issues that we could and should discuss. If an area of focus is brought to our attention, it is our duty to consider whether it is proper for us to make it a part of the council’s work. For example, the recent [AICHR] Judicial Colloquium on the sharing of Good Practices Regarding International Human Rights Law in Kuala Lumpur sought greater cooperation between the AICHR and the Council on issues of human rights law. The question we must answer is whether this is the appropriate forum for such an issue to be discussed.”<sup>130</sup>

The Chief Justice of the Philippines has also expressed some hesitation regarding unifying and integrating laws across the region. She explained that this may be complicated in light of existing structural systems between the countries,<sup>131</sup> stating, “even explaining how processes work takes time,” and that the Philippines itself is “still grappling with the question of our own jurisdiction.”<sup>132</sup>

Regardless of existing hesitation towards integration and implementation of human rights law in the region, the work of the CACJ is significant. By sharing practices, integrating laws, and teaching international human rights norms, the CACJ can strengthen domestic judiciaries, which can, in turn, ensure better means of redress for domestic human rights violations. The very fact that justices from the highest courts of member states are discussing human rights laws is an important step for ASEAN and highlights the ways in which human rights norms are beginning to gain more acceptance within the region. What remains is figuring out how to apply this momentum towards overcoming principles of non-interference under the “ASEAN Way” to create a legal mechanism to redress human rights abuses.

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130. James Kon, *Brunei Hosts Asean Chief Justices’ Meet*, BORNEO BULLETIN (Mar. 25, 2017), <https://borneobulletin.com.bn/brunei-hosts-asean-chief-justices-meet/>.

131. Buena Bernal, *ASEAN Chief Justices Sign Accord for Judicial Cooperation*, RAPPLER (Mar. 9, 2015, 11:25PM), <https://www.rappler.com/nation/85990-asean-chief-justices-accord>.

132. Buena Bernal, *Sereno: Long Way to Go for Liberalized Legal Profession*, RAPPLER (Mar. 2, 2015, 11:59 AM), <https://www.rappler.com/nation/85481-sereno-liberalized-legal-profession>.



#### IV. CREATING AN EFFECTIVE REGIONAL HUMAN RIGHTS MECHANISM IN ASEAN AND THE STRENGTHS OF ALTERNATIVE DISPUTE RESOLUTIONS

##### *A. Progressive Implementation of Human Rights Mechanisms*

Yvonne Xin Wang noted in her 2015 article *Contextualizing Universal Human Rights: An Integrated Human Rights Framework for ASEAN* that many of the existing human rights systems took an incremental approach towards establishing a concrete regional human rights mechanism complete with a convention, a commission, and a court.<sup>133</sup> In fact, none of these regional systems adopted all three instruments at once, instead taking years between introducing each new instrument before culminating in the implementation of the strongest human rights instrument of all—human rights court.<sup>134</sup> The African Charter, for example, which established the African Commission, was created 18 years after the Organization of African Unity (now known as the African Union) was first formed.<sup>135</sup> The Charter came into force in 1986,<sup>136</sup> and, after much reluctance on the part of the member states, the African Court on Human and People's Rights was created in 1998.<sup>137</sup>

Wang posits that a progressive approach would particularly suit ASEAN, even at the cost of waiting for stronger human rights mechanisms to be implemented:

Given ASEAN's resistance towards adversarial or coercive intrusions into state sovereignty and a lack of political will for establishing binding enforcement mechanisms, the ASEAN Commission should start by engaging governments using mechanisms that appear least intrusive to state sovereignty. Some may argue that we should not give up on pushing for stronger mechanisms just because it is politically difficult. Indeed, material inducements signal that the community condemns the proscribed behavior, and the absence of punishment might signal that the community does not strongly support the norm. However, this expressive

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133. Wang, *supra* note 4, at 401–02.

134. *Id.*

135. *Id.* at 402.

136. Carole J. Petersen, *Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 ASIA-PAC. L. & POL'Y J., no. 1, 2011, at 174, 188.

137. *Id.* at 190.

value of punishment might work only when the proscribed behavior is already “broadly, unequivocally, and manifestly understood as inappropriate.” Premature punishment, prior to the institutionalization of a norm, “can also result in a (greater) backlash by norm violators who feel unjustly penalized.”<sup>138</sup>

Thus, by first implementing less intrusive steps, with the ultimate goal of establishing a regional human rights court, ASEAN can ensure that their initiatives will be met with the political will and level of social acceptance necessary for such instruments to be successful. ASEAN states, long known for their reluctance to acquiesce to outside intervention, would be far more apt to accept measures incrementally.

One such measure is the implementation of ADR proceedings. Studies indicate that ADR has had great successes as a means of conflict resolution in Southeast Asia,<sup>139</sup> and may be a form of resolution better suited for parties less receptive to outside intervention.<sup>140</sup> Additionally, instituting a mechanism for ADR is feasible in the short-term, as existing ASEAN instruments already have provisions in place for utilizing ADR.

### *B. Alternative Dispute Resolutions*

In the case of ASEAN, where high importance is placed on respect for the internal affairs of other members, non-confrontation, quiet diplomacy, non-recourse to use or threat to use of force, and decision-making through consensus,<sup>141</sup> traditional forms of adversarial judicial processes may not be best suited to address every conflict. With these values in mind, it also seems unlikely that member states would respond enthusiastically to being taken to court by an outside regional body and made to litigate their disputes in the near future.

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138. Wang, *supra* note 4, at 407 (footnotes omitted).

139. See, e.g., Joel Lee, *Culture and Its Importance in Mediation*, 16 PEPP. DISP. RESOL. L.J. 317, 324–25 (2016) (discussing how mediation has been used for dispute resolution in Singapore); Sorawit Limparangri & Prachya Yuprasert, *Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective*, ASEAN LAW ASSOCIATION [https://www.aseanlawassociation.org/docs/w4\\_thai.pdf](https://www.aseanlawassociation.org/docs/w4_thai.pdf) (“Alternative dispute resolution (ADR) has been in existence in Thailand, at least, since Thai history was first recorded in writing. Pursuing an amicable solution to a dispute will come as a natural choice once Thai people confront a dispute.”).

140. See Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR*, 26 EUR. J. INT’L L. 607, 612 (2015).

141. Phan, *supra* note 3, at 113.

ADR presents a promising alternate means of conflict resolution for ASEAN states. ADR refers to “processes other than a judicial determination, in which a third person assists parties to resolve a dispute.”<sup>142</sup> Settling disputes through ADR “increases the chances of preserving continuing relationships . . . both personal and commercial as well as protecting reputations.”<sup>143</sup> Characteristics of ADR “such as ‘consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and. . . justice’”<sup>144</sup> align with many characteristics of the ASEAN Way such as consensus, autonomy, and quiet diplomacy.

As a means of dispute settlement, ADR seems well-suited for ASEAN countries—ADR is known for its successes in dispute resolutions in multi-cultural communities<sup>145</sup> and some even argue that mediation has its roots in Asian culture.<sup>146</sup> In fact, ASEAN has developed a dispute settlement mechanism utilizing ADR for economic disputes,<sup>147</sup> and ADR is already successfully used by member states for the negotiation of business-related conflicts.<sup>148</sup>

### 1. An Overview of ADR

In ADR processes, the role of the neutral third party can vary depending on the form of dispute resolution used and generally falls between two categories. In evaluative (also known as “determinative”) forms of ADR “the ADR practitioner has a role in investigating the dispute, which may also include the hearing of formal evidence, and determining a resolution which may be internally enforceable, externally enforceable or unenforceable.”<sup>149</sup> A common form of determinative ADR is arbitration,<sup>150</sup> where the arbiter hears evidence

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142. TRACEY RAYMOND, ALTERNATIVE DISPUTE RESOLUTION IN THE HUMAN RIGHTS AND ANTI-DISCRIMINATION LAW CONTEXT 2 (2006), <http://www.asiapacificmediationforum.org/resources/2006/raymond.pdf>.

143. McGregor, *supra* note 140, at 612 (footnotes omitted).

144. *Id.* (quoting Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)* 83 GEO. L.J. 2663, 2669–70 (1995)).

145. Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT’L & COMP. L.J. 343, 346 (2004).

146. Lee, *supra* note 139, at 325.

147. See ASEAN Protocol on Enhanced Dispute Settlement Mechanism art. 1 (June 18, 2012), <http://agreement.asean.org/media/download/20141217102933.pdf>.

148. See Marquise Clarke, *Successfully Resolving Commercial Disputes: An Overview of Arbitration in ASEAN*, ASEAN Briefing (June 28, 2016), <https://www.aseanbriefing.com/news/2016/06/28/asean-arbitration.html>.

149. RAYMOND, *supra* note 142, at 3.

150. *Id.*

from both sides in order to decide an outcome which may or may not be binding upon the parties.<sup>151</sup>

In contrast, in facilitative ADR processes the “third party’s intervention relates to the process of resolution rather than the content of the dispute or the terms of its resolution.”<sup>152</sup> Thus, the neutral third party guiding the resolution functions less as a trier-of-fact and more as a facilitator to communications. The most common form of facilitative ADR is mediation, in which the mediator fosters communication between parties in order to reach a non-binding settlement mutually agreed to by all.<sup>153</sup>

In practice, “ADR processes may also be classified as hybrid or combined processes.”<sup>154</sup> For example, differences between varieties of “hybrid models and the many variants within each model[] includ[e] whether engagement is voluntary or mandatory; . . . whether it is integrated into the judicial system; whether the decisions reached are binding; [and] whether the process is public or private.”<sup>155</sup>

ADR proceedings can be kept confidential, though critics argue that a lack of transparency “may limit the social reforming potential of the law and work to the disadvantage of those the law aims to protect.”<sup>156</sup> Proponents, however, argue that “ADR[] is championed on grounds that it advances self-determination and autonomy and empowers parties to ‘control the outcome’. On this justification, the major critiques of arbitration—for example, its privacy and confidentiality—are seen as advantages to party choice and control of the dispute.”<sup>157</sup>

Differences may also exist in whether ADR processes are interest-based or rights-based. In interest-based ADR, a resolution is sought which reflects the underlying needs and interests of the parties in question.<sup>158</sup> In rights-based ADR, the resolution is implemented “with reference to perceived rights and duties for example, as articulated in law.”<sup>159</sup>

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151. *Id.*

152. *Id.*

153. See *ADR Types & Benefits*, CAL. CTS.: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/3074.htm> (last visited Mar. 14, 2018).

154. RAYMOND, *supra* note 142, at 3.

155. McGregor, *supra* note 140, at 615 (footnotes omitted).

156. RAYMOND, *supra* note 142, at 2.

157. McGregor, *supra* note 140, at 612 (footnotes omitted).

158. RAYMOND, *supra* note 142, at 7.

159. *Id.*

## 2. Models of ADR Best Suited Under the “ASEAN Way” and Human Rights Enforcement

As noted by Tracey Raymond, Principal Training and Policy Officer and Principal Investigation/Conciliation Officer with the Australian Human Rights and Equal Opportunity Commission, ADR in the human rights context should, at least in part, be rights-based.<sup>160</sup> The ADR facilitator in human rights conflicts would have to consider the relevant human rights laws and how other disputes have been handled by courts or tribunals.<sup>161</sup>

A *solely* rights-based approach, however, may not be the answer. Disadvantages of a rights-based resolution process include the fact that, in more closely mirroring traditional judicial processes, resolutions typically focus more on customary forms of remedy such as restitution.<sup>162</sup> In doing so, more creative or meaningful outcomes for the parties are not explored.<sup>163</sup> In addition, rights-based ADR “can include competitive, adversarial negotiation techniques which can be detrimental to any ongoing relationship between the parties and can intensify and entrench conflict.”<sup>164</sup>

As many ASEAN states value autonomy, non-interference, quiet diplomacy and consensus,<sup>165</sup> they may not be receptive to an overly adversarial rights-based form of ADR. Raymond argues, however, that “within this rights-based framework there is a place for the philosophy and skills associated with interest-based ADR.”<sup>166</sup> She notes that there are numerous advantages to having more facilitative or interest-based negotiations:

The role of the third party in an interest-based approach is characterised by interventions which elicit the needs and interests of both parties, encourage parties to understand each other’s views and aim to maintain constructive dialogue through which the parties can generate creative resolution options to address mutual needs and interests. An interest-based approach to resolution is seen to contribute to maintenance of relationships, encourage an appreciation of

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Phan, *supra* note 3, at 113.

166. RAYMOND, *supra* note 142, at 7.

different perspectives, educate parties about alternative ways to deal with conflict and increase the potential for resolution.<sup>167</sup>

Raymond postulates that ADR for human rights disputes should incorporate aspects of both interest-based and rights-based ADR.<sup>168</sup> For example, interest-based approaches may be best suited for dealing with impasses within negotiations, while a focus on rights may be better suited at later stages in negotiation, particularly if interest-based ADR has been less successful.<sup>169</sup>

In a survey of ADR initiatives in the Balkans, Cameroon, Nepal and the Ukraine, Fulbright Distinguished Chair and conflict resolution expert Nancy Erbe also advocates for a somewhat hybridized version of ADR.<sup>170</sup> Respondents identified that “critical blocks to international development include predominance of the evaluative, or expert, approach, along with failure to facilitate effective partnerships with communities.”<sup>171</sup> Instead, Erbe recommends a facilitative ADR approach but with a *directive* mediator: “the most popular leaders of cross-cultural processes are portrayed as balancing receptivity and rapport with assertive direction. Respondents from several regions mention direct, detailed questioning as important to careful listening.”<sup>172</sup>

Erbe notes that ADR is particularly well-suited for “transitional and emerging democracies, where the rule of law and legal institutions require capacity building.”<sup>173</sup> In surveying 115 respondents who engaged in ADR because of ethnic conflicts in Nepal, the Balkans, Cameroon, and the Ukraine, she found that ADR is particularly effective at empowering and giving voice to “communit[ies] in the face of corrupt and self-interested political leadership.”<sup>174</sup> She also found that “additional interventions that are different from, but complementary to trials, such as *facilitating culturally accepted mechanisms of justice* should be considered . . . [S]ocial reconstruction may not occur when people are faced with judicial

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167. *Id.*

168. *Id.* at 8.

169. *Id.*

170. *See* Erbe, *supra* note 145, at 369–70.

171. *Id.* at 355.

172. *Id.* at 370.

173. *Id.* at 358.

174. *Id.*

decisions that do not correspond to their perceptions of what happened, i.e., their ‘truth.’”<sup>175</sup>

In an article discussing ADR initiatives in Singapore (where ADR has been used since 1994 in forums including courts and community mediation centers set up by the Ministry of Justice),<sup>176</sup> anthropologist Dr. Joel Lee notes that “it was possible to preserve the usefulness of the interests-based model of conflict resolution—its functional paradigm—and harmonize it with the culture of Singapore in its application—its operational paradigm.”<sup>177</sup> He posits that ADR practitioners can “contextualize the interests-based model for their own cultures.”<sup>178</sup>

In Singapore, for example, interest-based ADR emphasizes social hierarchy, in that the mediator has high social status, is at the center of the mediation process, and provides guidance to the parties.<sup>179</sup> The processes prioritize observing group interests alongside self-interest.<sup>180</sup> Communications and conduct emphasize preserving harmony and relationships—this includes steering away from uncomfortable topics when needed, as “[u]nearthing issues that should be left unspoken may lead to embarrassment and disengagement from the process.”<sup>181</sup>

Lee rejects the notion that certain values can automatically be prescribed to Asian or “Eastern” versus “Western” countries,<sup>182</sup> and also advocates for interest-based but *context-driven* ADR:

[W]here the circumstances call for it, it is possible to manifest the interests-based model in a less facilitative, if not non-facilitative, manner. In fact, one could even practice directive/authoritative (not authoritarian) interests-based mediation. It should be made clear that this means that mediators may take on more of a leadership role but without depriving parties of their power to decide how to resolve the dispute.<sup>183</sup>

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175. *Id.* at 355–356 (alterations in original).

176. Lee, *supra* note 139, at 324.

177. *Id.* at 328.

178. *Id.*

179. *Id.*

180. *Id.* at 328–29.

181. *Id.* at 329.

182. *Id.*

183. *Id.* at 331.

ADR provides a strong choice for dispute resolution of human rights issues for ASEAN because of its flexibility (i.e., it can be tailored to suit the conflict and parties in question) and because of its strength in conflicts involving multicultural parties. It is also a realistic option for ASEAN, as the ASEAN Charter already contains provisions for utilization of ADR to resolve conflicts.<sup>184</sup>

### 3. ADR within the ASEAN Legal Instruments

Ideally, ADR would be a preliminary means of dispute resolution for citizens of ASEAN states. Once ASEAN has developed a regional human rights court and states have come to accept its jurisdiction, disputes unresolved through ADR could be transferred to the court for binding adjudication.

Existing ASEAN instruments have mechanisms which call for ADR in dispute resolution.<sup>185</sup> As outlined below, some minor changes to ASEAN instruments, coupled with the development of ASEAN organizations, would establish ADR as a means of dispute resolution and help lay the groundwork for the development of a regional human rights court.

Article 24 of the ASEAN Charter, entitled “Dispute Settlement Mechanisms in Specific Instruments” mandates that “[d]isputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.”<sup>186</sup> Neither the AICHR terms of reference nor the AHRD, however, provide for a dispute settlement mechanism in the event of a violation of the AHRD.<sup>187</sup> Article 25 of the ASEAN Charter addresses ASEAN instruments which do not themselves provide for dispute settlement, stating: “Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.”<sup>188</sup> The question of how such dispute settlement mechanisms are to be established remains unanswered.

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184. ASEAN Charter, *supra* note 51, at art. 23–28.

185. *See id.*

186. *Id.* at art. 24.

187. *See* Terms of Reference, *supra* note 57.

188. ASEAN Charter, *supra* note 51, at art. 25.



In 2011, ASEAN created the ASEAN Institute for Peace and Reconciliation (AIPR).<sup>189</sup> This organization shows promise to be a future resource for the AICHR to facilitate dispute resolution in the event that a complaint arises regarding a human rights violation.<sup>190</sup> Unfortunately, however, the AIPR “is still in its formative stage”<sup>191</sup> and has been largely inactive since its establishment. Though the organization has conducted a number of capacity-building symposia on a range of peace-related topics,<sup>192</sup> the AIPR still lacks a website and only just instituted an Executive Director in October of 2017.<sup>193</sup> It is clear that the AIPR needs to progress as an organization and develop an expertise in ADR before becoming a realistic resource in dispute resolution.

In the event that ADR does become utilized to resolve human rights abuses in the region, Article 27 of the ASEAN Charter provides a means of ensuring compliance with the finding, recommendation, or decision found through the dispute resolution.<sup>194</sup> Article 27 reads:

1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.

2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.<sup>195</sup>

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189. Elizabeth P. Buensuceso, *The ASEAN Institute for Peace and Reconciliation and Its Role in Preventing Crises*, UN CHRONICLE (Oct. 2017) <https://unchronicle.un.org/article/asean-institute-peace-and-reconciliation-and-its-role-preventing-crises>.

190. *See id.*

191. *Id.*

192. *Id.*

193. *ASEAN Welcomes First Executive Director of AIPR*, ASEAN: ASEAN SECRETARIAT NEWS (Oct. 20, 2017), <http://asean.org/asean-welcomes-first-executive-director-of-aipr/>.

194. Hao Duy Phan, *Procedures for Peace: Building Mechanisms for Dispute Settlement and Conflict Management Within ASEAN*, 20 U.C. DAVIS J. INT'L L. & POL'Y 47, 57 (2013).

195. ASEAN Charter, *supra* note 51, at art. 27.

Article 26 states that any unresolved disputes should also be referred to the Summit for a decision.<sup>196</sup>

The ASEAN Summit is comprised of the Heads of State or Government from each member state, and serves as the “supreme policy-making body of ASEAN.”<sup>197</sup> As noted by Phan, the “ASEAN Summit is not a court or an arbitral tribunal. It is a policy-making body that continues to operate according to the ASEAN Way, including, most importantly, the norm of decision-making on a consensus basis.”<sup>198</sup> Unfortunately, this consensus-based decision-making process means that if any of the parties do not agree with a determination, no decision can be reached.<sup>199</sup>

This is where an ASEAN Court, once established, could come into play. Article 26 should refer unresolved conflicts to the regional court. A court could also ensure compliance under Article 27, by issuing orders and punishments for any party’s failure to adhere to binding decisions. A court could also serve as the next step in the event that ADR fails to settle a dispute. In this regard, Wang proposes that ASEAN follow the actions of the Inter-American System:

For the Inter-American System, states are incentivized to use [mediation] and reach an agreement. Failure to settle in mediation would allow the Commission to take stronger actions, such as publishing detailed public reports and non-binding recommendations, or referring the dispute to the Inter-American Court, if the state has accepted the Court’s jurisdiction. The potential for private settlements makes mediation more palatable than the following mechanisms, which involve public shaming or formal adjudication.<sup>200</sup>

Such an approach makes sense and would allow for ADR initiatives to serve as a natural step in the dispute settlement process once a human rights court has been created.

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196. *Id.* at art. 26.

197. *Id.* at art. 7.

198. Phan, *supra* note 194, at 57 (footnotes omitted).

199. *See id.* at 57–58.

200. *See* Wang, *supra* note 4, at 414 (footnotes omitted).

#### 4. The Case for a Human Rights Court, and Its Role Within ASEAN and with ADR Initiatives

To be clear, this Note does not propose that changing ASEAN's legal instruments and implementing ADR initiatives is the ultimate solution for ASEAN. A regional human rights court is absolutely necessary to ensure the effective enforcement of human rights in the Southeast Asian region.<sup>201</sup> Strengthening the AICHR's mandates alone would not adequately provide the legal force needed to provide redress for human rights violations as "even if the AICHR had stronger protection mandates, it could not replace the role of a court because only courts are able to provide legally binding decisions."<sup>202</sup>

The same stands true for ADR initiatives. If ADR proceedings rendered a nonbinding decision which was not followed by one or both parties involved in the dispute, as mentioned above, a court could function as an "appellate" forum where a binding decision could be reached.<sup>203</sup> In short, "courts provide effective and enforceable remedies."<sup>204</sup>

Ideally, a court would function as an independent organ of the ASEAN human rights architecture. Such is the case in the regional human rights system in the Americas: "While the Inter-American Commission on Human Rights (IACHR) undertakes 'monitoring and promotional activities', including the selection and submission of cases to the Court, the Court issues binding decisions and advisory opinions to protect rights in danger."<sup>205</sup>

ASEAN would still play a role in supervising and ensuring execution of court decisions. In both the European and African human rights mechanisms, the court is monitored and supervised respectively by the Council of Europe and the Executive Council.<sup>206</sup> As the established overarching regional organization, ASEAN would have the power and influence needed amongst its members to ensure that all Court decisions were properly executed and complied with.

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201. See Bui, *supra* note 22, at 135 ("[T]he most pressing rationale for an ASEAN human rights court remains to provide adequate remedies for victims of human rights violations, something which cannot be accomplished by other means.").

202. *Id.* at 134.

203. See Wang, *supra* note 4, at 414.

204. Bui, *supra* note 22, at 134.

205. *Id.* at 136.

206. *Id.*

The AICHR, too, would have a role to play by receiving complaints and investigating human rights violations. In the African and Inter-American human rights systems, the human rights commission receives complaints from individuals and, once they pass the “admissibility phase and merits phase,” the commission passes the complaints to the court for adjudication.<sup>207</sup> Both organizations have mandates which allow for them to contact states and investigate human rights complaints.<sup>208</sup> To fit into the regional human rights system, then, the AICHR would need to add a similar mandate to their Terms of Reference which would allow them to “receive information, communicate with governments, and undertake investigations.”<sup>209</sup>

## V. CONCLUSION

ASEAN has many of the tools it needs to progress towards creating an integrated regional human rights system. It has already undertaken initiatives to improve domestic laws, has provisions for ADR initiatives to settle disputes, and, most importantly, has set up a commission and declaration for human rights.<sup>210</sup> ASEAN’s instruments, while concerning in their adherence to traditional ideals of the “ASEAN Way,” need only be modified to create the groundwork through which human rights laws can be enforced. The missing key ingredient is an organ for human rights enforcement.

As noted by Bui, “it is probably fair to admit that the formation of a strong judicial mechanism in any form would be premature, given the current stage of ASEAN’s development.”<sup>211</sup> ADR represents a feasible and more approachable solution for ASEAN until they gain the member state support they need to establish a human rights court. ASEAN states, who remain reluctant to cede their sovereignty to external intervention, would be more apt to accept ADR because of its flexible, less intrusive nature.<sup>212</sup> ADR proceedings can be shaped depending on the cultural environment and context within a given dispute, and, as such, are well-suited for cross-cultural conflicts and

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207. Phan, *supra* note 3, at 197.

208. See Bui, *supra* note 22, at 132; *Mandates and Functions of the Commission*, INTER-AMERICAN COMMISSION ON HUM. RTS., <http://www.oas.org/en/iachr/mandate/functions.asp> (last visited Mar. 12, 2018).

209. Bui, *supra* note 22, at 132.

210. See ASEAN Intergovernmental Commission on Human Rights, *supra* note 8, at 11.

211. Bui, *supra* note 22, at 133.

212. See Phan, *supra* note 194, at 53.

negotiations with reluctant parties.<sup>213</sup> If successfully implemented, ADR initiatives would also help ASEAN states warm up to the idea of regional human rights enforcement, bringing them closer to initiating and accepting a human rights court.<sup>214</sup>

In the short-term, implementation of ADR processes would provide a means for individuals in ASEAN states to report and address human rights violations.<sup>215</sup> In the long-term, once a human rights court has been established, ADR would still have an important role to play. ADR can function both as the initial step in conflict resolution before turning to binding adjudication in court, and as an alternative procedure for conflict resolution for states or individuals who do not want to accept the court's jurisdiction, or for conflicts better suited for ADR's flexible, culture- and context-driven structure.<sup>216</sup>

Considering that ASEAN has progressed from decades of stoutly resisting human rights initiatives to more recently creating a human rights commission and mechanisms to unify legal frameworks between ASEAN countries, the organization is clearly capable of and in the process of enacting great change. Human rights norms have become more accepted by ASEAN states, and will continue to gain prominence in the Association's eyes. As such, the question of a human rights court is less of an "if," and more of a "when" and "how."

On the road to forming a human rights court, ASEAN still has work to do. Following the "incremental approach," ASEAN must strengthen the AICHR's protection mandate and modify their legal instruments to recognize the non-derogable nature of key international human rights laws.<sup>217</sup> ASEAN should also implement ADR proceedings for victims of human rights violations. All of these steps will help institutionalize human rights norms within the region and open the door towards establishing a much-needed regional human rights court.

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213. Wang, *supra* note 4, at 415.

214. *See id.* at 412.

215. *See id.* at 416.

216. *Id.* at 414.

217. *See id.* at 402.