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The ASEAN Human Rights System: A Critical Analysis

Hien BUI*
National University of Singapore, Singapore
hienbui@nus.edu.sg

Abstract
This article offers a critical analysis of the human rights system established by ASEAN. It first investigates concrete evidence of the system's ineffectiveness by comparing the cases of Myanmar and Thailand, which illustrate ASEAN's failure to address human rights violations both before and after the creation of the ASEAN system. It then examines the substantive and procedural limitations of the ASEAN human rights instruments and mechanisms. Specifically, while restrictions on rights and freedoms contained in the instruments undermine the universality of human rights, ASEAN's mechanisms lack independence and offer only weak protection mandates to address rights violations. In addition, the absence of a judicial body to hear complaints and issue binding remedies makes the system incomplete. The article recommends the creation of an ASEAN court of human rights and suggests changes to the existing instruments and mechanisms that might accommodate the new court.

It has been nearly half a century since the Association of Southeast Asian Nations (ASEAN)[1] was founded in 1967.[2] During this time, the world has witnessed the organization both increase in size and expand its competence in a number of different fields.[3] But while ASEAN's achievements in facilitating regional economic co-operation among its ten member states have been remarkable,[4] its performance in the field of human rights and fundamental freedoms requires serious re-evaluation.

Generally speaking, Southeast Asian countries have had bad records in the field of human rights, ranging from failures to protect fundamental freedoms to directly and

* LLM (University of London); LLB (Vietnam National University); Bar Training (Vietnam Judicial Academy); Research Associate, Centre for Asian Legal Studies, National University of Singapore, Faculty of Law; With special thanks to Prof Andrew Harding, Dr Paul Gragl, Dr Tan Hsien-Li, and Dr Son Bui for their inspirational guidance; and Marie De Martino for her unconditional love and support.

1. ASEAN is the association of ten Southeast Asian countries, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. See ASEAN Secretariat, "ASEAN Member States", online: ASEAN <http://www.asean.org/asean/asean-member-states>.
2. ASEAN Secretariat, "History", online: ASEAN <http://www.asean.org/asean/about-asean/history>.
3. Surin PITSUWAN, "Foreword" in Tommy KOH, Gosario MANALO, and Water WOON, eds, *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing Co Pte Ltd, 2009), xv at xv.
4. *ASEAN Vision 2020, Kuala Lumpur*, 15 December 1997, para 3 [*ASEAN Vision 2020*].

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significantly violating them. Examples of human rights violations are many and varied.[5] As a result, ASEAN has been criticized for not doing enough to stop these abuses in the region.[6] In response to such criticism, ASEAN established a suite of instruments and mechanisms to protect and promote human rights. Yet despite all these efforts, human rights violations have continued, while adequate remedies have not been adopted.

This article offers a critical and comprehensive analysis of the ASEAN human rights system in order to discover why ASEAN's efforts remain ineffective. To clarify, the term "system" refers to both the instruments and mechanisms available in ASEAN,[7] but it is outside the scope of this article to analyse every instrument or mechanism in ASEAN. Instead, it focuses on the ones that play the most important roles in shaping the system for human rights in the organization. With regard to instruments, the article focuses mainly on the *ASEAN Human Rights Declaration* (AHRD) of 2012. With regard to mechanisms, the article pays most attention to the ASEAN Intergovernmental Commission for Human Rights (AICHR). Apart from the existing instruments and mechanisms as two pillars of the ASEAN human rights system, this system is missing the third important pillar required to form a complete human rights protection regime: a judicial organ.[8] This aspect will also be analysed.

This article is divided into three parts. Part I provides concrete evidence of ASEAN's failures in addressing human rights infringements committed by state parties, both before and after having the system for rights protection. Taking the birth of the AHRD as a watershed event, this article compares ASEAN's response to major infringements of human rights by the military juntas in Myanmar (1962–2011) and Thailand (starting in May 2014). While the case in Myanmar represents ASEAN's past responses, the case in Thailand exemplifies ASEAN's reactions after the establishment of a system for human rights. By comparing the two cases, this article claims that ASEAN has failed to address violations of human rights regardless of the existence of its human rights regime. This failure, as evidenced by the two cases, poses an important question, namely why is the ASEAN human rights system irresponsive to the violation of rights?

In response to this question, Part II critically scrutinizes the substantive and procedural flaws in the ASEAN human rights system from a legal perspective. In terms of substantive limitations, this article claims that the greatest problem with ASEAN's instruments is their denial of the universality of human rights. ASEAN undermines universal rights by subordinating them to particular "regional

5. Bill HAYTON, *Vietnam: Rising Dragon* (New Haven and London: Yale University Press, 2011) at 113–134; Human Right Watch, "World Report 2014: Cambodia", online: Human Rights Watch <http://www.hrw.org/world-report/2014/country-chapters/cambodia?page=3>.

6. Erik Martinez KUHONTA, "Toward Responsible Sovereignty: The Case for Intervention" in Donald K EMMERSON, ed, *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (Stanford: The Walter H Shorenstein Asia-Pacific Research Centre, 2008), 292 at 293; Simon CHESTERMAN, "Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person" (2008) 12 Singapore Year Book of International Law 199 at 206.

7. Daniel COLLINGE, "Background Paper on ASEAN and Human Rights" (2010) at 16, online: OHCHR <http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf>.

8. See Yuyun WAHYUNINGRUM, "ASEAN Human Rights" (Presentation at the 28th DTP Session, Dili, Timor Leste, 23 November 2013), online: Slideshare <http://www.slideshare.net/wahyuningrum1/asean-human-rights-yuyun-wahyuningrum-2013> (PowerPoint slides).

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and national context[s]"[9] and by balancing rights with duties.[10] It also legitimates restrictions on rights based on national law,[11] security, and morality.[12] The inefficacy of the ASEAN human rights system can be explained not only by the above limitations, but also by procedural shortcomings. On this point, this article argues that the lack of independence and the weakness of protection mandates are barriers which prevent ASEAN's mechanisms from being effective. The examples of Myanmar and Thailand are used throughout this analysis.

Rectifying these flaws in the instruments and mechanisms would help strengthen ASEAN's human rights protection. However, even this system would prove inadequate in addressing various violations in the region without a judicial mechanism capable of hearing cases and issuing binding judgments. Part III argues that a human rights court is needed to complete the architecture of the ASEAN human rights system. It provides the rationale for such a court and positions it in the current system. It also indicates the substantive and procedural shortcomings in the current system which must be improved in order to accommodate the court. In order to do this, examples and comparisons of existing regional human rights courts in Europe, Africa, and the Americas are used throughout this section.

While analysing problems and proposing changes to the current ASEAN human rights system, this article acknowledges that national human rights systems and the political will of member states need to be improved in order to truly transform the region. In addition, there are many crucial factors to be taken into consideration in order to realize an ASEAN human rights court, such as drafting a founding treaty, decisions about finances, and the recruitment of judges and other professional staff,[13] all of which are beyond the scope of this article. Therefore, further research combining diverse fields, including law, politics, and administration, are needed in order to make the ASEAN human rights system an effective one for Southeast Asia.

1. SETTING THE SCENE: ASEAN'S PAST AND PRESENT FAILURES IN RESPONDING TO HUMAN RIGHTS VIOLATIONS

If we were to sketch a picture of ASEAN, it would generally be a very colourful one full of myriad shades and nuances. Such a colourful palette would come from the diversity between member states of the region in terms of religion,[14] economic development,[15]

9. *ASEAN Human Rights Declaration, Phnom Penh, Cambodia*, 18 November 2012, art 7 [*AHRD*].
10. *Ibid*, art 6.
11. *Ibid*, arts 27 and 30.
12. *Ibid*, art 8.
13. 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* (Leiden and Boston: Martinus Nijhoff Publishers, 2012) at 185–224 [Phan, *A Selective Approach*].
14. Eugene KB TAN, "The ASEAN Charter as 'Legs to Go Places': Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia" (2008) 12 Singapore Year Book of International Law 171 at 174.
15. Jeannie HENDERSON, *Reassessing ASEAN* (Oxford: Oxford University Press, 1999) at 40–44.

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and politics.[16] In contrast, human rights would appear extremely monochromatic in this picture. This is because ASEAN has been consistently unenthusiastic in reacting to violations committed by its member states, choosing to "remain[] silent"[17] and "powerless"[18] in the face of the many human rights abuses in the region.

Clearly, human rights have not been one of the Association's fundamental concerns.[19] However, over the last two decades ASEAN has taken several significant steps towards creating a regional human rights system. The birth of the *Charter of the Association of Southeast Asian Nations* (ASEAN Charter) in 2008 and the AHRD in 2012, as well as the establishment of the AICHR in 2009, illustrate this movement. These events are supported by several instruments addressing the rights of women, children, and migrant workers,[20] together with a number of mechanisms designed to implement these instruments.[21] Equipped with this arsenal of instruments and mechanisms, it was hoped that ASEAN would be able to respond more adequately to the violation of rights committed by its member states. Sadly, this has not been the case. Indeed, both ASEAN and the AICHR have remained passive in addressing these wrongdoings, both before and after the above mentioned human rights instruments and mechanisms were put in place.

Evidence of this passivity can be found by comparing ASEAN's reactions towards the human rights abuses in Myanmar and Thailand under military rule. These cases were chosen for a number of reasons. First, both cases are relatively similar. Myanmar and Thailand both violated the human rights of their own people through coups,[22] and in so doing failed to respect and fulfil their human rights obligations. Moreover, the infringed rights – e.g., the freedom of the press, the right to a fair trial, and the freedom of assembly – are virtually identical in both cases.[23] Second, both cases have attracted

16. Geoffrey B COCKERHAM, "Regional Integration in ASEAN: Institutional Design and the ASEAN Way" (2010) 27:2 East Asia: An International Quarterly 165 at 174.

17. "Asean Remains Silent as Myanmar Junta Ignores Global Outrage" *ASEAN Affairs* (19 May 2009), online: ASEAN Affairs <http://www.aseanaffairs.com/myanmar_daily_news_updates/politics/asean_remains_silent_as_myanmar_junta_ignores_global_outrage>.

18. "'Useless' Asean Human Rights Mechanism Needs Scrutiny–Group" *Newsdesk* (2 July 2013), online: Newsdesk <http://newsdesk.asia/useless-asean-human-rights-mechanism-needs-scrutiny-group/>.

19. Mathew DAVIES, "The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration" (2013) 14:2 Georgetown Journal of International Affairs 51 at 53 [Davies, "The ASEAN Synthesis"].

20. These instruments are the *ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers, done at Cebu, Philippines*, 13 January 2007, and a number of instruments on Women and Children, such as the *Declaration on the Elimination of Violence against Women and Children in ASEAN, adopted in Bandar Seri Begawan, Brunei Darussalam*, 9 October 2013, the *ASEAN Declaration on the Elimination of Violence Against Women, done in Jakarta, Indonesia*, 13 June 2004, and the *ASEAN Declaration on the Advancement of Women, done in Bangkok, Thailand*, 5 July 1988.

21. The ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children (2010); and the ASEAN Committee to Implement the Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007).

22. BK SEN, "Need for Legal Aid Law in Burma: Problems and Prospects" (2003) 14 Legal Issues on Burma Journal 23 at 26; Greg BOTELHO, Paula HANCOCKS, and Kocha OLARN, "Thai Military Takes Over in Coup – Again" *CNN* (22 May 2014), online: CNN <http://edition.cnn.com/2014/05/22/world/asia/thailand-martial-law/>.

23. UNHRC, *The Situation of Human Rights in Myanmar*, HRC Res A/HRC/RES/19/21, 19th Sess, UN Doc A/HRC/RES/19/21 (20 March 2012), para 7; Audrey COUPRIE, "Thailand: Military Junta Must Respect Freedoms Guaranteed Under International Law" *FIDH: Worldwide Movement for Human Rights* (30 May 2014), online: FIDH <http://www.fidh.org/en/asia/thailand/15427-thailand-military-junta-must-respect-freedoms-guaranteed-under>.

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significant attention and criticism of ASEAN's role in the matter, if any.[24] Most importantly, the two cases occurred at different periods of time, with the birth of the AHRD representing a watershed event.[25] While the Myanmar case presents ASEAN's reaction to rights violations in the past,[26] i.e., before a clear ASEAN human rights system came into being, the case in Thailand shows a similar response even after the ASEAN human rights system was put in place. By comparing the two responses to two very similar cases, this article hopes to demonstrate that ASEAN has taken a consistent approach to human rights infringements.

A. *Myanmar*

"Myanmar is described as the darkest piece on the Southeast Asia human rights map"[27] and one of the worst violators of human rights in the world.[28] The rights of the Myanmar people have been seriously undermined, especially when the military regime ruled the country from 1962 until 2011.[29] During this time, freedom of speech and assembly were rigorously restricted, the media was heavily censored, and abuses against minorities were regularly conducted on a large scale.[30] Moreover, some of these human rights violations were justified by law.[31] Yet despite these serious human rights violations and strong objections from the international community,[32] Myanmar became an official ASEAN member state in 1997,[33] bringing into question the role played by ASEAN in the whole scenario.

Both the decision to accept Myanmar as a member state and the manner in which ASEAN responded to criticism of this decision have been described as "the most serious challenge to ASEAN's national standing".[34] While some scholars embraced the

24. Pavin CHACHAVALPONGPUN, "The New Thailand-Myanmar Axis" *The Diplomat* (29 June 2014), online: The Diplomat <http://thediplomat.com/2014/07/the-new-thailand-myanmar-axis/>.

25. To clarify, the birth of the AHRD can be considered as a "watershed" for two main reasons. First, it represents ASEAN's first collective and complete announcement towards human rights in general, which is similar to the UDHR (as opposed to other instruments that address solely the rights of particular subjects, such as women, children or migrant workers). Second, it is also the latest significant move towards a regional human rights system, following the creation of the AICHR in 2009. This does not mean that the ASEAN human rights system did not exist before the AHRD. However, the adoption of the AHRD completes the ASEAN human rights system as a regional system which consists of both regional mechanisms and instruments to promote and protects human rights.

26. "Myanmar Country Profile" *BBC* (30 March 2016), online: BBC <http://www.bbc.co.uk/news/world-asia-pacific-12990563>.

27. Phan, *A Selective Approach*, *supra* note 13 at 54.

28. Kenneth CHRISTINE and Denny ROY, *The Politics of Human Rights in East Asia* (London: Pluto Press, 2001) at 81.

29. "Myanmar Profile Overview" *BBC* (27 August 2015), online: BBC <http://www.bbc.com/news/world-asia-pacific-12990565>.

30. *Supra* note 26.

31. Christine and Roy, *supra* note 28 at 89.

32. Kyaw Yin HLAING, "ASEAN's Pariah: Insecurity and Autocracy in Myanmar (Burma)" in Emmerson, ed, *supra* note 6, 151 at 153.

33. John J BRANDON, "ASEAN Chairmanship Offers Opportunity for Myanmar" *Asia Foundation* (8 January 2014), online: Asia Foundation <http://asiafoundation.org/in-asia/2014/01/08/asean-chairmanship-offers-opportunity-for-myanmar/>.

34. Lee JONES, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Basingstoke and New York: Palgrave Macmillan, 2012) at 180 [Jones, *Sovereignty and Intervention*].

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decision, the reasoning behind ASEAN's reaction to Myanmar's human rights abuses clearly demonstrates a failure to protect human rights in the region. But while current literature has focused on the political will of ASEAN member states, it is clear that the lack of instruments and mechanisms protecting human rights is the main reason for ASEAN's failure on this issue.

Those who support ASEAN's stance on Myanmar generally espouse a view similar to that of Lee Jones, who argues that ASEAN's efforts are best understood as an effort to "insert itself" into political and human rights issues in Myanmar[35] as a means of promoting liberalization and human rights in the country.[36] His position is based on a theory of "constructive engagement" with non-compliant states,[37] and is in line with statements made by former Vietnamese Foreign Minister Mr Nguyen Dy Nien, who affirmed that "ASEAN is trying to democratize Myanmar".[38]

But while advocates of constructive engagement argue that "only by engaging with Myanmar can outsiders encourage democratic change",[39] they do not seem to take the actual results – that is, the efficacy of actions taken to improve Myanmar's human rights situation – into consideration. Clearly, the fact that human rights violations actually worsened in the years after Myanmar joined ASEAN suggests that any attempt at constructive engagement was ineffective in this case.[40] This fact shows that even though ASEAN might not have remained totally inactive, it did not bring about any positive results.

As a result, not every scholar agrees with Jones and the former Vietnamese Foreign Minister. In fact, convincing criticism can be found in both the media and academic research.[41] Mann Bunyanunda argues that ASEAN's decision to include Myanmar in the organization as a means of constructively engaging with the government constitutes proof of its failure to improve the human rights situation in the country.[42] Bunyanunda reaches this conclusion by comparing the situation in Myanmar during the period it was accepted as an ASEAN member state to that when constructive engagement was introduced.[43] Other authors, such as Erik Martinez Kuhonta and Kyaw Yin Hlaing, have offered even stronger criticism, pointing out that instead of stopping rights violations in Myanmar, ASEAN has actually supported[44] – or even "embraced" – the junta, thereby "prolong[ing] its tenure".[45]

35. *Ibid* at 182.
36. *Ibid* at 181.
37. Jones, *Sovereignty and Intervention*, *supra* note 34 at 182.
38. Lee JONES, "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement" (2008) 4:3 Asian Security 271 at 271.
39. Hlaing, *supra* note 32 at 157.
40. International Bar Association's Human Rights Institute, *The Rule of Law in Myanmar: Challenges and Prospects* (London: International Bar Association, 2012) at 19.
41. Mann BUNYANUNDA, "Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement 1991–2001" (2002) 2 Stanford Journal of East Asian Affairs 118; Kuhonta, *supra* note 6.
42. *Ibid* at 120.
43. *Ibid*.
44. Kuhonta, *supra* note 6 at 302.
45. Hlaing, *supra* note 32 at 154.

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These criticisms rightly point out the unfortunate fact that ASEAN did too little to address human rights violations in Myanmar. At the same time, these critiques are not legal in nature, but rather concentrate on ASEAN's hesitance to push Myanmar on the issue in order to preserve international relations both internally and externally. None of these evaluations take into account the fact that even if there had been the political will to combat the infringement of rights in Myanmar, there were no instruments and mechanisms in place to process it. After all, the main reason for ASEAN's insufficient and ineffective actions was rooted in the fact that ASEAN did not have any "enforcement machinery", as Li-ann Thio rightly notes.[46] In other words, "ASEAN cannot do anything for the Burmese people".[47]

B. *Thailand*

As mentioned earlier, ASEAN's present human rights system did not exist until 2008 when the passing of the ASEAN Charter resulted in the birth of a number of instruments and mechanisms. Whether the existing system helps improve ASEAN's response to flagrant human rights abuses is another question that can be answered by examining ASEAN's engagement with Thailand during its recent political crisis.

Thailand was one of the founding members of ASEAN,[48] and has been praised as one of the more liberal democracies among the ten member states.[49] Indeed, Thailand proposed some significant initiatives to put ASEAN forward in terms of promoting democracy and protecting human rights in the region,[50] and it was hoped that Thailand would play an important role in advocating for a better human rights system in ASEAN.[51] However, the recent military coup, starting in May 2014 and continuing into the present, has called this confidence into question. Violations of the freedoms of expression and assembly have been prevalent since then: for example, fourteen satellite TV channels and radio networks have been forced off the air, and academics have been warned not to comment on the political situation.[52] Most recently, the military regime detained fourteen students for peacefully protesting for democracy and against the coup, accusing them of serving some unknown political "kingpins" in their efforts to disturb the country's peace and stability.[53] The Thai military has committed these

46. Li-ann THIO, "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep" (1999) 2 Yale Human Rights and Development Law Journal 1 at 4.

47. Wai MOE, "ASEAN Countries Vote Against UN Committee Resolution on Burma" *The Irrawaddy* (21 November 2007), online: The Irrawaddy <http://www2.irrawaddy.org/article.php?art_Ibid=9386> (quoting Anselmo Lee).

48. Daniel SEAH, "The ASEAN Charter" (2009) 58 International and Comparative Law Quarterly 197 at 197.

49. Phan, *A Selective Approach*, *supra* note 13 at 75.

50. Kuhonta, *supra* note 6 at 300.

51. Phan, *A Selective Approach*, *supra* note 13 at 60–61.

52. Human Rights Watch, "Thailand: Revoke Martial Law Undermining Rights" (20 May 2014), online: Human Rights Watch <http://www.hrw.org/news/2014/05/20/thailand-revoke-martial-law-undermining-rights>.

53. Atiya ACHAKULWISUT, "Keep Quiet, We Are Building Democracy" *Bangkok Post* (30 June 2015), online: The Bangkok Post <http://www.bangkokpost.com/opinion/opinion/607960/keep-quiet-we-re-building-democracy>.

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violations under the *Martial Law Act*, which justifies their unchecked and unlimited powers.[54]

So far, both ASEAN and the AICHR have remained silent.[55] Indeed, ASEAN is now even more silent than it was when dealing with the military junta in Myanmar. In light of what happened in Myanmar, it would seem unrealistic to expect meaningful political action from ASEAN. However, from a legal perspective, this is not the case. As stressed earlier, the ongoing human rights issue in Thailand is happening at a time when ASEAN has put a human rights system in place. From this perspective, it is fair to expect ASEAN to do much more than it did in the past for Myanmar. Yet, what we have seen proves the opposite. Not only has ASEAN not used its legal instruments and mechanisms to combat human rights violations in Thailand – the military also uses ASEAN to insulate itself from its wrongdoings.[56]

The fact that none of the instruments and mechanisms has any impact on the behaviour of ruling governments poses an important question: why is it that ASEAN cannot do anything to protect human rights in the region even *after* establishing a human rights system? The next section will examine such limitations and the barriers which prevent the ASEAN human rights system from being effective.

II. THE ASEAN HUMAN RIGHTS SYSTEM: SUBSTANTIVE AND PROCEDURAL LIMITATIONS

Before and throughout the process of forming the human rights system, ASEAN has constantly upheld the principle of "non-interference" with each other's internal affairs, which includes human rights practices. The prevalence of this principle in ASEAN affairs poses the important question of why countries like Myanmar and Thailand would create a regional human rights system in the first place. The most likely explanation (as compared to a robust commitment to human rights or deepening supranational governance, or even efforts to ease "potential internal threats"[57]) is to protect ASEAN's "external regional legitimacy",[58] whether as a way of confronting or "emulate[ing]" the West[59] or simply as a display "for the international audience, to

54. *Ibid*.

55. Mary BACALSO and MUGIYANTO, "Members of ASEAN Intergovernmental Commission on Human Rights, Act Now Against Increasing Human Rights Violations in the Region!" *Asian Federation Against Involuntary Disappearances (AFAD)* (15 June 2014), online: AFAD <http://www.afad-online.org/news/10-statements/189-members-of-asean-intergovernmental-commission-on-human-rights-act-now-against-increasing-human-rights-violations-in-the-region>.

56. Thanida TANSUBHAPOL, "Thailand Lobbies ASEAN to Defend the Coup" *Bangkok Post* (4 June 2014), online: The Bangkok Post <http://www.bangkokpost.com/most-recent/413578/thailand-to-asean-to-defend-coup>.

57. James MUNRO, "Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory" (2009) 10(1) Asia-Pacific Journal on Human Rights and the Law 1 at 13-15. This might, however, be true for few more democratic countries like the Philippines and Indonesia.

58. Avery POOLE, "The World Is Outraged: Legitimacy in the Making of the ASEAN Human Rights Body" (2015) 37(3) Contemporary Southeast Asia 355 at 357.

59. See Hiro KATSUMATA, "ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?" (2009) 22(5) The Pacific Review 619; Emilie HAFNER-BURTON and Kiyoteru TSUTSUI,

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show [ASEAN] is doing something".[60] But whatever the real driving force may be, it is clear that ASEAN has created an ineffective system and that its limitations need to be examined.

It was already mentioned that the ASEAN human rights system consists of both mechanisms and instruments intended to protect human rights in the region, and both are analysed in this section. To do this, it focuses on the most recent and most influential documents and mechanisms, and in particular on the AHRD and the AICHR. Accordingly, this section is divided into two main parts, the first addressing the substantive problems, the second concentrating on the procedural issues. While most of the current scholarly research has focused on *either* the substantive *or* the procedural issues of the ASEAN human rights system,[61] this article looks at *both*. Indeed, it is only when the instruments and mechanisms are taken together that one can appreciate the full structure of the human rights system, with the legal instruments setting the relevant norms and standards, and the mechanisms serving to implement these norms and standards in practice.[62] It is therefore necessary to adopt an approach that can examine substance and process simultaneously.[63]

Of course, most ASEAN human rights instruments are not legally binding. Nevertheless, many do form a kind of "soft law"[64] – i.e. "nonbinding rules or

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"Human Rights in a Globalizing World: The Paradox of Empty Promises" (2005) 110(5) American Journal of Sociology 1373.

60. Cited in Poole *supra* note 58 at 367.

61. For substantive issues, see Mathew DAVIES, "The ASEAN Synthesis", *supra* note 19; Joel NG, "ASEAN Human Rights Declaration: A Pragmatic Compromise" (2012) RISIS Commentaries No 211 1 at 3, online: NTU <http://dr.ntu.edu.sg/bitstream/handle/10220/11694/RSIS2112012.pdf?sequence=1>; Katherine Shanahan RENSHAW, "The ASEAN Human Rights Declaration 2012" (2013) 13(3) Human Rights Law Review 557; Gerard CLARKE, "The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012" (2012) 11 Northwestern Journal of International Human Rights 1; Gino J NALDI and Konstantinos D MAGLIVERAS, "The ASEAN Human Rights Declaration" (2014) 3(2) International Human Rights Law Review 183. For procedural issues, see PHAN, *A Selective Approach*, *supra* note 13; TAN Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights* (Cambridge: Cambridge University Press, 2011) at 160; Andrea DURBACH, Catherine RENSHAW, and Andrew BYRNES, "A Tongue but No Teeth?': The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region" (2009) 31 Sydney Law Review 211, Deborah BASHAM-JONES, "ASEAN's Intergovernmental Commission on Human Rights: A Pale Shadow of What It Could Have Been" (2012) 13(2) Asia-Pacific Journal on Human Rights and the Law 1; Yuval GINBER, "Human Rights in ASEAN – Setting Sail or Treading Water" (2010) 10(3) Human Rights Law Review 504; Vitit MUNTARBHORN, "A Roadmap for an ASEAN Human Rights Mechanism" (Prepared for the Third Workshop for an ASEAN Regional Mechanism on Human Rights, Bangkok, Thailand, 28–29 May 2003), online: Friedrich Neumann Foundation for Liberty <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm> [Muntarbhorn, "A Roadmap"]; Catherine DRUMMOND, "The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential" (2010) Working Paper on ASEAN and R2P No I.

62. OHCHR, "An Overview of Regional Human Rights Systems", online: OHCHR <http://bangkok.ohchr.org/programme/regional-systems.aspx>.

63. See Tek-Ung BAIK, *Emerging Regional Human Rights Systems in Asia* (Cambridge: Cambridge University Press, 2012) at 43: human rights norms and protection mechanisms are key elements of a human rights system. While norms illustrate the goals of a system, institutions for human rights are the guarantee of the protection mechanism.

64. Nicholas DOYLE, "The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting" (2014) 63 International and Comparative law Quarterly 67.

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instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct."[65] As such, they exert some normative influence on human rights in the region.[66] In the case of ASEAN's major human rights instruments, and especially the AHRD, their normative force comes from the fact that they often elaborate ASEAN's understanding of the *Universal Declaration on Human Rights* (UDHR) and other human rights treaties, and convey the promises and expectations of rights and obligations. As such, while they are not formal law, they are also not merely political documents.

Like other soft law instruments, ASEAN's human rights instruments have both strengths and weaknesses. On the one hand, soft law is less conclusive and only provides weak rights and duties.[67] On the other, it is more flexible and therefore easier to change.[68] In the case of the ASEAN human rights instruments, their flexible character is likely an advantage, given the flawed content of many of the instruments,[69] and should not be seen as a real limitation of the system.

A. *Substantive Limitations: ASEAN's Denial of the Universality of Human Rights*

Discussions about the universality, "particularism", or "cultural relativism"[70] of human rights are dominated by two schools of thought.[71] The first school supports the idea that human rights are universal, i.e. that they apply to all human beings regardless of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[72] and that "all human beings are born free and equal in dignity and rights".[73] The second school claims that human rights are not universal,[74] but rather can be differentiated on the grounds of "national and regional particularities".[75]

65. Andrew GUZMAN and Timothy MEYER, "International Soft Law" (2010) Journal of Legal Analysis 171 at 174.
66. *Ibid*.
67. Tan, *supra* note 61 at 187.
68. *Ibid* at 188.
69. *Ibid* at 187.
70. Kristina MILIAUSKAITÉ, "Human Rights Dichotomy: Universality or Particularism?" (2004) 54(46) Jurisprudencija 54 at 92.
71. Henry J STEINER, Philip ALSTON, and Ryan GOODMAN, *International Human Rights in Context: Law, Politics, Morals*: *Text and Materials*, 3d edn (Oxford: Oxford University Press, 2007) at 157; Shashi THAROOR, "Are Human Rights Universal?" (2000) XVI:4 World Policy Journal 1 at 1; Damien KINGSBURY, "Universalism and Exceptionalism in Asia" in Leena AVONIUS and Damien KINGSBURY, eds, *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Palgrave Macmillan, 2008), 19 at 20.
72. Chriatian TOMUSCHAT, *Human Rights Between Idealism and Realism*, 2nd edn (Oxford: Oxford University Press, 2008) at 69.
73. *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, art 1 [*UDHR*].
74. Tharoor, *supra* note 71 at 2.
75. *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, Bangkok, 17 December 1991, para 8 [*Bangkok Declaration*].

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Southeast Asian countries have clearly raised their voices in support of the second school of thought. Nevertheless all ASEAN countries are members of key treaties protecting the rights of women and children,[76] and a majority have already ratified the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[77] all of which recognize and uphold the principle of universality. Therefore, it follows that ASEAN regional human rights instruments and mechanisms should impose universal standards. Yet despite this fact, ASEAN member states continue to cling to ideas of particularism. These claims represent one of the severest limitations of human rights instruments in ASEAN,[78] which not only undermines the application of international legal standards, but also helps justify member states' human rights abuses.

Evidence of the fact that ASEAN rejects the universalist approach to human rights and confirms its adherence to relativism and particularism[79] can be found in the texts of the ASEAN human rights instruments. Three aspects of these instruments are analysed here to prove this statement. First, these instruments rely on references to the "regional and national context"[80] as a means to limit the universality of human rights. Second, they require that individual rights be balanced by corresponding duties, which is used as a tactic to impose unreasonable restrictions on rights and freedoms.[81] Third, the instruments recognize that human rights and freedoms can be conditioned by measures designed to uphold "national law", "national security, public order, public health, public safety, [and] public morality"[82] without subjecting these measures to tests of legality, legitimacy, and proportionality.

1. *Limiting human rights by using regional and national particularisms*

ASEAN's use of the "regional and national context" to limit human rights and fundamental freedoms can be found in almost every ASEAN human rights instrument. In the ADHR, the most important instrument for human rights in ASEAN, article 7 imposes direct restrictions on human rights, stating that:

> [T]he realization of human rights must be considered in the *regional and national context* bearing in mind different *political, economic, legal, social, cultural, historical and religious* backgrounds.[83]

76. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.
77. Mathew DAVIES, "States of Compliance?: Global Human Rights Treaties and ASEAN Member States" (2014) 13 Journal of Human Rights 4.
78. Sok KHEMARA, "Mixed Reviews of ASEAN Human Rights Declaration" *VOA Khmer* (19 December 2012), online: VOA Khmer <http://www.voacambodia.com/content/mixed-reviews-of-asean-rights-declaration/1567319.html>.
79. Herman Joseph S KRAFT, "Human Rights, ASEAN and Constructivism: Revisiting the 'Asian Values' Discourse" (2001) 22(45) Philippine Political Science Journal 33 at 33–34.
80. *AHRD, supra* note 9, art 7.
81. *Ibid*, art 6.
82. *Ibid*, art 8.
83. *Ibid*, art 7 [*emphasis added*].

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Based on the above provision, it could be understood that ASEAN promotes and protects human rights and fundamental freedoms as long as they do not run counter to the history, politics, religions, or economic context of the member state in question. In other words, the rights of ASEAN's peoples must be compromised so as to conform to a particular history, political system, or set of development goals. None of these compromises are new. Historically, this was evident in official statements made by ASEAN in the early 1990s,[84] and was fervently reconfirmed in the *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights* in 1991.[85]

While the international community has protested article 7 of the ADHR,[86] Catherine Renshaw offers an opposing view.[87] She argues that the second part of article 7 does not authorize States to defer to particularities of context in realizing rights.[88] In fact, it only "draw[s] attention to different contextual backgrounds of the region and is not 'an endorsement of relativism'".[89] Renshaw's conclusion is based on a comparison between "the formulation" of article 7 of the AHRD and article 5 of the *Vienna Declaration and Programme of Action* (VDPA) adopted by the World Conference on Human Rights in 1993, which representatives of the ASEAN countries attended.[90] She believes that the ADHR "follows the formation" of the VDPA, which "ultimately affirmed" the universality of human rights, as stipulated in the UDHR.[91] Specifically, the VDPA states that:

> 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, to promote and protect all human rights and fundamental freedoms.[92]

At first glance, the formulations of the two articles are similar. Both refer to the idea of "bearing in mind" (AHRD) ("must be borne in mind" (VDPA)) the role of "national and regional particularities". Yet the two articles mention "national and regional particularities" and "context" for contradictory purposes. The main part of the last sentence in article 5 of the VDPA firmly states that human rights are universal, and that states are obligated to promote and protect them *no matter what* "political, economic and cultural system" the state may have. The reference to "national and regional

84. ASEAN, *Joint Communique of 24th ASEAN Ministerial Meeting (Kuala Lumpur, 19–20 July 1991)*, para 15; ASEAN, *Joint Communique of 25th ASEAN Ministerial Meeting (Manila, 21–22 July 1992)*, para 18.

85. *Bangkok Declaration*, *supra* note 75, para 8.

86. Caryl THOMPSON, "Self-Inflicted Harm: The ASEAN Declaration of Human Rights" *Global Policy Journal* (21 December 2012), online: Global Policy Journal <http://www.globalpolicyjournal.com/blog/21/12/2012/self-inflicted-harm-asean-declaration-human-rights>.

87. Renshaw, *supra* note 61 at 569.

88. *Ibid*.

89. *Ibid*.

90. *Ibid*.

91. Diane A DESIERTO, "Universalizing Core Human Rights in the 'New' ASEAN: A Reassessment of Culture and Development Jurisdictions Against the Global Rejection of Impunity" (2009) 1:1 Goettingen Journal of International Law 77 at 82.

92. *Vienna Declaration and Programme of Action*, UN Doc A/CONF. 157/2 (25 June 1993) (adopted by the World Conference on Human Rights), art 5 [*emphasis added*].

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particularities" are in this case merely supplementary considerations. However, article 7 of AHRD completely ignores the main emphasis of article 5, which defines the state's obligation "regardless" of its regional and national context. Hence, it is unconvincing to say that article 7 conveys the same meaning as article 5 of the VDPA. On the contrary, the formulation of article 7 emphasizes particularism as a condition for the realization of human rights. Nicholas Doyle persuasively confirms this point, stating that the wording of article 7 does not consider "regional particularities" in the same way as the VDPA does, which is to "draw[] on Southeast Asian historic experience" to describe human rights.[93] Instead, it is "to constrain the role that human rights can be expected" to play in the region.[94] Thus, Renshaw's argument that article 7 does not allow states to restrict human rights is unpersuasive.

Renshaw is not alone in her view. In his article commenting on AHRD, Joel Ng argues that article 7 expresses the realistic concerns of some member states[95] and "a pragmatic compromise" for human rights in ASEAN.[96] However, admitting the use of economic, political, and other background matters to condition human rights and then calling it a "compromise" is itself strong evidence showing that ASEAN instruments in fact deny the universality of human rights. But, is this compromise reasonable? This article explores the compromise on the ground of economic context, which a number of scholars have pointed to as being one of the dominant reasons for Asian states – including ASEAN member states – rejecting the universality of human rights.[97]

The compromise stems from the belief that universal human rights are a "Western" concept which cannot apply to non-western countries with lower economic capabilities.[98] On this point, Kishore Mahbubani has explicitly endorsed the protection of human rights particularism. He states that "it is necessary for a developing society to first succeed in economic development before it can attain the social and political freedoms found in [...] developed societies".[99] This reasoning has been repeated again and again, not only by politicians, but also by academics. Bilahari Kausikan raises his voice to defend "Asia's different standard" and question the universality of human rights. According to Kausikan, "the myth of the universality of all human rights is harmful if it masks the real gap that exists between Asian and Western perceptions of human rights".[100]

Mahbaburi, Kausikan, and other supporters of human rights particularism are right in the sense that economic constraints might make it difficult for ASEAN countries to

93. Doyle, *supra* note 64 at 13.
94. *Ibid* at 14.
95. Ng, *supra* note 61.
96. *Ibid* at 1.
97. Yash GHAI, "Rights, Social Justice, and Globalization in East Asia" in Joanne R BAUER and Daniel A BELL, eds, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), 241 at 243; Thio, *supra* note 46 at 38.
98. Dato Seri Dr Mahathir bin MOHAMAD, "The Asian Values Debate" (Speech delivered at the 29th International General Meeting of the Pacific Basin Economic Council at Washington, DC, 21 May, 1996) (quoted in Kraft, *supra* note 79 at 33–34).
99. Kishore MAHBUBANI, *Can Asians Think?*, 3rd edn (Singapore: Marshall Cavendish Editions, 2004) at 85.
100. Bilahari KAUSIKAN, "Asia's Different Standard" (1993) 92 Foreign Affairs 24 at 32.

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realize certain rights, especially rights that require greater economic resources.[101] However, accepting this as a challenge and denying it are two different things. Challenges, if realized, can be overcome, but denying that human rights are universal and upholding regional and national particularism would allow states to neglect their international legal obligations. Article 2 of the ICESR addresses this problem and does not justify states using economic limitations to deny universal rights and their obligations. The article explicitly states that each state is obligated to "take steps […] to the maximum of its available resources" to progressively achieve the full realization of its citizens' rights.[102] Here, Mahbabuni and Kausikan seem to forget that rights, especially economic, social, and cultural rights, can be realized progressively. Therefore, it is not convincing to call for economic achievement before fundamental rights can be protected.

This compromising of fundamental freedoms for particularism, especially for the reason of economic development, is strongly criticized by Jack Donnelly. He calls it a "short-run excuse"[103] and points out that the "excuse" might "sacrifice" economic and social rights, but not civil and political rights.[104] Donnelly refutes the argument that economic development rightly justifies the rejection of human rights as universal. Instead, the author elaborates that the costs of denying civil and political rights must be considered because it facilitates corruption.[105] Indeed, compromising fundamental freedoms to achieve economic growth or other goals is "misleading".[106] There is no study that could give statistical support to Mahbabuni and Kausikan's claims that fundamental freedoms and "economic performance" conflict.[107] As Damien Kingsbury and Grey Barton critically point out, compromises do not facilitate economic development, but allow human rights violations in the name of pursuing economic flourishing.[108]

2. *Balancing rights and duties*

Asian societies, including those in ASEAN, often discuss the tension between human rights and social duties. [109] The question of whether "Western individualism"[110] is suited to Asia, or whether "community harmony"[111] or "communitarianism"[112]

101. Michael DENNIS and David STEWARD, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" (2004) 98 American Journal of International Law 462 at 464.

102. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 2.

103. Jack DONNELLY, "Human Rights and Asian Values: A Defense of "Western" Universalism" in Bauer and Bell, eds, *supra* note 93, 60 at 72 [Donnelly, "A Defense"].

104. *Ibid.*

105. *Ibid* at 73.

106. Damien KINGSBURY and Grey BARTON, *Difference and Tolerance: Human Rights Issues in Southeast Asia* (Geelong: Deakin University Press, 1994) at 2.

107. Amartya SEN, "Human Rights and Economic Achievements" in Bauer and Bell, eds, *supra* note 97, 88 at 91.

108. Kingsbury and Barton, *supra* note 106 at 3.

109. Donnelly, "A Defense", *supra* note 103 at 78.

110. Avonius and Kingsbury, *supra* note 71.

111. *Ibid.*

112. Kraft, *supra* note 79 at 1.

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should trump individual wishes, is a hotly contested issue within the "Asian values" debate, one that raises important issues regarding the relationship between human rights and duties and whether particular duties constitute preconditions for the enjoyment of rights.

Thirteen years ago in his article discussing "Asean values", Herman Kraft spotted the tension between "individual rights and communitarianism" and asserted that the tension would remain valid in that Asia views human rights as attached to duties.[113] Thirteen years later, the actual wording of ASEAN's human rights instruments has proven Kraft's assertion as essentially true. The conditioning of fundamental rights on particular duties or obligations is prevalent throughout the ADHR, and imposes limitations on the rights of Southeast Asian people.[114]

According to article 6 of the ADHR, "the enjoyment" of rights and "the performance" of "duties" are tightly bound together. They are not something that should be, but rather "must be" balanced. Some scholarly research protects the idea that the balance between human rights and individual duties is consistent with the UDHR and therefore justifiable.[115] This argument is weak. On the contrary, the balancing act imposed by ASEAN declarations not only undermines universal human rights and freedoms, but generates the basis for violations of those rights in the name of "balanc[ing] between rights and responsibilities."[116]

At the Vienna Conference in 1993, the representative from Indonesia, Ali Alatas, tried to justify the need to balance rights and obligations.[117] He did so by indicating the consistency between the UDHR (article 29) and the above requirement.[118] To say that the use of duties to condition rights is consistent with the UDHR, which upholds the universality of human rights, is misleading. Even though article 29 of the UDHR does mention people's duties to their communities,[119] it does not convey that the performance of those duties is a condition for one's enjoyment of rights. Therefore, the balancing requirement stated in ASEAN instruments, and as claimed by Alatas, is not at all consistent with the UDHR. And even if it were, article 29 is controversial in itself. It creates "an imbalance" and "confusion" as well as possibilities for the "suspension of rights".[120]

Both scholars and Civil Society Organizations (CSOs) are more or less in agreement on the point that this balancing requirement provides grounds for violations. Opinions presented by Amnesty International and scholar Nicholas Doyle provide two

113. *Ibid*.

114. *AHRD*, *supra* note 9, art 6 [*emphasis added*].

115. Ali ALASTAS, Ministry for Foreign Affairs and Head of the Delegation of the Republic of Indonesia (Statement before the Second World Conference on Human Rights, Vienna, 14 June 1993) in Letter from Wtijaksana SOEGARDA to the UN Secretary-General (16 June 1993) (UN Doc A/48/214, 18 June 1993), Annex.

116. Amnesty International, *Amnesty International's Briefing to the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children on the Draft ASEAN Declaration on the Elimination of Violence against Women and Children* (London: Amnesty International Publications, 2013) at 12.

117. Alastas, *supra* note 115.

118. *Ibid*.

119. *UDHR*, *supra* note 73, art 29.

120. Thomas HAMMARBERG, "Human Rights and Duties" (1998) 25.4 Media Asia 186 at 187.

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examples. Amnesty International explicitly expresses the view that violence against women and children in ASEAN may be justified on the grounds of "balancing between rights and responsibilities".[121] Doyle confirms this view by saying that the balancing requirement presents the "potential for oppressive effect[s] by acting as a source of justifications for derogation by the state invoking the norm."[122] However, neither of these arguments elaborate on the reasons why using duties as conditions for the enjoyment of rights can justify violations or derogation in ASEAN.

These reasons can be explained by looking at the actual relationship between duty-bearers and rights-holders in human rights law. In a legal human rights relationship, individuals are rights-holders and states are duty-bearers.[123] In other words, people's rights are equivalent to the state's obligations to "respect, protect and fulfil".[124] Neither the ICESCR nor the ICCPR contain requirements that human rights be balanced with duties to societies. While obligations are on the state's shoulders, the balancing act between rights and individual duties can have serious consequences in that the rights protected may no longer be regarded as human rights.

It is important to remember that one is entitled to human rights simply by virtue of the fact that a person is a human being.[125] However, the AHRD seems to ignore this point and mix-up the "legitimate limits" in exercising a right with "duties inherent in the possession of a right".[126] Regarding this point, Jack Donnelly provides a convincing example in the case of freedom of speech. He rightly indicates that the rights and duties involved in this case have no "logical connection".[127] Someone might be punished for saying something harmful to others, but that is because the person violates another human being's rights. However, the person's right to free speech itself is not restricted.[128] Donnelly argues that any rights granted with conditions, like that of using duties as restrictions, are not human rights.[129] If applying Donnelly's argument to the case of article 6 of the AHRD, it would appear that the rights granted in these instruments are not human rights because they are subject to restrictions by duties.

3. *Failing to condition restrictions to tests of legality, legitimacy, and proportionality*[130]

Added to the list of the ASEAN instruments' shortcomings is the fact that the regional instruments refer to national law, security, and morality as reasons for restricting

121. Amnesty International, *supra* note 116.

122. Doyle, *supra* note 64 at 9.

123. Danwood Mzikenge CHIRWA, "State Responsibility for Human Rights" in Mashood A BADERIN and Manisuli SSENYONJO, eds, *International Human Rights Law: Six Decades After the UDHR and Beyond* (Farnham and Burlington, VT: Ashgate Publishing Limited, 2010), 397 at 401.

124. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 (1997), para 6.

125. Jack DONNELLY, *Universal Human Rights in Theory and Practice*, 3rd edn (Ithaca: Cornell University Press, 2013) at 10.

126. Donnelly, "A Defense", *supra* note 103 at 79.

127. *Ibid*.

128. *Ibid*.

129. *Ibid*.

130. *AHRD*, *supra* note 9, art 8.

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human rights. CSOs and scholars have repeatedly criticized this limitation. Human Rights Watch, for example, indicates that making the enjoyment of rights subject to national laws would strengthen the power of governments, instead of limiting it.[131] Similarly, Wilder Taylor claims that human rights are supposed to limit the obligations that governments might impose on their nationals, instead of expanding them.[132] More specifically, Nicholas Doyle points out that using national laws would undermine a state's compliance with the obligations contained in the ICCPR and ICECR.[133]

It appears that there is little disagreement on the point that subjecting the enjoyment of rights to national law, national security, and morality would weaken the international human rights standard and strengthen a state's power. However, the above-mentioned claims simply indicate the limitation; they do not elaborate on how such restrictions would augment governmental power and prevent the relevant ASEAN instruments from effectively protecting human rights.

The AHRD contains many references to the role of national law, security, and morality in limiting the enjoyment of rights. In particular, article 8 provides that the exercise of rights shall be subjected to limitations only as *determined by law*, and to meet the *just requirements* of "national security, public order, public health, public safety, [and] public morality".[134]

In her recent work, Catherine Renshaw compares the AHRD, the *African Charter on Human and Peoples' Rights* (ACHPR), and the *European Convention on Human Rights* (ECHR).[135] Through this comparison, Renshaw argues that the way in which the AHRD uses law, morality, and national security as limitations on rights is not any different from that employed by other documents.[136] Even though the ECHR and the ACHPR also mention morality and national law as appropriate bases for restricting certain rights,[137] there lies a difference in that the AHRD does not apply this restriction to a select number of rights, but to every right. This restriction is dangerous, especially for rights that have already been infringed upon by national law in some countries in the region.

Take freedom of speech in Vietnam as an example. Article 25 of the recently-amended *Constitution of the Socialist Republic of Vietnam* stipulates that the exercise of freedom of speech "shall be provided by the law".[138] By virtue of this article, one can

131. Human Rights Watch, "Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration" (19 November 2012), online: Human Rights Watch <http://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>.

132. Emerlynne GIL and Ian SEIDERMAN, "ICJ Condemns Fatally Flawed ASEAN Human Rights Declaration" *ICJ* (19 December 2012), online: ICJ <http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/>.

133. Doyle, *supra* note 64 at 9.

134. *AHRD*, *supra* note 9, art 8.

135. Renshaw, *supra* note 61 at 560.

136. *Ibid* at 571.

137. *Convention for Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 212 UNTS 222 (entered into force 3 September 1953) (as amended), arts 8-10 [*ECHR*]; *African Charter on Human and People's Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), art 12.

138. *Constitution of the Socialist Republic of Vietnam* (adopted 28 November 2013), art 25.

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argue that Vietnam justly guarantees its people freedom of speech. However, the *Vietnam Criminal Code* prohibits and imprisons those found guilty of speech or acts against the government.[139] As a result, many dissenters have been imprisoned for exercising their rights under the ICCPR, to which Vietnam is a party. Yet, the rights are still restricted by the law. This particular example reveals that using national law – or any of the other conditions above – to restrict the enjoyment of human rights can be risky.

This is not to say that restrictions could never be imposed on human rights. Clearly, not every right is absolute. There are qualified rights that tend to compete with one another,[140] and states are given a "margin of appreciation"[141] to balance the conflicting rights. But states can do so only if their decisions satisfy three strict tests: the condition of legality; the condition of legitimacy (i.e., that decisions satisfy legitimate aims); and the condition of proportionality.[142] With respect to the condition of legality, the European Court of Human Rights (ECtHR) has noted that legal enactment is not enough: a law must also be good law.[143] However, while the balancing requirements in international law generally subject states to strict conditions, there are no such demands in the ASEAN system.

Without the above tests, the risk of states expanding their power to restrict human rights is real, and this has been proven by the case of freedom of expression in Vietnam. While the "central function of human rights is to set limits on the state and its laws",[144] the way that ASEAN's declarations have been designed makes this goal impossible to achieve.

B. *The Procedural Limitations: ASEAN Has No "Teeth" or Has "Teeth" But Is Unwilling to "Bite"?*[145]

In order to identify the procedural shortcomings of the ASEAN human rights system, the functions and mandates of the main mechanism in ASEAN, the AICHR, will be looked at. This exercise aims to prove that ASEAN human rights mechanisms contain two main and interrelated flaws. The first relates to the fact that the mechanisms generally lack independence, the second to the Commission's weak protection mandates.[146] Other shortcomings undermining the efficacy of the AICHR – for example, the lack of connection between the mechanisms and other stakeholders[147] – are well-known. However, the two limitations above are chosen in the belief that they

139. *Vietnam Criminal Code 1999* (No 15/1999/QH10), art 88.
140. Donnelly, "A Defense", *supra* note 103 at 77.
141. Arai-Takahashi YUTAKA, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Oxford, and New York: Intersentia, 2002) at 2–3.
142. Olivier DE SCHUTTER, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010) at 288.
143. *Rotaru v Romania*, no 28341/95 (2000) 8 BHRC 449, paras 55–57.
144. Donnelly, "A Defense", *supra* note 103 at 77.
145. Durbach, Renshaw, and Byrnes, *supra* note 61.
146. Phan, *supra* note 13 at 107.
147. *Ibid*.

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are the most serious and fundamental procedural flaws and therefore must be addressed.

1. *A lack of independence*

For human right mechanisms, independence is a vitally important requirement. No matter what form the mechanisms take – a court, commission, committee, or the like – the emergence and existence of credible human rights bodies requires their independence from political organs.[148] The Office of the High Commissioner for Human Rights (OHCHR) also stipulates independence as a prerequisite for regional human rights mechanisms.[149] It explicitly requires that "a regional human rights mechanism shall be mandated to independently promote and protect human rights"[150] and that it has to "be composed of members who are independent from government".[151] From these requirements, it can be concluded that both the body and its members must be independent from national government. ASEAN and its regional mechanisms for human rights should not be excluded from these standard requirements.

While the international community urges for independent human rights mechanisms, ASEAN's Committee and Commissions for human rights are designed in almost the opposite way. Several factors undermine this international standard. The first, which is also the most decisive, is the fact that the AICHR is "a consultative inter-governmental body."[152] As a consultative body, the AICHR is structured in such a way that it functions to accommodate its close relationship with governments. Regarding this point, the AICHR's *Terms of Reference* (TOR) provide procedures which are problematic. Firstly, it requires that the representative of the member state that chairs ASEAN will also lead the AICHR in the same year.[153] Secondly, the ASEAN Foreign Ministers make all final decisions on amending, reviewing, and interpreting the AICHR's functions and mandates.[154] And lastly, the member states' governments are responsible for nominating and replacing the members of the AICHR, who "shall be accountable to the appointing Government."[155]

Different scholars have found these provisions problematic. Tan Hsien-Li provides a comprehensive assessment of the above provisions. She indicates that they create strong connections between governments and the AICHR, thereby "omitt[ing]" the

148. Caroline MUSCAT, "Human Rights Body Has to Be Independent" *Times of Malta* (31 May 2014), online: Times of Malta <http://www.timesofmalta.com/articles/view/20140531/local/Human-rights-body-has-to-be-independent-.521268>; ASEAN NHRI Forum, "Position Paper Concerning the Political Declaration on the ASEAN Intergovernmental Commission on Human Rights (AICHR)" (Submitted at the 3rd Consultation Meeting with the High Level Panel (HLP), Jakarta, 28 August 2009), online: SEA NHRI Forum <http://www.seanf.asia/index.php/home/joint-statements>.

149. OHCHR, "Principles for Regional Human Rights Mechanisms (Non-Paper)", online: OHCHR <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx> [OHCHR, "Principles"]

150. *Ibid*.

151. *Ibid*.

152. *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), art 3 [*TOR*].

153. *Ibid*, art 5(9)

154. *Ibid*, art 9

155. *Ibid*, art 5(2). See also *ibid*, arts 5(5)-(6).

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Commission's independence.[156] Phan Duy Hao shares a similar view.[157] Though not explicitly demanding that the AICHR be independent from governments, he expressly criticizes the fact that the AICHR is merely a "consultative intergovernmental body", as well as the nomination and accountability requirements.[158]

So far, however, scholars tend to discuss the reasons for the AICHR's lack of independence instead of its consequences. And without this element, arguments for the independence of ASEAN human rights bodies are not very convincing. In his critique of the dependence of the African Commission for Human and Peoples' Rights (AfCHPR), Olufemi Amao came closer to explaining the possible ramifications.[159] He clarifies that being dependent on states would give the states significant control over the Commission.[160] The same clarification can be applied to ASEAN, but this still does not explain what would happen if states controlled the AICHR.

On this point, dependent human rights bodies would have two main interrelated effects on human rights in the region. Firstly, human rights would be politicized. Secondly, it would undermine the AICHR's ability to hold governments responsible for their human rights obligations. Regarding the first effect, it is important to remember that avoiding the politicization of human rights is a goal which ASEAN has repeated again and again.[161] However, the AICHR functions in a way that allows the promotion and protection of human rights to be influenced by the political wills of member states. One illustration of this point is the principle of having the state which chairs ASEAN also chair the AICHR in the same year. According to Tan Hsien-Li, the "scope of [the] AICHR's operations would vary according to [the chairing] state's priority for human rights."[162] This dependence on the political will of the chairing state would place the effectiveness of the mechanisms at risk.

From a legal perspective, the dependence of the AICHR on governments makes it difficult to hold governments responsible for human rights violations. The fact that the AICHR is not equipped to be a judicial body that could provide legally binding remedies for violations is well-recognized. On the basis of this fact, one might claim that as a consultative body, the AICHR does not need to be independent. However, even a consultative body needs to be able to provide opinions and receive information independently from its constituent governments. In fact, the AICHR's TOR equips the Commission with the ability to "obtain information from ASEAN Member States on the promotion and protection of human rights".[163] Furthermore, it allows the AICHR to "consult with [...] national entities concerned with the promotion and protection of human rights."[164] Therefore, in order to "consult" with governments on rights

156. Tan, *supra* note 61.
157. Phan, *A Selective Approach*, *supra* note 13 at 107.
158. *Ibid*.
159. Olufemi AMAO, "African Regional Human Rights System" in Baderin and Ssenyonjo, eds, *supra* note 123, 235 at 242–243.
160. *Ibid* at 243.
161. *TOR*, *supra* note 152, art 2(2).
162. Tan, *supra* note 61 at 157.
163. *TOR*, *supra* note 152, art 4(10).
164. *Ibid*, art 4(9).

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violations, the AICHR needs information from diverse sources, i.e. sources other than governments. However, this need is hard to fulfil when most of the personnel entitled to conduct such consultations are governmental staff who have duties to and speak for the governments involved. This problem might best be described as a "conflict of interest" or "conflict of commitments" between the AICHR's members, governments, and victims of human rights abuses.[165] This conflict would interfere with the AICHR's impartiality when performing its duties.

2. *Weak protection mandates*

Under the "'typology of states' obligations", states are compelled to "respect, protect and fulfil" the human rights of their citizens.[166] This typology not only requires that states do not directly infringe human rights, but they must also proactively defend them from being violated by third parties.[167] From the perspective of international law, states can be "liable" for failing to protect rights holders from violations.[168] In this sense, the "responsibility to protect" rests first and foremost with states.[169] However, when states are either incapable of or "unwilling" to fulfil this responsibility, the responsibility would "shift" to regional mechanisms,[170] in this case ASEAN and the AICHR. This responsibility to protect at the regional level is upheld by the OHCHR's principles for regional human rights mechanisms, which require that "a regional human rights mechanism [...] be mandated to [...] *protect* human rights."[171] The concept of responsibility to protect is applied in all other well-known regional human rights systems in the world, including the Inter-American, African, and European systems.[172]

At first glance, ASEAN seems to incorporate and realize this obligation in its system for human rights. The obligation to protect has been consistently upheld in every instrument and mechanism.[173] Similarly, "protection" is often mentioned simultaneously with the "promotion" mandate in shaping the principles and purposes of the AICHR.[174] However, the Commission has proven ignorant of its protection mandate in practice, which has attracted criticism from scholars and the

165. BM DICKENS and RJ COOK, "Conflict of Interest: Legal and Ethical Aspects" (2006) 92(2) International Journal of Gynecology and Obstetrics 192 at 192–193.

166. De Schutter, *supra* note 142 at 242.

167. *Ibid* at 365.

168. Frédéric MÉGRET, "Nature of Obligations" in Daniel MOECKLI, Sangeeta SHAH, and Sandesh SIVAKUMARAN, eds, *International Human Rights Law*, 2nd edn (Oxford: Oxford University Press, 2010), 96.

169. Václav HAVEL and Desmond M TUTU, "Introduction" in Jared GENSER and Irwin COTLER, eds, *Responsibility to Protect* (Oxford: Oxford University Press, 2012), xxv at xxvi.

170. Phan, *A Selective Approach*, *supra* note 13 at 106; Drummond, *supra* note 61 at 4.

171. OHCHR, "Principles", *supra* note 149.

172. Jo PASQUALUCCI, "The Americas" in Moeckli, Shah, and Sivakumaran, eds, *supra* note 168, 398 at 487; Ilias BANTEKAS and Lutz OETTE, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2013) at 219.

173. *Charter of the Association of Southeast Asian Nations, done in Singapore*, 20 November 2007 (entered into force 15 December 2008), art 2(i), online: ASEAN <http://www.asean.org/storage/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf>; *AHRD*, *supra* note 9, arts 36 and 39.

174. TOR, *supra* note 161, arts 1 and 2.

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media.[175] However, the levels of criticism are not identical. While some point out that the lack of a protection mandate is by design, others believe that the Commission is equipped with the tools needed to implement its responsibility to protect but simply chooses not to use them.

Phan Duy Hao is one of the scholars who indicates that the AICHR only concentrates on "promotional work" and not on its protection mandate.[176] In his exact words, he claims that the "AICHR fails to recognize the concept of the responsibility to protect".[177] Indonesia's commissioner to the AICHR, Rafendi Djamin, confirms Phan's argument by stating that the AICHR does not have the authority to undertake investigations of human rights violations.[178]

In order to justify the claim that the AICHR lacks a protection mandate, it is important to understand which mandates a regional commission for human rights would need in order to fulfil its responsibility to protect. The African Commission, for example, has performed its obligation to protect through different mandates. The mandates involve receiving communications about violations of rights, communicating them to states, and investigating the violations.[179] CSOs also ask for mandates comparable to those of the ACHPR, but generally speaking, the ability to "receive, analyze and investigate" rights violations is greatly stressed in their claims.[180]

If the core of the protection mandate is the competence to receive information, communicate with governments, and undertake investigations, then perhaps the AICHR already has this legal capacity. This is the argument presented by Yuval Ginber, who argues that "there is nothing in AICHR's TOR to prevent it from investigating complaints concerning human right violations".[181] He further supports his view by pointing out provisions in the TOR which can be used to justify activities that fulfil the responsibility to protect, such as the ability to "develop strategies" for the "protection of human rights" in order to find information from state parties on the protection of rights.[182] In addition, Ginber indicates that the AICHR has the legal ability to acquire information from member states in order to protect rights, which can be used to conduct investigations.[183]

Ginber has a good point. The AICHR's TOR does provide provisions that can justify and support activities for rights protection, such as strategies for developing[184] and obtaining information.[185] However, it is perhaps too optimistic to say that legally, there is nothing in the language to prevent the AICHR from investigating human rights

175. Phan, *A Selective Approach*, *supra* note 13 at 106.
176. *Ibid*.
177. *Ibid*.
178. Carmela FONBUENA, "ASEAN Human Rights Body Fails Kin of Massacred Journalists" *ABS-CBN News* (29 March 2010), online: ABS-CBN News <http://www.abs-cbnnews.com/nation/03/29/10/asean-humanrights-body-fails-kin-massacred-journalists>.
179. Amao, *supra* note 159 at 242.
180. Letter from Indonesia's NGO Coalition for International Human Rights Advocacy to Dr RM Marty Natalegawa (17 December 2013).
181. Ginber, *supra* note 61 at 517.
182. *Ibid*.
183. *Ibid*.
184. TOR, *supra* note 161, art 4(1).
185. *Ibid*, art 4(4).

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violations.[186] Apparently, there is at least one significant barrier both in the language of the TOR and in practice which stops the AICHR from fulfilling its protection mandates. The barrier is the Commission's lack of independence, as analysed earlier. So, even though the AICHR is equipped with tools to protect rights, realistically, it cannot do so because it is dependent on governments, which are often also the institutions being investigated. Therefore, it would be more precise to say that the AICHR has weak tools, rather than it lacks protection mandates.

III. COMPLETING THE ASEAN HUMAN RIGHTS SYSTEM: TIME FOR AN ASEAN COURT OF HUMAN RIGHTS

Improving human rights in ASEAN "has been a long and winding road".[187] Considering ASEAN's decades-long hesitance in getting on this road, the fact that it has gradually included human rights in the region's dialogues and recently achieved a system for human rights indicates that the journey is challenging, but not impossible. At present, there are two reasons to be positive about a better road ahead. One is the AICHR's commitment to engage with civil society and prestigious international human rights partners.[188] The second is the initiation of discussions about an ASEAN human rights court in Southeast Asia.[189]

So far, discussions of an ASEAN human rights court have been limited to scholarly discussions and civil society advocacy groups.[190] No official discussion or action has been taken by ASEAN officials. This lack of action stems from the prevalence of "the ASEAN Way" and the organization's "signature" principle of "non-interference".[191] Indeed, accepting state scrutiny by a neutral and independent judicial body would also mean shaking the premise of absolute state sovereignty, which is unlikely to be accepted by most, if not all, of ASEAN's member states. As such, 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.

Despite the political hesitance,[192] the need for a human rights court to promote legally enforceable human rights in ASEAN is genuine. The next parts explore how a

186. Ginber, *supra* note 61 at 515.

187. Muntarbhorn, "A Roadmap", *supra* note 61.

188. AICHR, *Annual Report of the ASEAN Intergovernmental Commission on Human Rights: The Annual Report of the AICHR for the Period of July 2014 to July 2015* (1 July 2015) at 4, online: AICHR – Thailand <http://www.aichr.or.th/file_content/article_doc_35.pdf>.

189. See Phan, *A Selective Approach*, *supra* note 13; Vitit MUNTARBHORN, *Development of the ASEAN Human Rights Mechanism* (Brussels: European Union, 2012) at 4, online: European Parliament <http://www.europarl.europa.eu/RegData/etudes/note/join/2012/457120/EXPO-DROI_NT(2012)457120_EN.pdf> (Briefing Paper No EXPO/B/DROI/2012/05); Ary HERMAWAN, "ASEAN Urged to Form Human Rights Court" *The Jakarta Post* (26 August 2009), online: The Jakarta Post <http://www.thejakartapost.com/news/2009/08/26/asean-urged-form-human-rights-court.html>; "Call to Set Up a Human Rights Court" *The Brunei Times* (27 December 2013), online: The Brunei Times <http://m.bt.com.bn/frontpage-news-national/2013/12/27/call-set-asean-human-rights-court>.

190. *Ibid*.

191. Dimitri VANOVERBEKE and Michael REITERER,"ASEAN's Regional Approach to Human Rights: The Limits of the European Model?" (2014) 14 European Yearbook on Human Rights 185 at 194.

192. Thio, *supra* note 46 at 78, Hao Duy PHAN, "Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report" (2009) 31(3) Contemporary Southeast Asia 468 at 490.

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court would help complete the ASEAN human rights system and where it would fit into the current system. They also explore how the substantive and procedural aspects of the current system might be adapted to support this powerful mechanism.

A. *The Necessity of a Court of Human Rights to Complete ASEAN's Human Rights System*

"[N]o right is genuinely assured unless it is safeguarded by a competent court."[193] Moreover, a court offers an "effective enforcement of human rights in line with regional needs, experiences and legal traditions", especially in regional settings.[194] The protection of rights in ASEAN is no exception. Indeed, the need for a judicial body to complete ASEAN's human rights system is pressing because ASEAN lacks the regional mechanisms needed for victims of human rights abuses to exercise their right to adequate remedies. This right can be accommodated by a court.

At the international level, the right to adequate remedies is one of a human being's fundamental rights. This right is safeguarded by important international treaties, which grant the victims of violations effective remedies determined by competent judicial authorities.[195] On the regional scale, the AHRD also provides ASEAN's peoples with the right to "effective and enforceable" remedies for victims of rights infringements.[196] But while ASEAN's peoples are undeniably entitled to exercise these rights, ASEAN provides no mechanism for them to do so.

Remedies under the AHRD range from declaratory judgments to the awarding of compensatory damages and the order for specific state actions.[197] Considering the above-mentioned range of remedies, one might argue that a commission for human rights (i.e. one with strong protection mandates) would be competent enough to provide them. One might then ask whether strengthening a commission's protection mandates[198] – in this case those of the AICHR – would be enough. However, 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. Thus, while commissions might offer remedies, courts provide effective and enforceable remedies.

The case of the African system for human rights serves to illustrate this point. The African Commission, which is equivalent to the AICHR in Southeast Asia, is capable of providing remedies for victims of infringements of rights.[199] In practice, it has adopted

193. Ninth International Conference of American States, Res XXXI, *Inter-American Court to Protect the Rights of Man*, (1948) (quoted in Phan, *A Selective Approach*, *supra* note 13 at 130).

194. Gerd OBERLEITNER, "Towards an International Court of Human Rights" in Baderin and Ssenyonjo, eds, *supra* note 123, 359 at 363.

195. *UDHR*, *supra* note 72, art 5; *International Covenant of Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 8; ECHR, *supra* note 137, art 3.

196. *AHRD*, *supra* note 9, art 5.

197. Dinah SHELTON, *Remedies in International Human Rights Law*, 2nd edn (Oxford: Oxford University Press, 2006) at 2.

198. Evelyn A ANKRUMAH, *The African Commission on Human and People' Rights: Practice and Procedures* (Dordrecht: Kluwer Law International, 1996) at 195.

199. Gina BEKKER, "African Commission on Human Rights and People's Rights in Relation to Remedies for Human Rights Violations" (2013) 13:3 Human Rights Law Review 499 at 503.

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"provisional measures" and "declaratory decisions", and "awarded damages", as measures to address specific violations.[200] However, these remedies are only recommendatory and based on "amicable resolutions"[201] that are non-binding.[202] And when remedies are not legally binding, violators are not bound to comply, and result in unenforceable decisions.[203] Indeed, statistics from the UN Human Rights Committee show that only twenty-five percent of states comply with its non-binding decisions.[204] This high risk of non-compliance likely undermines the right to adequate remedies. Therefore, no matter how strong the protection mandates of the Commission might be, the reality is that they do not render binding decisions which states are obligated to follow.[205] Only courts are given the judicial competence to provide legally binding remedies for victims of human rights violations.

Considering the current situation of ASEAN and the AICHR, the need for a human rights court is acute. So far, the AICHR has not been able to provide any remedies to redress human rights violations in the region. Thailand's current situation is just one example. There, victims of human rights violations under the military regime cannot go to the AICHR for remedies because it lacks both the independence and the strong protection mandates to act on these matters. A court, however, would be able to overcome these challenges because, as a judicial organ, it would be independent and capable of issuing legally binding judgments against member states.[206] In this case, victims of the Thai military government would have a better chance of obtaining adequate remedies.

There are, of course, a number of other reasons which support the argument for an ASEAN human rights court. For example, there is the potential influence which a human rights court might have on state practices, or the buttressing of efforts to improve the handling of human rights issues among state parties.[207] But while these effects would indeed be valuable, the 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 any other means.

B. *Positioning the Court in the ASEAN Human Rights System*

Every other regional system in the world has a human rights court, including Europe, Africa, and the Americas. In Africa and the Americas, the human rights courts exist side-by-side with regional commissions.[208] In such systems, the courts work to strengthen the system as a whole by rendering legally binding decisions that can be

200. *Ibid*.
201. *Ibid*.
202. Ankrumah, *supra* note 198 at 24.
203. *Ibid* at 196.
204. Chidi Anselm ODINKALU, "Courting the Court" (1994) 2 African Topics 11 (quoted in Ankrumah, *supra* note 198 at 196).
205. Phan, *A Selective Approach*, *supra* note 13 at 479.
206. Collinge, *supra* note 7 at 12.
207. Phan, *A Selective Approach*, *supra* note 13 at 483.
208. Collinge, *supra* note 7 at 12.

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enforced against member states. The Inter-American system for human rights is one example. 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.[209] The same model is recommended for ASEAN. In other words, the proposed judicial body for ASEAN would not replace the AICHR,[210] but would exist independently as a part of the ASEAN human rights architecture.

So far, the suggestions for a court in ASEAN which have been proposed by academic research and the media have simply identified the need for a judicial body without elaborating how such a court might fit into the regional architecture.[211] The only clear proposal has been presented by Phan Duy Hao.[212] Phan's proposal is valuable and comprehensive, covering both political and legal issues surrounding a court for human rights in Southeast Asia. Regarding the issue of positioning the court in Southeast Asia, Phan proposes that it should not be part of ASEAN, but rather operate within the wider context of the region.[213]

Accordingly, Phan suggests a court that is open to any state in the region, whether or not it is a member of ASEAN.[214] Arguments supporting this suggestion include the dominant role of the non-interference principle in ASEAN affairs as well as the different commitments and capabilities among ASEAN's member states.[215] While the above obstacles to a court in ASEAN are real, Phan's proposal to have a court that is completely separate from ASEAN is questionable. There are a number of issues associated with this proposal, which are brought out by comparing Phan's model to other regional courts.

The first issue relates to whether a supervisory political organ would be needed to execute the court's judgment.[216] In all other systems, this role is undertaken by a body which is an integral part of that system. In Europe, for example, the ECtHR is under the supervision of the Council of Europe,[217] and the enforcement of ECtHR's judgments is undertaken by the Committee of Ministers, which is also an organ of the Council of Europe.[218] A similar format is applied in Africa, which has the Council of Ministers (now the Executive Council)[219] to monitor the execution of court judgments on behalf of the African Union (AU).[220] Since Phan claims to follow the models of the

209. James L CAVALLARO and Stephanie Erin BREWER, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" (2008) 102 American Journal of International Law 768 at 778.

210. Collinge, *supra* note 7 at 12.

211. Hermawan, *supra* note 189.

212. Phan, *A Selective Approach*, *supra* note 13.

213. *Ibid* at 227.

214. *Ibid* at 132.

215. *Ibid* at 128.

216. *Ibid* at 226.

217. Phan, *A Selective Approach*, *supra* note 13 at 162.

218. De Schutter, *supra* note 142 at 903–904.

219. Phan, *A Selective Approach*, *supra* note 13 at 226.

220. Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998 (entered into force 25 January 2004), art 29(2).

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above-mentioned courts,[221] then ASEAN should play a role similar to that of the AU[222] and the Council of Europe. In other words, there should be a body to supervise and enforce the court's judgments on behalf of ASEAN. Accordingly, this body should have a role similar to that of the Committee of Ministers in Europe and Africa.

Phan's suggestion, however, is that ASEAN and the court should be separate,[223] meaning that ASEAN will not play any role in assisting the court with execution. Moreover, in Phan's proposal it is unclear who would be responsible for this role. It is important to acknowledge that Phan did mention the need for an organ that would oversee the enforcement of the court's judgments, and proposes a "Meeting of State Parties" to fulfil this role.[224] However, it remains unclear as to what this organ is and how it relates to the court. If Phan's plan is to create a separate system, which includes a court and a supervisory body, it might lead to confusion with the system already established by ASEAN.

The second issue, which is slightly more specific, concerns the enforceability of the court's judgments. As indicated above, Phan's proposed court models itself on courts in other continents.[225] However, this is not exactly true in terms of the enforcement and execution of judgments rendered by the court, especially in the case of the ECtHR. The Committee of Ministers is authorized to enforce judgments by the ECtHR by using different measures.[226] Among these, there is a powerful measure which Phan's court could not apply (i.e. the "suspension or expulsion" from the Committee of Ministers).[227] The Committee of Ministers can enforce this type of measure because all of its member states are in the Council of Europe. As a result, the suspension or limitation of a member's voting rights can be seen as "coercive".[228] However, Phan's proposal to place the court outside ASEAN would make this form of enforceability impossible, because there would not be a similar sanction to threaten the membership or voting rights of non-complying members.

In relation to Phan's proposal to establish a court with a broader membership than that of ASEAN, he suggests that the court should include members more willing and equipped to engage in human rights litigation.[229] The members can be ASEAN's members or outsiders such as Timor-Leste.[230] With this plan, Phan argues that the court should offer an alternative to the AICHR, and as such, would help improve regional rights protection in general.[231] Unarguably, the court would help with rights protection to some extent, but the problem is that this model would not put pressure on countries that are less open to having their human rights

221. Phan, *supra* note 13 at 226.
222. Steiner, Alston, and Goodman, *supra* note 71 at 1063.
223. Phan, *A Selective Approach*, *supra* note 13 at 132.
224. *Ibid* at 227.
225. *Ibid*.
226. Yuval SHANY (with Henry LOVAT), "The European Court of Human Rights" in Yuval SHANY, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014) at 268–269.
227. *Ibid*.
228. Phan, *A Selective Approach*, *supra* note 13 at 225.
229. *Ibid* at 132.
230. *Ibid*.
231. *Ibid* at 201.

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records scrutinized,[232] and there is nothing to ensure that they would not remain outside the court indefinitely. Pressure, however, can be applied through ASEAN membership. In other words, as members of ASEAN with its economic and security benefits, the countries would feel obligated to join the court eventually. This has proven to be true in other regions. For example, countries are parties of the Council of Europe and the AU before they sign up for treaties that give legal foundation for the courts.[233] Especially in the case of the ECtHR, all forty-seven members of the Council of Europe accept the mandatory jurisdiction of the Court.[234] The same can be expected of ASEAN members in the future.

Given all the uncertainties discussed above, the plan to separate the court from ASEAN needs to be reconsidered. In order to avoid confusion and bring benefits to a wide range of people from different states in Southeast Asia, the court should, perhaps, be incorporated into the ASEAN system while still being independent of ASEAN's governments.

C. *Improvements Needed to Accommodate the Court to ASEAN's Human Rights System*

The establishment of regional courts in Europe, Africa, and the Americas proves that there are many different conditions that need to be met before a court becomes a reality. These conditions include new requirements, which are additional to those already existing in the system. As also indicated, a comprehensive proposal for a court for Southeast Asia can be found in Phan's work, which explains the foundations needed for a functioning court of human rights.[235] Of course, the conditions for a court embedded in ASEAN will be slightly different to those needed for a court established outside the regional organization.[236] And while Phan focuses on new issues such as founding treaties and the composition of the court, this article focuses more on improving the existing framework in order to accommodate a human rights court for ASEAN. This is not to say that the conditions proposed by Phan are not important; on the contrary, they are indeed valuable for the establishment of a new regional court. Nevertheless, they remain beyond the scope of this article.

In the context of an ASEAN court, the need to make changes to the existing instruments and procedures is an important one, as it will decide whether this court can make the best out of what is available to protect human rights under ASEAN's system. That said, the court, even when established, might not be effective if limitations still remain. In order to indicate what changes are needed to accommodate the court to ASEAN's human rights system, this part will refer to many of the findings in section II, which discussed the flaws contained in the current system.

Perhaps the biggest substantive impediment to an effective ASEAN human rights court is the fact that ASEAN's instruments do not recognize the universality of

232. Phan, *A Selective Approach*, *supra* note 13 at 45–64.

233. *Ibid* at 163; African Court on Human and Peoples' Rights, "African Court in Brief", online: African Court on Human and Peoples' Rights <http://en.african-court.org/index.php/about-us/court-in-brief>.

234. Vaughne MILLER, "The European Convention on Human Rights and the Court of Human Rights: Issues and Reforms" (2011) House of Common Standard Note No SN/IA/5936 at 3, online: UK Parliament <www.parliament.uk/briefing-papers/SN05936.pdf>.

235. Phan, *A Selective Approach*, *supra* note 13 at 185-229.

236. *Ibid* at 227.

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fundamental rights and freedoms. If the current restrictive interpretation is applied, the court would not be able to protect the rights of and provide remedies to those in need. Again, the cases of Thailand and Myanmar serve as very real examples of the current limitations. Assuming that there was a court, the Thai and Burmese governments could be brought before it after the applicant had exhausted the "domestic remedies".[237] However, if the Thai and Burmese governments were to use article 7 of the AHRD to justify their wrongdoings, the victims would not have a very strong case before the court.

All this is to say that simply having a court in ASEAN is not the end of the story. In order for the court to protect rights and freedoms in ASEAN, the AHRD and other instruments must make sure that the current impediments to justice are eliminated. If a court is to be established, a human rights convention that gives rise to the court and is legally binding must be drafted.[238] In this case, eliminating unreasonable restrictions on rights is even more important, since the enforceability of a convention is unarguably stronger than a declaration.[239]

In line with the suggestion of building the court as a part of ASEAN's human rights system, the AICHR also needs to be granted the authority to carry out protection mandates alongside ASEAN's newly established court. In this sense, again, regional human rights systems in other regions are valuable models to follow. As mentioned earlier, the AfCHPR is able to receive communications, communicate to states, and inspect cases.[240] As for the AICHR, apart from protection mandates, which need to be strengthened, it needs to be independent in order to "obtain information" from state parties and "develop strategies" for protecting rights, such as communicating to governments and investigating cases. In addition, the Commission should have the authority to refer cases to the new court for binding decisions,[241] just like the AfCHPR and the IACHR.

Putting a new accessory into an existing machine requires adjustments and changes so that the new and old parts work well together. Similarly, the establishment of a brand new court of human rights for ASEAN requires that the existing instruments and mechanisms be improved in order to ensure an optimally effective system.

IV. CONCLUSION

ASEAN we are bonded as one - Look-in out to the world.
For peace, our goal from the very start - And prosperity to last.
The ASEAN Anthem

Peace has been the principal goal of ASEAN since its foundation in 1967. Maintaining a region with no wars among its members over the last five decades is undeniably an impressive achievement. However, it might be too soon to celebrate ASEAN as a truly

237. *Ibid* at 201.
238. *Ibid* at 188.
239. Tan, *supra* note 61 at 187.
240. Amao, *supra* note 159 at 242.
241. Phan, *A Selective Approach*, *supra* note 13 at 200–201.

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peaceful region when ASEAN peoples continue to fight hard for the basic rights and freedoms they deserve as human beings.

This article has offered a critical analysis of the ASEAN human rights system. First, it has proven that ASEAN has failed to protect the fundamental rights of its people. It has done so by analysing the major violations of rights carried out by the military regimes of Thailand and Myanmar, comparing ASEAN's response to the ongoing turmoil in Thailand under ASEAN's current human rights system with the case in Myanmar, which happened before any such system existed. Through this comparison, it demonstrated that the ASEAN human rights system has made little if any difference in the protection of rights and freedoms in Southeast Asia.

Next, this article has examined the main instruments and mechanisms constituting the system. In doing so, it has found both substantive and procedural flaws. In terms of substance, it has demonstrated that the biggest problem with ASEAN's instruments, especially the AHRD, is that they place unreasonable restrictions on rights and freedoms which undermine the universality of human rights. The overall outcome of these restrictions is that they help expand governmental authority and justify human rights abuses. In terms of procedure, this article has argued that the main mechanism for rights protection in ASEAN, the AICHR, has been struggling to fulfil its role because it lacks independence from governments and has weak protection mandates. These weaknesses prevent AICHR from holding governments accountable for their legal obligations.

Contributing to the inefficacy of the ASEAN human rights system is the absence of a judicial mechanism for legally binding judgments. This article has argued that there is an urgent need for a court which can address human rights and offer adequate remedies. It has proposed that this court should be a part of the ASEAN human rights system, and would be expected to supplement the AICHR's protection mandates in order to strengthen the protection of rights in Southeast Asia as a whole. Even though the court would complete the ASEAN system for human rights, its existence alone does not guarantee that ASEAN can protect human rights effectively. Thus, the remaining limitations of ASEAN's instruments and mechanisms must be removed in order to accommodate the existence of a new court.

Since human rights are still politically sensitive in many ASEAN countries, one might see the demand for regional human rights protection that fully meets with universal standards as unrealistic. Accordingly, plans for a human rights court in ASEAN may be too ambitious. Political and economic challenges are real, and they cannot be overcome in a day or two. However, such challenges should not stop ASEAN from making it a goal or initiating concrete plans to achieve it. On the bright side, ASEAN is in a better position than any other regional system because it was created after the others, which gives it more models to learn from. On another positive note, there seems to be a shift in ASEAN from being "state-centric" to being "people-oriented"[242] and a "caring" community, which is how it envisions itself in 2020.[243] Improving ASEAN's system for human rights would undeniably be the perfect fit for this positive approach.

242. Yuyun WAHYUNINGRUM, "ASEAN's Road Map Towards Creating a Human Rights Regime in Southeast Asia" in Jennifer MOURIN, ed, *Human Rights Milestones: Challenges and Developments* (Bangkok: Asian Forum for Human Rights and Development, 2009), 69 at 70.

243. *ASEAN Vision 2020*, *supra* note 4 at para 6.

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