Institutionalizing Human Rights in Southeast Asia

John D. Ciorciari*

ABSTRACT

In 2009 and 2010, the Association of Southeast Asian Nations (ASEAN) established two new human rights bodies: an inter-governmental human rights commission and a commission for the protection of the rights of women and children. This article examines the process leading to their creation, focusing on the normative and political debates that made creating an ASEAN human rights mechanism a long and challenging process. It then analyzes the commissions’ institutional features and shows how their design constrains their present capacity to promote and protect human rights. Finally, the article discusses the possibilities for near-term institutional evolution.

I. INTRODUCTION

In 2007, the heads of the ten states comprising the Association of Southeast Asian Nations (ASEAN)—Brunei, Cambodia, Indonesia, Laos, Malaysia, Burma/Myanmar,1 the Philippines, Singapore, Thailand, and Vietnam—signed the organization’s first-ever Charter. Its most heralded provision was an article

* John D. Ciorciari is an assistant professor at the Gerald R. Ford School of Public Policy, University of Michigan, and faculty affiliate at the University’s Center for Southeast Asian Studies. He is also an associate fellow of the Asia Society and a Senior Legal Advisor to the Documentation Center of Cambodia in Phnom Penh. The author thanks M. Rajaretnam and others at the ASEAN Secretariat for facilitating a research visit to the Secretariat in preparation of this article and to Carrie Booth Walling for her thoughtful comments on a previous draft.

1. This article follows ASEAN convention by using the name Myanmar, though many human rights advocates continue to call the country “Burma” to withhold legitimacy from its military regime.
announcing that ASEAN would create a new human rights body.2 That article led to the 2009 establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR), an entity with a mandate “[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN.”3 Just six months later, ASEAN followed by inaugurating a second body with a more specific focus—the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

The process of creating AICHR and ACWC was neither quick nor easy. Although the idea for a regional human rights body first appeared on ASEAN’s official agenda in 1993, it took sixteen years and many rounds of debate, both within the region and among ASEAN and its major external partners, for AICHR (and then ACWC) to come to fruition.4 Their establishment was noteworthy for an association that has long clung to the norm of non-interference and resisted pressures to prioritize human rights at the regional level—especially rights related to civil and political liberties. Nevertheless, reactions from human rights advocates have ranged from cautious to cool. AICHR has been the main target of commentary and criticism. Some have condemned it as toothless, describing it as “window dressing” or “a lame duck.”5 Others, including Amnesty International and Human Rights Watch, greeted the Commission’s arrival with faint and cautious praise, viewing it as a potential step forward but concerned at its lack of independent authority.6

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This article examines why the commissions were created, why they have such limited initial capacity, and some ways they could evolve. The argument advanced here is that AICHR and ACWC institutionalize human rights in two different senses of the word. From one perspective, they “institutionalize” human rights in the sense of confining them to a controlled bureaucratic environment, enabling ASEAN members to address (or deflect) criticism by discussing human rights in a safe political space in which incumbent government officials control the pace and content of the discourse. From another vantage point, however, AICHR and ACWC may institutionalize human rights in the sense of solidifying norms and the regimes responsible for their enforcement.

The new commissions embody the normative and political tensions surrounding ASEAN’s struggle over how to handle human rights. Part II of this article discusses the difficult normative and political debates on the road to creating an ASEAN human rights mechanism. Part III examines the way in which ASEAN ambivalence toward human rights is reflected in the features of AICHR. Part IV briefly explores differences in ACWC and its relationship to AICHR. Finally, Part V concludes by discussing the near-term prospects for institutional evolution.

II. THE ROAD TO AN ASEAN HUMAN RIGHTS BODY

A. An Uphill Normative Battle

From a human rights perspective, ASEAN had inauspicious beginnings. The Association was established in 1967, when five conservative Southeast Asian governments came together to manage neighborly feuds and ward off communist advances. The Association developed diplomatic norms and practices designed to manage intergovernmental relations by discouraging member states from peering into one another’s domestic affairs. These included a strong norm of non-interference and the “ASEAN Way” of diplomacy, which emphasizes consultation and consensus-building rather than formal and legalistic decision-making procedures. In exchange for regional cooperation and restraint, member governments would enjoy relatively free hands in their home jurisdictions, contributing to what Erik Kuhonta has dubbed an

7. Indonesia, Malaysia, the Philippines, Singapore, and Thailand issued a declaration announcing ASEAN’s creation in August 1967. Brunei Darussalam acceded to ASEAN in 1984, following its independence from British rule. See ASEAN website http://www.aseansec.org/about_ASEAN.html.

“illiberal peace.”9 ASEAN’s illiberal peace was preferable to a state of illiberal interstate war but carried an important downside: member governments faced scant regional opprobrium when they used the specters of communism and separatism to justify excessively repressive internal practices.

Human rights rarely surfaced in official ASEAN discourse during the Cold War.10 Governments faced occasional pressure from their constituents and Western capitals to address human rights abuses, particularly when left-leaning parties were in power in the United States and Europe, but that pressure was generally weak. ASEAN states and their Western security partners were primarily concerned with battening down the hatches against communist foes amid festering insurgencies and the Indochina Wars.

B. An Early Push for Human Rights in ASEAN

Human rights entered much more prominently into official ASEAN discourse in the early 1990s. Internal and external pressure on ASEAN governments provided the impetus for that change. As Cold War threats receded, it became more difficult for Southeast Asian governments to justify domestic political repression, and a series of brutal episodes drew international attention to rights abuses in the region. The most glaring example occurred in Myanmar, where a military junta negated the results of a 1990 national election and imprisoned the iconic Aung San Suu Kyi. The Santa Cruz massacre of 200 Timorese protesters in Dili by Indonesian troops in 1991 and the 1992 “Black May” military crackdowns against pro-democracy protesters in Thailand also mobilized local and international criticism.11

Although criticism was primarily directed at national governments, ASEAN also faced demands to act. External pressure came from various sources, including international watchdog groups and governments. Western governments slapped sanctions on Myanmar, and Aung San Suu Kyi was awarded the 1991 Nobel Peace Prize. Friends of the West were not immune from invective. The United States curtailed military ties with Bangkok and Jakarta, signaling that Washington was more willing to promote liberalism and less ready to condone heavy-handed security tactics in the New World Order. ASEAN also began to face pressure to address human rights from within the region. Most notably, leaders of the ASEAN Institutes of Strategic and International Studies (ASEAN ISIS)—a network of influential think tanks—recommended in 1992 that ASEAN foreign ministers consider creating a regional human rights mechanism.

It was in that context that ASEAN ministers joined a pan-Asian meeting on human rights in Bangkok in March 1993. There, in anticipation of the UN World Conference on Human Rights, Asian governments issued the Bangkok Declaration, which affirmed their commitment to human rights and planted the seed for a regional human rights body by reiterating “the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.”

A few months later, the UN World Conference adopted the Vienna Declaration and Programme of Action, calling on member states to establish regional human rights bodies where they did not already exist. At their July 1993 annual meeting, ASEAN Foreign Ministers expressed their “commitment to and respect for human rights and fundamental freedoms,” and agreed that “ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.” Two months later, the ASEAN Inter-Parliamentary Organization—a group formed by Southeast Asian legislators

in 1977 to better connect ASEAN to their constituents—issued a declaration echoing that call.17

C. The “Asian Values” Defense

Despite those developments, ASEAN governments were far from granting the Association an expansive role in promoting and protecting human rights. In the years immediately following, no Southeast Asian government came forward with a concrete proposal or put the issue on the Foreign Ministers’ agenda.18 Moreover, the 1993 Bangkok Declaration did not simply affirm the importance of human rights; it was also a shot across the bow of Asia’s growing armada of Western critics as the battle over “Asian values” unfolded.

Much has been written about the Asian values debate, in which Malaysian Prime Minister Mahathir Mohamad, Singaporean leader Lee Kuan Yew, and others accused the West of force-feeding occidental conceptions of human rights to Asia, where culture and history led people to prioritize other ends.19 Asian values proponents claimed that Asian societies put greater relative importance on the community than the individual.20 They also argued that stability and economic development are necessary precursors to political liberalism—reversing the notion of “first-generation” and “second-generation” rights often used in Western discourse, which put civil and political rights first in sequence.21


18. Li-ann Thio, Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to go Before I Sleep,” 2 YALE HUM. RTS. & DEV. L.J. 1, 5 (1999).


Although the Asian values debate sometimes descended into blunt culturalist sound bites and self-serving political rhetoric, it also reflected genuine normative contestation and illuminated political concerns that the human rights movement generated in Asian halls of power. Those concerns help explain the eventual constraints placed on AICHR and ACWC.\(^{22}\)

One widely shared concern in Asia was that the human rights movement would be used as a wedge for the exercise of Western political prerogative.\(^{23}\) The 1993 Bangkok Declaration warned against “double standards” and the use of human rights as a condition for development lending or “instrument of political pressure.”\(^{24}\) It also stressed the importance of “non-interference in the internal affairs of States,” the primary role of states as guardians of human rights, and the need to consider “national and regional particularities” and cultural contexts.\(^{25}\) These were clear admonitions, particularly to Western governments, not to use human rights as a pretext to chip away at disfavored incumbent regimes in Asia. For many Southeast Asian officials, relatively recent experiences with colonial rule and foreign intrusion have made this a pressing concern—and an understandable basis for charges of Western hypocrisy, if not a legitimate reason to violate human rights themselves. Many Asian officials also feared that the human rights movement—and particularly the push for civil and political rights—could contribute to pulling the lid off the kettle of simmering domestic resistance. Most Southeast Asian governments had spent decades consolidating post-colonial rule and managing restive populations—including elements funded by foreign powers. Increasing political freedom meant incurring risks of domestic instability, economic dislocation, and losses of personal power and privilege.\(^{26}\)

Advocacy groups, international organizations, and Western governments tended to emphasize civil and political rights—such as freedoms of speech, assembly, and the press—precisely the types of rights most likely to empower political oppositions. They also tended to couple demands for human rights protections with demands for democratization, which added to threat perceptions in many Asian capitals.\(^{27}\) Asian governments pushed back by stressing the collective good and economic, social, and cultural rights such as entitlements to education, health, and decent standards of

\(^{22}\) See infra §§III–IV.

\(^{23}\) Mahathir claimed that “[a]s we all know the pressure to democratise and respect human rights is not due to concern for the well-being of people, but for the benefit of those rich people wishing to reap more profits for themselves in more countries.” Mahathir bin Mohamad, Prime Minister of Malaysia, Agenda for a New Asia: Address at the Asia Society Hong Kong Center (28 Oct. 2000), available at http://www.aseansec.org/2805.htm.

\(^{24}\) 1993 Bangkok Declaration, supra note 14, ¶¶ 4–5, 7.

\(^{25}\) Id. ¶¶ 6, 8–9.

\(^{26}\) Mauzy & Milne, supra note 20, at 119–33.

\(^{27}\) See id. at 117–18, 130–33.
living. The 1993 Bangkok Declaration emphasized the “indivisibility of economic, social, cultural, civil, and political rights,” expressed concern that human rights mechanisms “relate mainly to one category of rights,” and cited poverty alleviation as a key to the enjoyment of human rights.28 The declaration’s sole reference to a “universal and inalienable right” was the collective “right to development” articulated in the 1986 UN General Assembly Declaration on the Right to Development.29

Shifting the focus from civil and political freedoms toward collective economic needs served instrumental aims. It sought to diminish focus on political freedoms and used the language of human rights to help justify the heavy role of Asian governments in managing the development state and at least occasionally repressing political foes in the name of collective order.30 It also sought to turn the tables on Western critics, who were generally slower to acknowledge economic and social rights than civil and political ones. The “right to development” in particular put the first world on defense, because it implied an obligation for rich countries to provide more financial succor to the Global South.

Arguments based on Asian values—led by senior ASEAN statesmen—were rooted partly in legitimate (and enduring) differences of opinion on the relative priorities to assign to different types of social goods. However, they were also fundamentally about incumbents’ preservation of political power. “Soft authoritarian” leaders such as Mahathir, Lee, and Suharto did not reject individual human rights and freedoms as theoretical propositions and societal aspirations, but as Li-Ann Thio argues, they took a “contextual approach.”31 Rather than accepting human rights as natural endowments beyond the reach of government discretion, they treated rights as products of social deliberation dependent on a society’s culture and stage of development.32

31. Thio, supra note 18, at 22.
32. Although the naturalist school has had a strong influence on human rights scholarship and advocacy, many liberal thinkers also take a “deliberative” approach, regarding human rights as socially constructed. See Marie-Bénédicte Dembour, What Are Human Rights? Four Schools of Thought, 32 HUM. RTS. Q. 1, 2–12 (2010); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 85 (Amy Gutmann ed., 2001). For a rejection of the argument that a society’s culture and development should justify exceptions to basic human rights norms, see Diane A. Desierto, Universalizing Core Human Rights in the “New” ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity, 1 GÖTTINGEN J. INT’L RTS. 1 (2009).
Importantly, the political champions of the Asian values movement viewed themselves as the appropriate authorities to lead the discussion of what rights are to be recognized, and to what extent. Unsurprisingly, incumbents often arrived at self-serving depictions of social consensus, helping to legitimate their continued rule and forestall the emergence of multiparty systems that would enable a broader societal deliberative process about human rights.\textsuperscript{33} Thailand and the Philippines were somewhat more forward-leaning, but when ASEAN added four illiberal states to its membership roster between 1995 and 1999—the “CMLV” countries of Cambodia, Myanmar, Laos, and Vietnam—the ideational balance within the Association tilted away from openness to broad domestic (or regional) deliberation on civil and political freedoms.\textsuperscript{34}

### D. Changing Forces in Southeast Asia

Despite the Asian values debate and accession of the CMLV states, human rights rose in prominence on the ASEAN agenda in the years following the 1993 Bangkok Declaration. Western pressure contributed in a variety of ways—through naming and shaming, support for local civil society groups, educational exchanges, and sanctions or suspensions of aid.\textsuperscript{35} Just as important were forces aligning within Southeast Asia, including increased mobilization of Southeast Asian civil society groups, think tanks, and sympathetic officials and domestic political change in key Southeast Asian states.\textsuperscript{36}

\textsuperscript{33} Numerous critics of the “Asian values” approach have made this point in the literature on democracy. See, e.g., Larry Diamond, \textit{The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World} 31 (2008); See also Amartya Sen, \textit{Democracy as a Universal Value, in The Global Divergence of Democracies} 3 (Larry Diamond & Marc F. Plattner eds., 2001). Most Southeast Asian states are dominated by a single party (Vietnam, Laos, Cambodia, Singapore, and until quite recently Malaysia) or by military or monarchical rule (Myanmar and Brunei). Even in the Philippines, Thailand, and contemporary Indonesia, the ideological distance between the leading parties has been slim, and parties on the ideological left have been weak. See Allen Hicken, \textit{Developing Democracies in Southeast Asia: Theorizing the Roles of Parties and Elections, in Southeast Asia in Political Science: Theory, Region, and Qualitative Analysis} 80, 99–101 (Erik Martinez Kuhonta, Dan Slater & Tuong Vu eds., 2008).

\textsuperscript{34} Vietnam joined ASEAN in 1995, Laos and Myanmar followed in 1997, and Cambodia became the tenth member in 1999.

\textsuperscript{35} Key examples include the ongoing sanctions against Myanmar and the U.S. decision to suspend military cooperation with Indonesia following the East Timor crisis of 1999, in which Indonesian forces were implicated in widespread human rights abuses, and again in 2003 following allegations of military involvement in the killing of US citizens in Papua, New Guinea.

Civil society groups and think tanks were important agents for change, helping create bottom-up pressure on Southeast Asian governments lodging human rights on the ASEAN agenda.37 In 1994, the Institute for Strategic and Development Studies in Manila hosted the first annual ASEAN ISIS Colloquium on Human Rights.38 The following year, LAWASIA—an international organization led by lawyers, judges, and legal academics—set up the Working Group for an ASEAN Human Rights Mechanism to press for a human rights body. In 1998, ASEAN formally cited the Working Group as a partner. The Working Group inaugurated a series of meetings involving civil society and government actors and presented a draft plan for a regional human rights commission in 2000.39

That year, ASEAN ISIS also launched an ASEAN People’s Assembly (APA)—a diplomatic “track two” process designed to connect officials with civil society advocates.40 The APA’s first report set out nine core recommendations for ASEAN heads of state, and five explicitly referenced human rights.41 The APA designed a new ASEAN Human Rights Scorecard and called on ASEAN leaders to set up a regional mechanism for promoting and protecting human rights.42

Interstate political dynamics were also at play as some Southeast Asian governments came to the view that the Association should play a stronger role in defending human rights. By the late 1990s, comparatively liberal Southeast Asian officials began to challenge the norm of non-interference, as when then Thai Foreign Minister (and now ASEAN Secretary-General) Surin Pitsuwan advocated a policy of “flexible engagement” to deal with the problems emanating from Myanmar, which damaged ASEAN’s external reputation and hampered its collective relations with the West.43

38. The first of these meetings was called the Colloquium on Human Rights, Democracy, and the Environment in International Relations. By 1996, the name had shortened to the ASEAN-ISIS Colloquium on Human Rights and gained its own acronym, AICOHR.
41. ASEAN People’s Agenda for the 4th Informal Summit, in An ASEAN of the People, by the People—Report of the First ASEAN People’s Assembly 217–22 (2001).
Another important regional dynamic was a trend toward institutionalizing human rights within key ASEAN states. At the start of the post-Cold War period, only the Philippines had a national human rights commission—one set up in 1986 by decree of President Corazon Aquino following the ouster of the authoritarian Ferdinand Marcos. In 1993, Indonesia followed by creating a national commission, Komnas HAM, apparently motivated in large part by the international outcry over the Dili massacre.\textsuperscript{44} An even more important change was the shift of Indonesia from a heavy-handed military regime to a more liberal and democratic government after the fall of Suharto in 1998.\textsuperscript{45} Malaysia created a commission (called Suhakam) in 1999,\textsuperscript{46} at a time when opposition leader Anwar Ibrahim and US Vice President Al Gore were heaping criticism on Mahathir’s human rights record.\textsuperscript{47} Thailand set up a National Human Rights Commission in 2001, which grew out of a cabinet resolution passed shortly after the 1992 Black May affair, when the Thai government faced stiff pressure from human rights organizations.\textsuperscript{48}

\textbf{E. Plans for a Commission on Women and Children’s Rights}

By the late 1990s, human rights had become increasingly entrenched in ASEAN discourse and the Association’s human rights objectives became slightly more ambitious and concrete. In the 1998 Hanoi Plan of Action—the first of a series of five-year plans to reach ASEAN’s goal of a region of “peace, stability, and prosperity” by 2020—members agreed only to “enhance exchange of information in the field of human rights” and work toward implementation of international conventions on the rights of women and children.\textsuperscript{49} Progress was easiest to obtain in those areas, because most ASEAN member states had already recognized the rights of women and children at international law. All had ratified or acceded to the Convention on the Rights of the Child (CRC),\textsuperscript{50} and nearly all had ratified or acceded to

\begin{itemize}
  \item \textsuperscript{44} Monica Talwar, \textit{Indonesia’s National Human Rights Commission: A Step in the Right Direction?} \textit{Hum. Rts. BrieF} 1–2 (1997).
  \item \textsuperscript{45} Caballero-Anthony, \textit{supra} note 42, at 174.
  \item \textsuperscript{46} See Garry Rodan, \textit{Accountability and Authoritarianism: Human Rights in Malaysia and Singapore}, 39 J. CONTEMP. ASIA 184–91 (2009).
\end{itemize}
the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).  

In the 2004 to 2010 Vientiane Action Programme, members agreed to “promote human rights,” complete a review of existing human rights mechanisms, formulate a Memorandum of Understanding (MOU) to facilitate cooperation among them, promote human rights education, “elaborate[e] an instrument on the protection and promotion of the rights of migrant workers,” and “establish an ASEAN commission on the promotion and protection of the rights of women and children” by 2010. The Working Group on an ASEAN Regional Mechanism on Human Rights saw a commission focusing on the narrower and somewhat less controversial topics of women and children as a “first step” toward the establishment of a general human rights body. In contrast to the CRC and CEDAW, by 2004 only four ASEAN members were parties to the International Covenant on Civil and Political Rights (ICCPR), and just four had ratified or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR).


55. Cambodia, the Philippines, Thailand, and Vietnam had joined the ICESCR. Indonesia acceded in 2006, and Laos ratified the covenant in 2007. United Nations, supra note 50, at 182–84. Brunei, Malaysia, Myanmar, and Singapore are not parties to the ICESCR.
Between 2004 and 2007, ASEAN members also concluded a trio of regional declarations underscoring their commitment to eliminate violence against women, prevent human trafficking—particularly of women and children—and uphold the rights of migrant workers. Members also established a committee to implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. Consensus to sign these declarations and establish the committee was possible because they were less directly related to core concerns about political opposition. Current Thai representative to AICHR Sriprapha Petchamesree has explained, “the rights of women and children are considered to be a ‘soft issue’ and less threatening” to ASEAN members than civil and political liberties. In fact, even these have been controversial, as reflected in the numerous reservations ASEAN states have entered to the CRC and CEDAW.

F. Lodging Human Rights in the ASEAN Charter

The possibility of a human rights body became a major topic of discussion as the Association began work on drafting its first Charter. ASEAN leaders began by appointing an Eminent Persons Group (EPG) to issue recommendations for the drafting of the Charter. The EPG consisted largely of retired officials who had different incentives with respect to human rights than the incumbent leaders who had appointed them. The EPG consulted regional civil society organizations and other non-governmental groups that had been influential in putting human rights on the agenda. These included ASEAN-ISIS, the ASEAN Inter-Parliamentary Organization, and the Working Group


60. The group included six former officials, including the chair, Deputy Prime Minister of Malaysia Musa Hitam, and other prominent figures, such as former Philippine President Fidel Ramos and former Indonesian Foreign Minister Ali Alatas. Cambodia, Myanmar, Brunei, and Singapore appointed incumbent officials. See ASEAN, REPORT OF THE EMINENT PERSONS GROUP ON THE ASEAN CHARTER (Dec. 2006), available at http://www.aseansec.org/19247.pdf [hereinafter REPORT OF THE EPG].
for an ASEAN Human Rights Mechanism. The EPG also consulted with the Solidarity for Asian People’s Advocacy (SAPA), a network of roughly thirty civil society groups established in 2006 to coordinate and pool their influence in discussions leading to the ASEAN Charter.61

The EPG’s report, issued in December 2006, put considerable emphasis on “human rights and fundamental freedoms,” urged the development of democracy, and recommended regular official consultations with civil society and parliamentarians.62 With respect to an ASEAN human rights mechanism, it recommended that: “this worthy idea should be pursued further, especially in clarifying how such a regional mechanism can contribute to ensuring the respect for and protection of human rights of every individual in every Member State.”63

That ambitious language—including a specific emphasis on the protection of individual rights—pleased many non-governmental audiences but was not welcome in all Southeast Asian capitals. Although human rights had become more prominent in ASEAN discourse and became more formally embedded in some domestic systems, the human rights conditions in most Southeast Asian countries showed little improvement. Freedom House scores and qualitative metrics from the US State Department and Amnesty International suggested significant progress in Indonesia, stasis in much of the region, and backsliding in a few key cases (namely Thailand and the Philippines). By some metrics, the region looked remarkably similar to how it had appeared in 1976.64 Concerns about the political ramifications of the push for human rights and democracy remained acute in many Southeast Asian governments—especially the CMLV states, which opposed creating a regional human rights body.65

62. REPORT OF THE EPG, supra note 60, arts. 12, 23, 27, 47, 55, 60.
63. Id. art. 47.
65. For example, Myanmar’s participant in the drafting of the ASEAN Charter, Aung Bwa, argued afterward that human rights were a “delicate and sensitive issue” that “could be politicized,” warned against “double standards,” and cautioned that “those who live in glass houses should not throw stones.” Aung Bwa, The Jewel in My Crown, in THE MAKING OF THE ASEAN CHARTER 32–33 (Tommy Koh et al., eds., 2009). The Lao representative emphasized the “different views on the concept of human rights” and the need to uphold the “the value[s] of Southeast Asia” rather than “the universal value[s]” due to the fact that the institutions of [ASEAN] countries were relatively weak.” Bounket Sangsomak, A New Turning Point in the Relations Among the Southeast Asian States, in id. at 164–65. See also Current Developments: Public International Law, 58 INT’L & COMP. L. Q. 208 (2009).
The EPG report set the stage for a diplomatic brawl over human rights in the ASEAN Charter. Governments appointed a High Level Task Force (HLTF) to draft the Charter, and Singaporean representative Tommy Koh asserted that “[t]here was no issue that took up more of our time, no issue as controversial and which divided the [ASEAN] family so deeply as human rights.” The debate took place at a time when ASEAN faced internal pressures for reform manifest in the EPG report, through SAPA and related civil society groups, and through initiatives such as the ASEAN Inter-Parliamentary Myanmar Caucus, a group established in 2004 to promote human rights reform by the junta.

Western political pressure also helped motivate interest in an ASEAN human rights body. First, the United States, European Union, and others sought to impose direct material costs on ASEAN members for failure to deal with human rights issues. Clear examples included US and EU pronouncements that ASEAN-wide free trade agreements were off the table until the Association dealt more assertively with the Burmese junta. The importance of these carrots and sticks should not be exaggerated, however. Western states applied pressure unevenly across the region, tending to single out adversaries. Concerns about terrorism and waxing Chinese influence led the United States in particular to pursue trade and military ties energetically and demote human rights concerns when broader strategic and economic interests were at stake.

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

69. Moreover, US rights abuses in the campaign against terrorism sapped some of the force from its human rights critiques. See Rosemary Foot, Human Rights and Counter-Terrorism in America’s Asia Policy 45–60 (2004).
70. For an argument and further evidence to this effect, see Hiro Katsumata, ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?, 22 PAC. REV. 619, 623–28 (2009) (contending that ASEAN has engaged in “mimetic” adoption of human rights and certain other liberal norms).
ASEAN’s more progressive governments and Western critics spoke about the importance of the Association’s “relevance” and “credibility.”71 Neither term has been well-defined, but both carry strong reputational elements. In the diplomatic discourse surrounding ASEAN, being “relevant” generally has meant being viewed as an institution with the capacity to address some of Southeast Asia’s most difficult challenges. Being “credible” usually has meant possessing the apparent collective political will to pursue ASEAN’s lofty espoused aims. Implicit in these terms was a threat to ASEAN’s international social standing; extra-regional diplomats only spend time and resources on organizations they see as relevant and credible. Following the Saffron Revolution in Myanmar in 2007, when a brutal Burmese crackdown on unarmed demonstrators sparked intense international criticism, ASEAN entered something of a credibility crisis.

Some ASEAN officials expressed clear concerns about ASEAN’s reputation and status vis-à-vis other regional bodies. Indonesian Foreign Minister Marty Natalegawa said:

[W]e look around us to other developing regions and see that we cannot be left behind if we want to be at the center of things. Look at Africa—they are being quite strategic and farsighted in developing their human rights mechanisms. We must not set too low a standard.72

His predecessor, Ali Alatas, asked: “how can we avoid having [a human rights body] when all other regional organisations have one already?”73 These factors did not have uniform effects across the region, but collectively they led many officials to conclude that the Association had to tackle human rights, either for normative reasons or simply to protect the Association’s institutional standing.74

71. For example, ASEAN Secretary-General Ong Keng Yong said in 2006 that “ASEAN is concerned about the impact of this [Myanmar] issue . . . on our credibility and standing.” Heda Bayron, ASEAN Losing Patience with Burma, V OICE 0 F AMER I CA, 25 July 2006. Malaysian Prime Minister Abdullah Badawi added that “the situation in Myanmar is impacting on the image and credibility of ASEAN[.]” Heda Bayron, Southeast Asian Foreign Ministers Say Burma Situation Hurts ASEAN’s Credibility, V OICE 0 F AMER I CA, 25 July 2006. The High Level Task Force Chair Rosario Manalo said that establishment of a human rights body would “keep ASEAN relevant. It will announce to the world that ASEAN honors its human rights commitments.” Philippines Pushes for ASEAN Human Rights Body, A SIA PUL SE, 26 July 2007.

72. A SEAN Minister Elaborates on Indonesia’s Foreign Policy, O utlook, T HE N AT I O N (Thailand), 1 Dec. 2009.


74. See James Munro, The Relationship Between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights, 1 5 IN T ’ L J. H UM. R TS. 1 1 8 5 (2011); Marwaan Macan-Markar, Southeast Asia: Rights Issues Loom over ASEAN Summit, I NTERPRESS S ERVICE, 9 Jan. 2007, available at http://ipsnews.net/print.asp?idnews=36103 (noting that Indonesian Foreign Minister Hassan Wirayuda said ASEAN needed to address human rights issues to strengthen the bloc’s credentials).
A number of ASEAN governments remained skeptical. According to Tommy Koh, who chaired many of the HLTF meetings, negotiations over human rights tended to divide the countries into three groups. Indonesia, Malaysia, the Philippines, and Thailand were generally supportive; the CMLV countries were “not enthusiastic;” and Singapore and Brunei were in the middle. The High-Level Task Force debated whether to include references to human rights in the Charter, but ultimately the progressive camp won agreement to do so.

**G. Human Rights in the ASEAN Charter**

The HTLF clawed back some of the EPG report’s more ambitious recommendations. The Charter does refer on four occasions to “human rights and fundamental freedoms”—a significant step given the Association’s history. Moreover, by referring to fundamental freedoms, the Charter points to the civil and political rights ASEAN was traditionally shy to acknowledge. The Charter does not include similarly clear references to rights as individual entitlements, however, and emphasizes the contextual and contingent nature of human rights more forcefully than the EPG report. Provisions relating to human rights are consistently balanced by commitments to uphold the principle of non-interference and the “ASEAN Way” of diplomacy. For example, the preamble describes the Charter’s signatories as “adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.” Yet that phrase’s immediate antecedent emphasizes “respecting the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus, and unity in diversity.”

Article 1(7) identifies human rights as an explicit goal of the Association but again places that objective in dynamic tension with the rights of sovereign member states. The espoused goal is: “[t]o strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN[.]” Thus, the provision

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77. ASEAN Charter, supra note 2, prmb.
78. Id.; see also Anwar, supra note 52, at 35. Indonesia reportedly suggested referring to human rights in the preamble.
79. ASEAN Charter, supra note 2, art. 1(7). This provision comes seventh, following a number of ASEAN goals relating to security, development, poverty reduction, and
treats human rights as norms to be reconciled with and sometimes balanced against norms of sovereignty and non-interference. The Charter’s carefully chosen words do not paint a picture in which rights rest on one side of a scale and national interests or security imperatives rest on the other. Instead, they depict a struggle of rights against rights.\textsuperscript{80}

The Charter also frames human rights as goals of the Association but does not specify the concrete means by which those goals would be achieved or the sanctions that would follow non-compliance.\textsuperscript{81} According to one participant, the issue of a human rights body was “the most explosive and tense” debate during the drafting process.\textsuperscript{82} The CMLV countries and other members segregated during key negotiations to devise joint strategies,\textsuperscript{83} and ultimately the drafters compromised by punting to a considerable degree. The Charter merely states that ASEAN would establish a “human rights body,”\textsuperscript{84} leaving the specific features of that body to be negotiated by ASEAN foreign ministers.\textsuperscript{85}

\textbf{III. AIChR’S INSTITUTIONAL HANdIcAPS}

In July 2008, ASEAN foreign ministers appointed a High Level Panel (HLP) of government officials to hammer out the details of the human rights body

\textsuperscript{80} In addition, the clause suggests that states have the primary responsibility to deal with human rights, perhaps to address the debate within the region about the relationship between sovereignty and the emerging concept of a responsibility to protect. For a discussion of that principle in an ASEAN context, see Erik M. Kuhonta, Toward Responsible Sovereignty: The Case for Intervention, in Hard Choices, supra note 76, at 292, 305–10.

\textsuperscript{81} Sukma, supra note 76.

\textsuperscript{82} Pengiran Dato Paduka Osman Patra, Heart Labour, in the Making of the ASEAN Charter, supra note 65, at 7. Another HLTF member described the human rights language as “[p]erhaps the single most sensitive issue” in the negotiations. Tan Sri Ahmad Fuzi bin Abdul Razak, Facing Unfair Criticisms, in id. at 21.

\textsuperscript{83} Koh, supra note 75, at 62–64. See also Kao Kim Hourn, A Personal Reflection, in The Making of the ASEAN Charter, supra note 65, at 153 (acknowledging that “during the negotiation process for the ASEAN Charter, members of the HLTF were sometimes split into two groups, between the so-called old members and new members on certain issues, such as human rights”).

\textsuperscript{84} ASEAN Charter, supra note 2, art. 14. The term “human rights body” was used partly to defer questions over what precise form the resulting entity would take. Simon Chesterman, Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person, in ASEAN: Life After the Charter 31 (S. Tiwari, ed., 2010).

\textsuperscript{85} According to a senior ASEAN official, “no satisfactory compromise could be reached on the nature of the proposed body, nor about the scope of its influence.” Termseak Chalermpanalanupap, Institutional Reform: One Charter, Three Communities, Many Challenges, in Hard Choices, supra note 76, at 91, 105.
envisioned in the Charter. By that point, the discussion had moved from the idea of a commission for women’s and children’s rights to talks of a more general body, because human rights advocates and progressive ASEAN officials prioritized the broader of the two. The name of the body was subject to considerable dispute, with members wrestling over nouns that would convey greater or lesser independent decision-making power; a “council” or “commission” would sound more authoritative than a “mechanism” or “forum.”

The scope of the body’s authority was also debated, with the CMLV states perceived as most wary of a strong human rights body. ASEAN officials sought to manage expectations. Termsak Chalermpalanupap, a senior official at the ASEAN Secretariat, argued that ASEAN’s “political diversity” made it “unrealistic to try to start human rights cooperation with a ‘Big Bang’” and characterized the new body as an important “building block.” He added:

The dilemma facing ASEAN members states as well as the HLP is how to reconcile national political reality with new regional obligation[s] to promote and protect human rights. The ASEAN human rights body is expected to be “realistic,” “credible,” “workable,” “effective,” “evolving” and most importantly “acceptable” to all member states. . . . As such, the ASEAN human rights body is never intended to be a stand-alone independent entity—let alone an autonomous regional watchdog with “sharp teeth.”

Singaporean Foreign Minister George Yeo suggested that the body would “at least have a tongue[,] and a tongue will have its uses.”

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

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86. Chalermpalanupap, supra note 85.
87. Id.
90. Termsak Chalermpalanup, Life in ASEAN After the Entry Into Force of the ASEAN Charter, in ASEAN: LIFE AFTER THE CHARTER, supra note 84, at 50–51.
91. Id. at 49.
The TOR set up the same basic normative tug-of-war that exists in the ASEAN Charter. Article 1 states that the purpose of AICHR is to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN.” However, its work is part of a broader effort to “promote stability and harmony in the region” while “bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities[.]” Article 2 proceeds to emphasize that the Commission will promote and protect human rights in a manner consistent with the norm of non-interference, with deference to the primary responsibility of states and “avoidance of double standards and politicisation” (a thinly veiled swipe at the West). Instead, ASEAN will pursue a “constructive and non-confrontational approach,” stress “cooperation,” and take an “evolutionary approach.”

AICHR was also born with institutional features that impose serious constraints on its capacity to impact ASEAN human rights practices. ASEAN governments—especially the least liberal ones in the Association—are well aware of the potential of a human rights body to generate unwanted pressure. Thus, they designed the Commission in a manner that constrains its activities tightly and limits ASEAN governments’ exposure to unwanted pressure on human rights issues.

A. Weak Independent Authority

When they are given sufficient autonomy and backed by enough political muscle, regional human rights bodies can serve as independent adjudicators, enforcement agencies, and “norm incubators” that provide fertile institutional ground for the development and dissemination of human rights principles. The European Court of Human Rights and the Inter-American Commission and Court of Human Rights are perhaps the best regional examples. Both courts can investigate cases brought by private citizens and issue judgments.

94. AICHR Terms of Reference, supra note 3, art. 1.1.
95. Id. arts. 1.3–1.4.
96. Id. arts. 2.1–2.2.
97. Id. arts. 2.4–2.5.
98. Diane Desierto thus emphasizes “the contrast between the ASEAN Charter’s deep commitment to international human rights obligations and the unclear competence of [AICHR],” which has only “marginal implementing capacity to fulfill a narrow set of functions.” Diane A. Desierto, ASEAN’s Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter, 49 Colum. J. Transnat’l L. 268, 314 (2010–11).
against states. Some have argued that Southeast Asia merits a similar regional court in which Southeast Asians could get fairer hearings than many can currently get at home. However, AICHR is far from that model, both in terms of political independence and institutional power.

Its architects pointedly labeled it an *intergovernmental* commission. That adjective is a salient reminder that AICHR is essentially a governments’ club, like ASEAN itself. AICHR’s TOR make clear that it is a “consultative body” in which decisions are made based on the common ASEAN diplomatic practice of “consultation and consensus.” In other words, each member state has an effective veto over the Commission’s decisions, even when the decisions pertain to that state’s malfeasance.

The consensus requirement is potentially stifling because the officials who comprise the commission are government appointees (normally from foreign ministries) and are accountable to their host governments. They are called “Representatives” rather than “commissioners,” which puts an emphasis on their loyalty to their home capitals. Two of the Representatives—Indonesian Rafendi Djamin and Thai Sriprapha Petcheramesree—were elected by independent teams in their host countries after a transparent process allowing for public nominations, but others were simply appointed by their governments.

AICHR has no permanent secretariat; Representatives have neither a permanent brick-and-mortar hub nor a dedicated bureaucracy. Instead, most work from offices in their home ministries and report to foreign ministers, and most appear to have relatively short leashes. They convene at least twice a year at the ASEAN secretariat in Jakarta or in the capital of the annual ASEAN country chair. This setup makes it less likely that Representatives or their staff members will develop the sense of independent institutional identity or the interpersonal bonds required for strong norm incubation.

AICHR also has weak formal powers. It reports to the ASEAN Foreign Ministers Meeting and thus sits well below the metaphorical plane defined by the Association’s sovereign leaders. It lacks the ability to hear cases or initiate independent investigations of particular alleged rights abuses.

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101. AICHR Terms of Reference, supra note 3, arts. 3, 6.1.
102. Id. art. 5.2.
103. Cha-am Hua Hin Declaration, supra note 93, art. 3; AICHR Terms of Reference, supra note 3, art. 5. This appears to have been a compromise during the discussions over whether to call the human rights body a commission. Institute of Southeast Asian Studies, *Life After the Charter* (Singapore), Aug. 2009, at 9.
105. AICHR Terms of Reference, supra note 3, arts. 6.2–6.5.
106. Id. art. 6.6.
107. Indonesia, Thailand, and the Philippines reportedly pressed unsuccessfully for inclusion of country visits, cross-border investigations, and periodic reviews to be included.
Rather, its mandate includes a list of politically inoffensive goals. These include developing collaborative strategies, developing a regional human rights declaration, educating the public, providing technical assistance and aid for capacity building, promoting international human rights principles and instruments, obtaining information, and engaging in dialogue with governments and civil society to develop “common approaches and positions.”

The Commission’s focus is decidedly on human rights promotion rather than protection. This conscious choice reflected an effort to keep all members on board. “ASEAN is operating in the real world” explained senior ASEAN official Termsak Chalermpalanup, “and has to be realistic… [i]t is not desirable to try to [foster human rights cooperation] on the basis of ‘ASEAN minus X.”

Robust protection would entail exercising authority vis-à-vis member states to enforce human rights obligations and defend individual rights. In theory, this should be possible. All ten ASEAN states have undertaken formal commitments to uphold certain human rights norms. All ten states have ratified the CRC and CEDAW (albeit with reservations in some cases). Since 2004, ASEAN members also have concluded regional declarations underscoring their commitment to eliminate violence against women, prevent human trafficking—particularly of women and children—and uphold the rights of migrant workers. These instruments could provide useful starting points for protecting the human rights of some of the region’s most vulnerable populations. AICHR’s TOR grant the Commission no explicit enforcement powers, however. The Commission is instead equipped to draft a regional declaration, hold consultations, and issue general reports about regional human rights conditions. Those reports have unsurprisingly pulled punches and will almost certainly continue to do so as long as they require consensus approval.

B. Narrow Channels for Lateral Pressure

A second way for a regional body to drive human rights reforms is by providing a forum for other governments to apply “lateral” pressure. AICHR (like ASEAN itself) is designed—normatively and structurally—to head off lateral

108. AICHR Terms of Reference, supra note 3, art. 4.11.


110. Declaration on the Elimination of Violence Against Women in the ASEAN Region, supra note 56; ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, supra note 56; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, supra note 56.
pressure from both inside and outside the region. The TOR authorizes AICHR Representatives to consult with other national, regional, and international human rights bodies, but it does not mandate that they engage with foreign governments or international forums. AICHR also limits the scope for external influence through funding channels. Some of ASEAN’s existing programs related to human rights have been funded by Western donors, but the TOR notably contains a provision that “funding and other resources from non-ASEAN Member States shall be solely for human rights promotion, capacity building and education.” Thus, external (read: Western) funds cannot be channeled into the more controversial efforts to protect human rights.

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

Lateral pressure also depends on prevailing norms. ASEAN’s strong norm of non-interference and consensus-based diplomacy are still formidable barriers to interstate human rights advocacy. AICHR adopts these norms, usefully drawing illiberal states into dialogue but regrettably protecting them from censure. To some extent, ASEAN leaders have been justified in trying to avoid unduly poking one another and have benefitted from banding together and maintaining peaceful relations. Too often, however, this approach

111. AICHR Terms of Reference, supra note 3, art. 4.9.
112. Id. art. 8.6.
115. In a recent survey, Southeast Asian respondents working in the human rights field cited non-interference and the “ASEAN Way” of diplomacy as the principal obstacles to AICHR effectiveness. Phan, supra note 100, at 480.
simply enables elites to scratch one another’s backs and shield themselves from criticism. The possibility of group pressure will depend heavily on the correlation of ideational forces in Southeast Asia over time.  

C. Insulation from Public Demands

A third mechanism for policy change could come from the bottom up. A regional human rights body can serve as a portal through which civil society and members of the public apply pressure on the government. Local civil society groups and other citizens or collectives could change the cost-benefit calculation of their national leaders even if reshaping their leaders’ normative beliefs proves too formidable a task.

The ASEAN Charter includes the goal of establishing a “people-centered Association,” and AICHR is entrusted with engaging in “dialogue and consultation” with other ASEAN bodies and accredited civil society organizations. However, Southeast Asia’s more illiberal leaders generally see strong civil society pressure as anathema to their short-term interests. That helps explain why AICHR put in place little institutional space for civil society and public involvement.

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

116. See Anwar, supra note 52, at 38 (analogizing ASEAN to the fictional two-headed creature “Pushmi-Pullyu” in Dr. Doolittle cartoons, with liberal governments pushing the Association and its Charter in one direction as their illiberal peers tug in the opposite direction.)

117. ASEAN Charter, supra note 2, art. 1(13).

118. AICHR Terms of Reference, supra note 3, art. 4.8. Ch. V of the ASEAN Charter refers to an annex of accredited civil society organizations. ASEAN Charter, supra note 2, art. 16, ann. 2(IV).


121. Id.
In the first year of AICHR’s operations, human rights groups accused members of dragging their feet on adopting procedural rules as an excuse for shutting its doors to civil society and avoiding substantive discussions on human rights issues. Procedural rules were adopted at AICHR’s fourth meeting in February 2011 and are called the “Guidelines on the Operations of AICHR.” The semantic shift from rules to guidelines may be another subtle effort to emphasize the Commission’s consultative, non-legalistic nature. Despite a request from SAPA to disclose the Guidelines publicly, AICHR has not distributed them widely in the year since their adoption. The continuing loathness of many Representatives to meet with civil society groups critical of their policies—and the continued dominance of official dialogue in subsequent AICHR meetings—suggest that the Guidelines provided little if any new room for civil society engagement.

Its inability to receive and act upon complaints from victims or their advocates may be the Commission’s most hobbling handicap. That feature has already undermined AICHR’s public reputation. In late 2009, fifty-six people were massacred in the southern Philippine province of Maguindanao, including a large number of journalists and family members of a local opposition political candidate. Families of the victims petitioned AICHR to help them seek justice and compensation from the Philippine government. Indonesian Representative Rafendi Djamin expressed his regret and explained:

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

Advocates for the Philippine victims argued that the Philippine government’s invocation of immunity would prevent a domestic legal suit and that AICHR’s decision left them with no recourse. A local editorial lamented that “the high hopes for the commission proved short-lived.” Since the Maguindanao incident, other victims of alleged human rights abuses have also sent complaints to AICHR to no avail.

Amnesty International issued a scathing critique of AICHR’s response to the Maguindanao petitioners, urging the Commission to “apply its mandate, which includes protection of human rights, in line with international law and standards. Otherwise, AICHR risks reducing itself to an irrelevant and futile exercise in public relations.”

This is the sense in which “institutionalizing” human rights can mean something more akin to imprisonment than reification.

IV. ADDITION OF ACWC

A. Distinguishing Institutional Features

Even before AICHR was officially established, women’s groups convened in Bangkok and advocated for a return to plans for a commission dealing specifically with women’s and children’s rights. Somewhat ironically, AICHR’s inauguration provided a catalyst for restarting relatively dormant discussions on the commission once envisioned as its predecessor. ACWC was established just six months later in April 2010 and bears many similar features. Like AICHR, it is a consultative intergovernmental body without a central secretariat or significant enforcement authority. Each ASEAN member state dispatches two representatives—one to focus on women’s rights and the other on children’s rights—to meet biannually. Its TOR include many of the same caveats as those governing AICHR: emphasizing the primary role of national governments and requiring “consultation and consensus,” “avoidance of double standards or politicization,” and “a constructive non-confrontational and cooperative approach.”

There are meaningful differences between AICHR and ACWC, however. First, ACWC specifically links its mandate to the CRC and CEDAW and the UN committees responsible for their implementation. Anchoring the ACWC’s work in treaty obligations could theoretically make it easier for the commission to forge consensus, though the many reservations lodged by ASEAN signatories to those instruments suggest that devils lurk in the details. A second difference is that ACWC appears to have a slightly longer leash for engaging in human rights protection. Among other things, its TOR authorizes it to “advocate on behalf of women and children,” promote implementation of relevant laws, and propose policies and programs to protect their rights. ACWC’s stronger protection mandate likely results from the perception that women’s and children’s rights are less politically sensitive than the rights of political dissidents.

135. Id. arts. 6.2, 7.2.
136. Id. arts. 3.1–3.6, 7.1.
137. Id. arts. 2.5.
139. ACWC Terms of Reference, supra note 134, arts. 5.1–5.14.
B. Relationship to AICHR

The establishment of fraternal human rights commissions presents possible synergies but is also institutionally awkward in certain respects. The Charter referred to a single human rights body, not a pair. When AICHR was established, former ASEAN Secretary-General Ong Keng Yong recommended that it focus first on the rights of women, children, and migrant workers and thus “deal with some of the areas that have brought consensus.”140 The creation of ACWC thus raised the likelihood of two commissions dealing with nearly identical issues as both seek to build forward momentum.

AICHR is officially the “overarching human rights institution in ASEAN,” and ACWC is required to coordinate with AICHR on matters related to women and children, but it is not subordinate.141 This presents what ASEAN officials call a “problem of alignment” but other analysts describe as a “turf war.”142 In addition to vague spheres of authority, the two bodies could compete for money, as both are permitted to seek both regional and external funding.143 If the two work redundantly, one or both could lose appeal from donors. AICHR and ACWC did not convene together until AICHR’s seventh meeting in December 2011. That meeting produced a bland statement of mutual acknowledgement and a pledge to cooperate.144 Although ASEAN foreign ministers and both AICHR and ACWC have cited sound “alignment” as a priority, no specific plan is yet apparent.145

V. CONCLUSION: FUTURE INSTITUTIONAL EVOLUTION

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

141. ACWC Terms of Reference, supra note 134, art. 7.7.
143. ACWC Terms of Reference, supra note 134, art. 8.4; AICHR Terms of Reference, supra note 3, arts. 8.5–8.6.
aspects of the truth. In its current form, AICHR is unlikely to have a major effect on political and civil liberties in ASEAN member states. Its structure and decision-making rules essentially foreclose “top-down” organizational mandates and impose serious constraints on “lateral” peer pressure or “bottom-up” challenges from civil society and the public. It will likely focus, alongside ACWC, on specific sub-areas that have been less politically threatening to ASEAN governments—namely seeking added protections for women, children, and migrant workers.

Nevertheless, both commissions are concrete acknowledgments by ASEAN heads of state that their citizens are entitled to certain protections. The door to a regional human rights regime is now slightly ajar, and advocates are bound to push on that door to open it further. External actors and local civil society are eager to exploit this opportunity. US Secretary of State Hillary Clinton voiced “strong support” for the Commission,\(^{146}\) and both the United States and European Union hosted official visits by AICHR Representatives or their staff in late 2010.\(^{147}\) ASEAN will likely reap some Western rewards if the commissions pursue ambitious practical agendas.

AICHR and ACWC were also born into an increasingly dense network of multilateral human rights institutions, including other regional commissions in Africa and Latin America and the Asia-Pacific Forum of National Human Rights Institutions, which includes several national commissions from Southeast Asia, and global bodies. The UN Office for the High Commissioner on Human Rights has a regional office in Bangkok, and two Southeast Asian states—Malaysia and Thailand—recently took up seats on the UN Human Rights Council. Interaction with those groups by no means guarantees measurable near-term change in ASEAN’s approach to human rights, but it does present clear opportunities for learning and norm transmission.

AICHR and ACWC representatives (particularly the former) have limited authority to engage with civil society, but they are allowed to consult. In its first year of operations, AICHR alone received sixteen cases of reported human rights abuses.\(^{148}\) Despite its relative lack of response, such complaints are bound to continue, pressing ASEAN and its member governments to

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148. SAPA TASK FORCE ON ASEAN AND HUMAN RIGHTS, supra note 104, at 9–10.
react. AICHR provides a forum in which national advocates could lobby for human rights concerns at the regional level—and in some cases get a more sympathetic ear than they would at home. Its meetings and reports need not produce decisions that bind member states to be useful instruments in nourishing grassroots movements and catalyzing reform, which will often be instigated by civil society actors and politicians in domestic Southeast Asian systems. Ultimately, these bottom-up pressures will likely be the most important drivers for change in human rights practices in Southeast Asia.

In addition to external influence and bottom-up pressure, national leadership within ASEAN will be a key factor in the commissions’ evolution. ASEAN often moves slowly to keep lagging members on board. However, Southeast Asian governments have occasionally expressed frustration at the sluggish pace of change. Indonesia—which accounts for roughly 40 percent of the region’s population—is now the country most assertively pushing the bounds of consensus on human rights, prompting one regional expert to ask if it is “outgrowing ASEAN”—a prospect quite threatening to smaller ASEAN members. Maintaining “credibility” and “relevance” loom large in ASEAN calculations.

States could lead by inviting the commissions to conduct investigations on their soil—a real show of commitment—or simply host educational programs in line with the commissions’ promotion mandates. The Philippine government has already offered to host an AICHR Secretariat—an offer made by Gloria Macapagal Arroyo and affirmed by her successor, Noynoy Aquino. The Indonesian government under Susilo Bambang Yudhoyono has also taken pride in developing its human rights commission and has expressed an interest in hosting AICHR. A race among three or four of ASEAN’s most influential states to develop a model commission would be a significant institutional knock-on effect. A national commission in an opinion-leading state like Singapore—often seen as the intellectual vanguard for the “Asian values” position—would also have an important demonstrative effect.

149. Kelsall, supra note 6, at 6.
152. Interview with Rafendi Djamin, Indonesian Representative, Jakarta (20 May 2010).
Institutional change will not happen overnight at AICHR and ACWC; regional bodies cannot soar too far above the plane of relevant political will without getting their wings clipped. Those that have developed real teeth—such as the European Court of Human Rights and increasingly the Inter-American Commission and Court of Human Rights—earned their influence gradually. AICHR and ACWC will have to do the same.

As of this writing, AICHR representatives have drafted an ASEAN Human Rights Declaration, which was scheduled for completion in 2011 but was pushed back for consideration at the July 2012 ASEAN Ministerial Meeting.\footnote{Civil Society Demands Transparency and Consultation on the ASEAN Human Rights Declaration, \textit{Asian Tribune}, 9 Apr. 2012, available at \url{http://www.asiantribune.com/news/2012/04/08/civil-society-demands-transparency-and-consultation-asean-human-rights-declaration}; \textit{ASEAN Declaration Should be “Equally Powerful” to UN’s}, \textit{Jakarta Post}, 28 June 2012.} AICHR Representatives drafted the text behind closed doors, prompting complaints from civil society advocates who demanded an opportunity for public commentary.\footnote{Civil Society “Shunned” by AHRD Drafting Panel, \textit{Bangkok Post}, 9 Apr. 2012, available at \url{http://www.bangkokpost.com/news/asia/288093/civil-society-in-asean-hr-drafting} (noting that more than 100 civil society organizations signed a complaint and that only the AICHR Representatives from Indonesia, Malaysia, the Philippines, and Thailand have solicited civil society input to date).} The near-term effects of the declaration will probably be modest, like other steps in ASEAN’s slow march toward a robust regional human rights regime. Surin Pitsuwan, an important advocate of AICHR and ACWC, concludes his term as ASEAN Secretary-General in 2012, and his successor’s disposition will be an important variable. Also relevant will be the rotating country chairmanship of ASEAN. The 2012 chair is Cambodia, followed by Brunei and Myanmar—two countries apt to approach the human rights issue with considerable caution. Under the Terms of Reference, the commissions will be reviewed and reassessed on their fifth birthdays.\footnote{AICHR Terms of Reference, \textit{supra} note 3, arts. 9.6–9.7; ACWC Terms of reference, \textit{supra} note 134, art. 10.6.} It is highly unlikely that ASEAN’s human rights regime will have grown up, but it ought to be able to stand and move forward on its two new legs.