

CONTEXTUALIZING UNIVERSAL HUMAN RIGHTS: AN INTEGRATED HUMAN RIGHTS FRAMEWORK FOR ASEAN

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INTRODUCTION

This Note explores a central question in regime design: can a region that is arguably averse¹ to human rights develop a successful system to police its own human rights record? Southeast Asia, a region that had, and arguably still has, a human rights allergy,² has voluntarily created a human rights system for itself. Given that this system is institutionally weak by design,³ a plausible explanation for this paradoxical commitment is that it is simply disingenuous. Proposing reforms for an apparently disingenuous human rights system may at first blush appear to be a futile effort. Some human rights advocates may wish to wait for a different system altogether instead of celebrating a weak system and improving upon it. However, this Note argues that through harnessing social processes for influencing state practice,⁴ it is possible to stimulate even a disingenuous system to adopt meaningful changes over time.⁵

Regional human rights systems⁶ (Regional Systems) are commitment devices that nation states in regional blocs use to hold themselves accountable to their human rights obligations.⁷ Because states enjoy the

1. HSIEN-LI TAN, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS 60–61 (2011) (using “aversion” to describe Southeast Asia’s hesitance and suspicion towards international human rights law).

2. *But see* Mergawati Zulfakar and Lisa Goh, *Tough Task Ahead on Human Rights*, THE STAR (Aug. 1, 2007), available at <http://www.thestar.com.my/story/?file=%2f2007%2f8%2f1%2fnation%2f18461803&sec=nation> (quoting Foreign Minister Syed Hamid’s aspiration that ASEAN “must not be seen to be allergic to human rights.”).

3. *See infra* Part I.

4. *See* RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 21–22 (2013); *infra* Part III.

5. *See* GOODMAN & JINKS, *supra* note 4, at 137, 144; *infra* Part III.

6. Regional human rights systems consist of regional instruments and mechanisms. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *An Overview of Regional Human Rights Systems*, <http://bangkok.ohchr.org/programme/regional-systems.aspx> (last visited Jan. 26, 2015). Regional instruments (such as treaties, conventions, and declarations) help to “localise international human rights norms and standards, reflecting the particular human rights concerns of the region.” *Id.* Regional mechanisms (such as commissions and courts) then help to “implement these instruments on the ground.” *Id.*

7. *See* BALAKRISHNAN RAJAGOPAL, *Rights and Justice: A Prospective View, in SOUTH ASIA*

sovereign right to determine their own internal affairs without intervention from other states,⁸ participating in such commitment devices requires states to give up some of their sovereignty to allow a supranational body to monitor and criticize their domestic human rights records.⁹ For a state with a poor human rights record, consenting to a strong Regional System creates self-inflicted wounds—such consent requires significant political will or commitment to human rights. Given the sovereignty costs of participating in a Regional System, one may question whether a region that is allergic to human rights can genuinely desire to establish a Regional System. This Note contextualizes the struggle in the creation and development of Regional Systems by examining the Association of Southeast Asian Nations (ASEAN), a sub-regional organization consisting of ten Asian states.¹⁰

ASEAN has asserted that the application of universal human rights must be subject to regional particularities.¹¹ ASEAN has argued that Asia has a different value system (Asian values) that may be fundamentally incompatible with the West's conception of universal human rights.¹² However, despite its longstanding aversion to human rights,¹³ ASEAN created a human rights commission in 2009, called the ASEAN Intergovernmental Commission on Human Rights (ASEAN Commission).¹⁴ It later promulgated the ASEAN Human Rights Declaration (ASEAN Declaration) in late 2012.¹⁵

2060: ENVISIONING REGIONAL FUTURES 261, 264 (Adil Najam & Moed Yusuf eds., 2013) (“A regional commitment to human rights is an important device to improve conditions on the ground.”).

8. G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

9. See DEBRA DELAET, *THE GLOBAL STRUGGLE FOR HUMAN RIGHTS* 146 (2d ed. 2014) (“[R]egional human rights systems are typically limited by the fact that states are unwilling to give up sovereignty in the name of universal human rights.”).

10. ASEAN's ten member states include the five founding members, Indonesia, Malaysia, Philippines, Singapore, and Thailand, and the later members, Brunei Darussalam, Vietnam, Lao PDR, Myanmar, and Cambodia. *The Founding of ASEAN*, ASEAN, <http://www.aseansec.org/overview/> (last visited July 12, 2014).

11. Ben Saul, Jacqueline Mowbray & Irene Baghoomians, *The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific*, 18 *AUSTL. INT'L L. J.* 23, 30–31 (2011).

12. *Id.*; see *infra* Part I.C.2 for a more elaborate explanation of “Asian values.”

13. TAN, *supra* note 1 at 60–61.

14. *About*, ASEAN INTER-GOVERNMENTAL COMMISSION ON HUMAN RIGHTS, <http://aichr.org/about/> (last visited July 12, 2014).

15. Ass'n of Se. Asian Nations [ASEAN], ASEAN HUMAN RIGHTS DECLARATION (Nov. 19, 2012), available at <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration> [hereinafter ASEAN DECLARATION]. For a detailed analysis of the provisions in the ASEAN Declaration, see Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 *HUM. RTS. L. REV.* 557 (2013); see also Nicholas Doyle, *The Asean Human Rights Declaration And*

Since their inception, the ASEAN Commission and the Declaration have been flayed and pummeled for being some combination of weak, silent, and regressive.¹⁶ Nevertheless, ASEAN's struggle with its regional human rights body and Asian values makes it a promising test case for whether and how states can construct Regional Systems that are both culturally sensitive and also effective in protecting internationally recognized human rights.

Scholars, civil society groups and human rights institutions have recommended reforms for the ASEAN human rights system.¹⁷ However, ASEAN has not adopted many of these recommendations.¹⁸ This Note is the first attempt since the adoption of the ASEAN Declaration¹⁹ to propose a comprehensive ASEAN human rights framework that is tailored to the region's particularities and informed by institutional design literature. After examining ASEAN's conditions, the limitations of ASEAN's existing system, and other Regional Systems, this Note proposes a human rights framework for ASEAN that evolves in response to local conditions.

Contrary to the call for strong mechanisms,²⁰ the ASEAN Commission should first introduce less intrusive mechanisms and build its power sequentially. This is because strong mechanisms are not just politically infeasible at the outset—they could also be counterproductive.²¹ The evolutionary nature of the proposed framework is in line with ASEAN's evolutionary approach for the development of human rights, which augments its political feasibility.²² More importantly, it also reflects the lessons learned from other Regional Systems: arriving at an equilibrium that perfectly balances global norms and local conditions is a process, not a

The Implications of Recent Southeast Asian Initiatives in Human Rights Institution-building and Standard-setting, 63 INT'L & COMP. L. Q. 1, 15–27 (2013).

16. See *infra* Part I.B.

17. See, e.g., 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, chs. 5–6 (Roger S. Clark et al. eds., 2012) (proposing an ASEAN Court of Human Rights, which this Note argues is not feasible in the short run); *infra* notes 127–132 and accompanying text.

18. See *infra* notes 127–132 and accompanying text.

19. For a much earlier analysis of this topic, see Li-ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep,"* 2 YALE HUM. RTS. & DEV. L.J. 1, 76–79 (1999).

20. See, e.g., PHAN, *supra* note 17.

21. Employing strong mechanisms may undercut "softer" mechanisms. See *infra* note 194 and accompanying text.

22. Ass'n of Se. Asian Nations [ASEAN], ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (TERMS OF REFERENCE), art. 2.5 (Oct. 2009), available at <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf> [hereinafter ASEAN Commission T.O.R.].

one-shot attempt.²³

This Note proceeds in three parts. Part I describes the existing ASEAN human rights system and its limitations and challenges. Part II draws lessons from other Regional Systems. Finally, Part III proposes a multilayered human rights framework for ASEAN.

I. THE CURRENT ASEAN HUMAN RIGHTS SYSTEM AND ITS CHALLENGES

A. Existing human rights institutions and organizations in ASEAN

1. ASEAN Intergovernmental Commission on Human Rights

ASEAN was initially created for political and economic cooperation in 1967 and did not have human rights on its agenda until the 1990s.²⁴ In 2009, more than four decades after its inception, ASEAN established the ASEAN Commission.²⁵ The ASEAN Commission is the official “overarching human rights institution in ASEAN,”²⁶ with a mandate that includes promoting ASEAN human rights instruments, encouraging the ratification and implementation of international human rights treaties, and promoting public awareness of human rights.²⁷ The ASEAN Commission can also request information about the promotion and protection of human rights from its member states on a voluntary basis,²⁸ and conduct thematic studies and reports for ministerial meetings.²⁹ The ASEAN Commission consists of ten representatives, one appointed by each member state.³⁰

2. ASEAN Commission on the Promotion and Protection of the Rights of Women and Children

In addition to the ASEAN Commission, which has a general human rights mandate, ASEAN has a separate commission, the ASEAN

23. *See infra* Part II.

24. Sriprapha Petcharamesree, *The ASEAN Human Rights Architecture: Its Development and Challenges*, 11 EQUAL RTS. REV. 46, 47 (2013).

25. *About, supra* note 14; Irene I. Hadiprayitno, *The Institutionalisation of Human Rights, in ASEAN 1* (Dec. 19, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2191448>.

26. ASEAN Commission T.O.R., *supra* note 22, art. 6.8.

27. *Id.* art. 4.3–4.6.

28. *Id.* art. 4.10. This does not include the authority to require states to submit reports on their human rights records. *See infra* note 69 and accompanying text.

29. ASEAN Commission T.O.R., *supra* note 22, art. 4.12–4.13.

30. Daniel Aguirre & Irene Pietropaoli, *ASEAN Regional Human Rights Protection: Lessons from the African and Inter American Regional Systems*, 2 NAM YEARBOOK ON HUMAN RIGHTS AND CULTURAL DIVERSITY 154, 167 (Kamran Hashemi & Linda Briskman ed., 2013).

Commissions on the Promotion and Protection of the Rights of Women and Children (ACWC), focused on a subset of rights that are perceived to be less politically sensitive.³¹ Established in 2010,³² the ACWC is also an intergovernmental consultative body.³³ Its mandate is limited to women's and children's rights³⁴ and is explicitly linked to member states' obligations under the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³⁵ All ASEAN member states have ratified both conventions, albeit with reservations.³⁶

ACWC encourages compliance with international and regional human rights norms,³⁷ raises public awareness of the rights of women and children,³⁸ and assists with preparing periodic reports to the United Nations and treaty bodies.³⁹ The ACWC does not impose additional reporting obligations, but rather serves to complement existing state obligations to report to the United Nations and treaty bodies.⁴⁰

3. National Human Rights Institutions and the Asia Pacific Forum of National Human Rights Institutions

State governments establish National Human Rights Institutions (NHRIs) to promote and protect human rights in their countries.⁴¹ Although individual NHRIs have differing functions, they also share common ones such as monitoring the state, investigating and resolving complaints, or promoting human rights education.⁴² The Asia Pacific Forum of National Human Rights Institutions (Asia Pacific Forum) is a network of NHRIs in

31. According to Thai representative to the ASEAN Commission Sriprapha Petchamesree, the rights of women and children are perceived to be a "soft issue" that is less threatening to ASEAN members than civil and political liberties. Sriprapha Petchamesree, *The Human Rights Body: A Test For Democracy Building*, in *ASEAN 10* (International Institute for Democracy and Electoral Assistance 2009), available at http://www.idea.int/resources/analysis/upload/Sriprapha_low_2.pdf.

32. Aguirre & Pietropaoli, *supra* note 30, at 164.

33. Ass'n of Se. Asian Nations [ASEAN], TERMS OF REFERENCE OF THE ASEAN COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF WOMEN AND CHILDREN art. 4 (Feb. 2010), available at http://www.asean.org/images/2012/Social_cultural/ACW/TOR-ACWC.pdf [hereinafter ACWC T.O.R.].

34. *Id.* art. 2.1.

35. *Id.* art. 2.5.

36. Aguirre & Pietropaoli, *supra* note 30, at 184.

37. ACWC T.O.R., *supra* note 33, art. 5.1.

38. *Id.* art. 5.3.

39. *Id.* art. 5.6.

40. *Id.* art. 3.4

41. ASIA PAC. FORUM, *What are National Human Rights Institutions?*, <http://www.asiapacificforum.net/establishment-of-nrhis/what-is-an-nhri> (last visited July 12, 2014).

42. *Id.*

the Asia Pacific region, including countries outside of ASEAN.⁴³ The Asia Pacific Forum's primary roles include strengthening existing NHRIs⁴⁴ and supporting the establishment of NHRIs in accordance with the Paris Principles.⁴⁵ There are currently five NHRIs in the ASEAN region—in the Philippines, Indonesia, Malaysia, Thailand, and Myanmar.⁴⁶ Four NHRIs (excluding Myanmar) have established their own network, called the ASEAN NHRI Forum.⁴⁷ The ASEAN NHRI Forum has held several consultation meetings and developed working plans for regional collaboration and strategies for the promotion and protection of human rights.⁴⁸ These four NHRIs conform to the Paris Principles.⁴⁹ They are independent from the state and are vested with the competence to promote and protect human rights.⁵⁰ However, Myanmar's NHRI does not conform to the Paris Principles and thus does not have full membership in the Asia Pacific Forum.⁵¹

4. Working Group for an ASEAN Human Rights Mechanism

The Working Group for an ASEAN Human Rights Mechanism (Working Group) is a coalition of national working groups whose members are representatives from governments, academia, and civil society organizations.⁵² The Working Group is the only human rights civil society organization affiliated with ASEAN.⁵³ Its primary goal was to establish an

43. Andrea Durbach, Catherine Renshaw & Andrew Byrnes, *A Tongue but No Teeth: The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region*, 31 SYDNEY L. REV. 211, 212 (2009).

44. *Id.*

45. *Id.* at 226. The Paris Principles provide minimum standards on competence and responsibilities, composition, guarantees of independence and pluralism, methods of operation and the status of commissions with quasi-jurisdictional competence. Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 48/134, U.N. GAOR, U.N. Doc. A/RES/48/134 (Dec. 20, 1993) [hereinafter Paris Principles].

46. NHRIs in the Philippines, Indonesia, Malaysia, and Thailand were established in 1987, 1993, 2000, and 2001 respectively. Durbach et al., *supra* note 43, at 215.

47. See Press Release, Commission on Human Rights of the Philippines, ASEAN Human Rights Commissions Convene in Manila (Jan. 25, 2008).

48. Durbach et al., *supra* note 43, at 227.

49. INT'L COORDINATING COMM. OF NAT'L INST. FOR THE PROMOTION AND PROT. OF HUMAN RIGHTS, CHART OF THE STATUS OF NATIONAL INSTITUTIONS 2–3 (Dec. 30, 2014), <http://nhri.ohchr.org/EN/Documents/Accreditation%20Status%20Chart.pdf>.

50. Paris Principles, *supra* note 45.

51. *Associate Members*, ASIA PACIFIC FORUM, <http://www.asiapacificforum.net/members/associate-members> (last visited Jan. 27, 2015).

52. Hadiprayitno, *supra* note 25, at 15; Durbach et al., *supra* note 43, at 222.

53. Ass'n of Se. Asian Nations [ASEAN], ASEAN CHARTER OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS, Annex 2 (Nov. 20 2007), available at <http://www.aseansec.org/>

intergovernmental human rights commission for ASEAN,⁵⁴ though most of its recommendations for the ASEAN Commission were rejected.⁵⁵ It now assists in the promotion of human rights and provides recommendations to ASEAN organs.⁵⁶ It has also “become a platform where negotiations regarding alleged human rights violations between non-State and State actors . . . can be carried out.”⁵⁷

B. Evaluation of the current ASEAN human rights system and the ASEAN Declaration

1. Limitations of existing ASEAN institutions

ASEAN officials lauded the ASEAN Commission as a “historic milestone” in human rights promotion and protection.⁵⁸ However, a close inspection of the ASEAN Commission’s terms of reference indicates that ASEAN member states have in fact substantially restricted the Commission’s authority.⁵⁹ Among commentators and human rights advocates, criticisms of the ASEAN Commission abound. It has been called “the world’s most toothless human-rights body,”⁶⁰ “a lame duck,”⁶¹ and mere “window dressing.”⁶² Even some representatives to the ASEAN Commission are frustrated by the Commission’s limited power.⁶³

The ASEAN Commission is an “intergovernmental” political entity—

publications/ASEAN-Charter.pdf.

54. *About Us*, Working Grp. for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/aboutus.html> (last visited July 12, 2014).

55. See *infra* Section I.C.3.

56. Hadiprayitno, *supra* note 25, at 15; Petchamesree, *supra* note 24, at 48–49.

57. Hadiprayitno, *supra* note 25, at 15.

58. ASEAN, Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights arts. 4, 8 (Oct. 23, 2009), available at <http://www.aseansec.org/documents/Declaration-aichr.pdf>.

59. See, e.g., ASEAN Commission T.O.R., *supra* note 22, art. 2.1 (restricting the ASEAN Commission’s actions by emphasizing non-interference and state sovereignty in the first guiding principle).

60. *ASEAN’s Toothless Council*, WALL ST. J. (July 22, 2009), available at <http://www.wsj.com/articles/SB10001424052970203517304574303592053848748>.

61. Sarinna Areethamsirikul, *Can Indonesia Become the Central Leader of Asean?*, THE NATION, (Mar. 22, 2011), available at <http://www.nationmultimedia.com/2011/03/22/opinion/Can-Indonesia-become-the-central-leader-of-Asean-30151407.html>.

62. Solidarity for Asian People’s Advocacy, *AICHR: A Window Dressing for ASEAN’s Commitment to Human Rights* (Oct. 27, 2010), available at <http://www.forum-asia.org/?p=6901> (last visited July 12, 2014).

63. One representative to the ASEAN Commission expressed disappointment and apologized for the Commission’s inability to respond to the complaints submitted by NGOs at the ASEAN Commission’s inception. Hadiprayitno, *supra* note 25, at 13.

its lack of independence from member governments is evident from its very name. The ASEAN Commission is comprised of government appointees accountable to their governments,⁶⁴ who can remove the appointees at their discretion.⁶⁵ It operates by consultation and consensus, which gives each state an effective veto over the Commission's decisions.⁶⁶ The ASEAN Commission has no permanent secretariat or office, and no ability to hear complaints, initiate independent investigations,⁶⁷ or monitor compliance.⁶⁸ It is not even authorized to require states to produce periodic reports on their progress in implementing the human rights instruments that they have ratified.⁶⁹

The ASEAN Commission is also designed to avoid lateral pressure from governments outside of ASEAN.⁷⁰ External funding and resources directed towards the ASEAN Commission are limited to the promotion of human rights; non-ASEAN governments cannot fund activities that protect human rights, such as review, monitoring, and enforcement.⁷¹ Further, since the ASEAN Commission's inception, it has largely excluded civil society organizations (CSOs) from participation in its initiatives, including drafting of the ASEAN Declaration.⁷² Thus, it has been criticized as “an intergovernmental body that won't even talk to its own citizens.”⁷³

The ACWC faces normative and institutional challenges.⁷⁴ Even though all ASEAN member states have ratified the relevant U.N. treaties CEDAW and CRC, many states have entered reservations to their essential provisions.⁷⁵ Consequently, there is no consensus on the legal standard for

64. ASEAN Commission T.O.R., *supra* note 22, art. 5.2.

65. *Id.* art. 5.6.

66. John D. Ciorciari, *Institutionalizing Human Rights in Southeast Asia*, 34 HUM. RTS. Q. 695, 715 (2012).

67. *Id.* The inability to receive complaints from victims of human rights violations “may be the Commission's most hobbling handicap.” *Id.* at 719. The ASEAN Commission refused to consider all of the complaints submitted to it, including one concerning a massacre of fifty-six journalists and relatives of a political opposition candidate in the Philippines. *Id.* at 719–20.

68. Aguirre & Pietropaoli, *supra* note 30, at 166.

69. Silvia Croydon, *Two Rights Paths: East Asia's Emerging Regional Human Rights Framework*, 11 ASIA PAC. PERSP. 22, 29 (2013).

70. Ciorciari, *supra* note 66, at 716–17.

71. *See id.*; ASEAN Commission T.O.R., *supra* note 22, art. 8.6.

72. Renshaw, *supra* note 15, at 2.

73. Sri Wahyuni, *ASEAN Human Rights Body Deemed “Toothless,”* JAKARTA POST, Oct. 24, 2009, at 2.

74. *See generally* Ciorciari, *supra* note 66 (describing various normative and institutional constraints facing the ASEAN Commission and ACWC).

75. Aguirre & Pietropaoli, *supra* note 30, at 184. Singapore, Brunei, Thailand, and Malaysia have entered reservations to essential provisions of CEDAW or general reservations. *Id.* For a summary of ratification and reservations by ASEAN member states, *see* Suzannah Linton, *ASEAN States, Their*

women's and children's rights.⁷⁶ Also, ACWC's role could overlap significantly with that of the ASEAN Commission, since the former ASEAN Secretary-General advised the ASEAN Commission to focus on the rights of women, children, and migrant workers first.⁷⁷ Given that the ACWC has to coordinate with the ASEAN Commission but is not subordinate to it,⁷⁸ this can result in a turf war and a competition for funding.⁷⁹

2. Why ASEAN created the ASEAN Commission

The reasons motivating states to participate in international human rights regimes help explain how these regimes can influence state behavior.⁸⁰ Thus, in designing a workable ASEAN human rights framework, it is essential to understand why ASEAN created the ASEAN Commission, and its vision for the ASEAN Regional System in general.

Remarks from ASEAN and state government officials suggest that ASEAN's decision to create the ASEAN Commission was partly out of pressure to catch up with human rights developments in the international community and to "keep ASEAN relevant."⁸¹ The ASEAN Commission could also be a public relations stunt to change the world's perception, if any, that ASEAN is "allergic to human rights."⁸² Notwithstanding the desire to match other Regional Systems, ASEAN's vision for the ASEAN Commission is a body limited by political reality. A senior official at the ASEAN Secretariat stated, "to moan about [the ASEAN Commission's lack of independence] is to bark up the wrong tree,"⁸³ because it was unrealistic to start the ASEAN Commission as a strong body:

[T]he dilemma facing ASEAN members states . . . is how to

Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children, 30 HUM. RTS. Q. 436 (2008).

76. Aguirre & Pietropaoli, *supra* note 30, at 184.

77. Kor Kian Beng, *Human Rights Struggle*, THE STRAITS TIMES (Singapore) (Oct. 23, 2009).

78. ACWC T.O.R., *supra* note 33, art. 7.7.

79. See Ciorciari, *supra* note 66, at 722.

80. Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANN. REV. POLIT. SCI. 265, 280 (2012).

81. James Munro, *Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory*, 10 ASIA-PAC. J. HUM. RTS. 1, 23 (2009). ASEAN Secretary-General Pitsuwan explained that the "[human rights] issue is important in our interface with other organizations, with our dialogue partners, because this is an issue of concern to the international community." *Id.* Former Indonesian Foreign Minister Alatas also remarked, "[h]ow can we avoid having the [ASEAN human rights body] when all other regional organizations have one already" and stated that the ASEAN human rights body should be "in line with the demands of the [twenty-first] century." *Id.*

82. See Zulfakar & Goh, *supra* note 2.

83. Croydon, *supra* note 69, at 29.

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.”⁸⁴

Singaporean Foreign Minister George Yeo stated that instead, the body would “at least have a tongue[,] and a tongue will have its uses.”⁸⁵

Scholars have diverging views regarding ASEAN’s motivations for creating an ASEAN human rights body. Some believe that ASEAN created the ASEAN Commission in order to obtain international legitimacy and appease the outside world.⁸⁶ ASEAN states could also be motivated by the fear that the human rights movement, particularly the push for political and civil rights, could lead to domestic instability and forced democratization.⁸⁷ Others warned that, in institutionalizing the ASEAN Commission, ASEAN could “imprison”⁸⁸ human rights in “a controlled bureaucratic environment.”⁸⁹ This allows ASEAN to “deflect[] criticism by discussing human rights in a safe political space [where] . . . government officials control the pace and content of the discourse.”⁹⁰ However, the ASEAN Commission could also constitute an important first step towards stronger protection of human rights and help to solidify norms.⁹¹

The plausible, if troubling, view is that ASEAN chose to create the ASEAN Commission to relieve pressure for real change. The ASEAN Commission’s deliberately weak institutional design seems to be a placating statement with no real effect.⁹² Such disingenuous participation

84. Ciorciari, *supra* note 66, at 713.

85. *Id.*

86. Munro, *supra* note 81, at 24; see also Christof Heyns & Magnus Kilander, *Towards Minimum Standards For Regional Human Rights Systems*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W MICHAEL REISMAN 31 (2010) (arguing that the ASEAN Commission could shield governments from criticism for human rights violations rather than prevent violations given the absence of independent authority and oversight); Carole J. Petersen, *Bridging the Gap? The Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 ASIAN-PAC. L. & POL’Y J. 174, 176 (2011) (identifying the danger that the ASEAN Commission could undermine, instead of complement, international human rights standards).

87. Ciorciari, *supra* note 66, at 701.

88. *Id.* at 720.

89. *Id.* at 697.

90. *Id.*

91. *Id.*

92. This is analogous to Oona Hathaway’s view that states participate in treaties and human rights regimes because weak international enforcement mechanisms allow states to pay lip service to human rights without fulfilling the commitments. See Oona A. Hathaway, *Do human rights treaties make a*

might backfire if CSOs can hold governments locally accountable.⁹³ This is because international civil society could increase recognition, reporting, and publicity of local violations, thereby creating more pressure on governments to address human rights problems.⁹⁴ However, this requires a tight link between the governments and international civil society,⁹⁵ which may be absent in the ASEAN region.

3. Significance of the ASEAN Declaration

The ASEAN Commission has done little since its establishment in 2009, apart from overseeing the drafting of the ASEAN Declaration. The ASEAN Declaration is not the product of a democratic process. Rather, the drafting process was “controversial” because of the ASEAN Commission’s lack of independence, the lack of transparency, and exclusion of CSOs from the process.⁹⁶ An optimistic interpretation of the ASEAN Declaration is that it constitutes “another step towards the development of a human rights architecture”⁹⁷ and undermines ASEAN’s claim that human rights is a Western imposition.⁹⁸

However, the text of the ASEAN Declaration arguably falls below international standards for human rights.⁹⁹ Although the ASEAN Declaration’s preamble reaffirms ASEAN’s commitment to the Universal Declaration of Human Rights and other international obligations,¹⁰⁰ the Declaration broadly limits all rights and fails to include several basic rights.¹⁰¹ This has caused civil society to denounce it.¹⁰² The ASEAN

difference?, 111 YALE L. J. 1935, 2005 (2002).

93. Emilie Hafner-Burton & Kiyoteru Tsutsui, *Human rights in a globalizing world: the paradox of empty promises*, 110 AM. J. SOCIOL. 1373, 1385–86 (2005); H. SMITH-CANNOY, *INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM* 174–75 (2012).

94. Hafner-Burton & Tsutsui, *supra* note 93, at 1386.

95. *Id.*

96. Renshaw, *supra* note 15, at 2. No drafts of the ASEAN Declaration were made public, although two of them were leaked. *Id.*

97. Petcharameesree, *supra* note 24, at 58.

98. See Renshaw, *supra* note 15, at 23.

99. See U.N. Daily News, *U.N. Official Welcomes ASEAN Commitment to Human Rights, but Concerned Over Declaration Wording*, U.N. NEWS CENTRE, Nov. 15, 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=43536#.Upqyf41Q2XR>.

100. ASEAN DECLARATION, *supra* note 15.

101. Human Rights Watch, *Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration*, HUMAN RIGHTS WATCH, Nov. 19, 2012, available at <http://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration> (last visited July 12, 2014) [hereinafter Human Rights Watch]. Article 8 of the ASEAN Declaration is a general principle that could limit all rights, including non-derogable ones under international law. Renshaw, *supra* note 15, at 13. The ASEAN Declaration excludes the right to self-determination, the rights of indigenous peoples, *id.*, and the right to freedom of association.

Declaration also leaves unresolved the awkward tension between the aspiration to endorse universal human rights and the reluctance to cede state sovereignty.¹⁰³ The ramifications of this ambivalence could be severe.

As one scholar's scathing criticism of ASEAN Declaration explains:

ASEAN's human rights initiative, far from facilitating ASEAN States' compliance with treaty and customary human rights obligations, has been, and is likely to remain, ineffective and even antagonistic The [ASEAN Declaration] is a declaratory statement which purports to fragment the human rights norms recognized by some ASEAN States between the intra- and extra-ASEAN context [T]he [ASEAN Declaration] does not achieve a local-global reconciliation but rather an ossification of their skeptical position on human rights with little evidence of "novel" rights reflecting "regional particularities."¹⁰⁴

The adoption of a regional instrument that plausibly undermines international human rights standards is likely to complicate the ASEAN Commission's work in the future. It is difficult to promote and expand on an instrument that is contested and contains fractured legal standards. If the ASEAN Declaration were to evolve into a binding convention, as some soft-law declarations do,¹⁰⁵ its fractured standards have to be clarified so that it could be implemented in accordance with universal standards. These challenges, in addition to others described in the following section, mean that it is unlikely that the ASEAN Declaration will turn into a binding convention in the short run.

C. Challenges to establishing an effective human rights framework in ASEAN

1. Principle of non-interference and ASEAN's *modus operandi*

The region espouses an "extreme deference to state sovereignty understood in almost absolutist terms."¹⁰⁶ The principle of non-interference in states' domestic affairs is explicitly included in the ASEAN Commission's terms of reference¹⁰⁷ and the ASEAN Charter.¹⁰⁸ Many

102. Human Rights Watch, *supra* note 101.

103. Renshaw, *supra* note 15, at 578.

104. Doyle, *supra* note 15, at 98.

105. Soft-law declarations sometimes pave the way for binding instruments. For example, the Universal Declaration of Human Rights evolved into the legally binding International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

106. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 179 (4th ed. 2013).

107. Heyns & Kilander, *supra* note 86, at 30; ASEAN Commission T.O.R., *supra* note 22, art. 2.1.

108. Ass'n of Se. Asian Nations [ASEAN], ASEAN CHARTER, art. 2.2(e) (Nov. 20, 2007), available at <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>.

scholars identify this principle as a major challenge for regional human rights in ASEAN,¹⁰⁹ as states are neither willing to criticize nor receive criticism. In addition, the “ASEAN way” of doing business through consultation and consensus¹¹⁰—read: veto power by each state—further restrains when and how ASEAN and the ASEAN Commission can act. Diverse political, cultural, and economic positions within the region make forming consensus around norms difficult.¹¹¹ The result is a reluctance to impose sanctions on deviant members, slow decision-making process, and a weak ASEAN Commission. Further, most ASEAN states have rejected alternative methods of decision-making such as constructive and flexible engagement.¹¹² Thus, the proposed framework would likely have to work within the constraints of the current ASEAN method of consensus decision-making and persuasion.

2. ASEAN’s views on human rights: cultural relativism and Asian values

As Singapore has declared, rights are “contested concepts.”¹¹³ Singapore, Malaysia, and Indonesia promoted the principal cultural relativist objection to the universality of human rights using Asian values,

109. Thio, *supra* note 19, at 6 (identifying non-interference as a “cardinal principle” for ASEAN); John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. UJ INT’L HUM. RTS. 102, 115 (2009); Durbach et al., *supra* note 43, at 237; Saul et al., *supra* note 11, at 35. However, some have argued that adherence to the non-interference principle has weakened because the Asian Financial Crisis of 1997–98 exposed the need for interdependence and regional integration. Hadiprayitno, *supra* note 25, at 4–5.

110. Hsien-Li Tan, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, 12 SINGAPORE Y.B. OF INT’L LAW 239, 240 (2008).

111. Durbach et al., *supra* note 43, at 217; Renshaw, *supra* note 15, at 577; Saul et al., *supra* note 11, at 28.

112. Thio, *supra* note 19, at 53–54. Although it is unclear whether Malaysia or Thailand is responsible for first suggesting each concept, they are the only two ASEAN states that advocate for these concepts. *Compare id.* (attributing constructive engagement to Malaysia and flexible engagement to Thailand), with Petcharamesree, *supra* note 24, at 57 (attributing constructive engagement to Thailand and flexible engagement to Malaysia but confirming that besides Malaysia and Thailand, all ASEAN states have rejected these concepts since 1999). As opposed to nonintervention, constructive engagement is a “more proactive response to manage the spill[over] effects of certain domestic . . . crises . . . though ‘constructive intervention’ to prevent the escalation of problems.” Thio, *supra* note 19, at 53. Flexible engagement asserts that non-interference is not an absolute principle, and allows states to openly criticize other states’ domestic policies when these policies have transnational effects that impact them. *Id.* at 53–54.

113. Permanent Mission of Singapore to the United Nations, U.N. G.A. 60th Sess. High-level Plen. Mtg. (Sep. 16, 2005), <http://www.un.org/webcast/summit2005/statements16/sin050916eng.pdf> (“[A]ll but a handful of what are asserted to be rights are still essentially contested concepts.”); see Durbach, *supra* note 43, at 224; TAN, *supra* note 1, at 173 (quoting Singapore as stating that “the interpretation of most rights is still essentially contested concepts [*sic*]” at the Seventh Workshop on the ASEAN Regional Mechanism on Human Rights in 2008).

which first appeared in the international spotlight through the Bangkok Declaration, right before the 1993 Vienna Conference.¹¹⁴ The Bangkok Declaration was a document signed by over forty Asian states.¹¹⁵ It stated what has now come to be the Asian values position, which calls for attention to regional and cultural particularity as opposed to the universality of human rights.¹¹⁶ To the extent that regions possess generalizable cultural values, Asia values “communitarian, family-centered and non-individualistic belief systems,” whereas the West values “egalitarianism, individualism and liberal democratic beliefs.”¹¹⁷ The Asian values position highlights that human rights is a Western concept, and thus a form of “post-colonial, cultural imperialism.”¹¹⁸ Asian values proponents use culture “both to assert an exception, or opposition, to a certain type of human rights and to argue that international law should protect their culture.”¹¹⁹

Although some ASEAN countries have attempted to characterize this contestation as coming from ASEAN or Asia as a singular bloc that shares Asian values, neither the Asian nor ASEAN region observes one set of homogenous Asian Values or espouses one particular conception of human rights.¹²⁰ Even within countries that champion Asian Values, perspectives on human rights diverge.¹²¹ Although some scholars argue that relativism may be receding,¹²² the ASEAN Declaration contains language to the contrary.¹²³ Thus, it is uncertain whether the ASEAN Declaration has lain to rest the cultural relativism debate.¹²⁴

3. Lack of political will

The history of ASEAN’s interaction with human rights shows that the

114. Karen Engle, *Culture and Human Rights: the Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 311 (1999).

115. *Id.*

116. *Id.*

117. BADEN OFFORD, *HOMOSEXUAL RIGHTS AS HUMAN RIGHTS* 6 (2003).

118. *Id.* at 32.

119. Engle, *supra* note 114, at 312.

120. Saul et al., *supra* note 11, at 28–31.

121. For example, Singapore has been a vociferous champion of Asian Values, and has insisted that human rights are Western concepts. OFFORD, *supra* note 117, at 5–6. However, Chee Soon Juan, Secretary General of the Singapore Democratic Party (an opposition party) has exerted that “the longing for equality, justice, and freedom is not Asian or Western—it is primordial.” *Id.* at 41.

122. Linton, *supra* note 75, at 482.

123. *See supra* Part I.B.3.

124. A member of the Philippines drafting team described the ASEAN Declaration as the ASEAN Magna Carta that finally ends the remnant of cultural relativism, but the U.S. State Department objects to the ASEAN Declaration precisely on the grounds that it endorses cultural relativism. Renshaw, *supra* note 15, at 558–59.

primary reason for a weak ASEAN human rights system is deeper than a simple lack of capacity to implement. Rather, it is a lack of political will. The process for developing a human rights system for the region has been described as a “long and winding road.”¹²⁵ ASEAN has a long history of producing declarations¹²⁶ without the appetite for binding human rights instruments. The ASEAN Commission is institutionally weak, but not for a lack of trying. Many prior proposals to shape the ASEAN Commission’s powers have failed. For example, “proposals for a commission that constituted comprehensive human rights protection and reporting mechanisms had been denied by authoritarian ASEAN member states.”¹²⁷ The Working Group asked for a commission with both protective and promotional functions, but the ASEAN Commission was restricted to only promotional functions.¹²⁸ Member states also refused the Working Group’s request for a concrete timeframe for the ASEAN Commission’s growth and evolution.¹²⁹ The states also refused to allow elected representatives to be independent from member states,¹³⁰ instead reserving the right to remove them at will.¹³¹ Even though the NHRIs of Indonesia, Malaysia, the Philippines, and Thailand recommended that the ASEAN Commission be empowered to conduct country visits,¹³² the states did not include this ability in the ASEAN Commission’s mandate. The lack of political will for

125. Vitit Muntarbhorn, *A Roadmap for an ASEAN Human Rights Mechanism* (May 28–29, 2003), <http://www.fnf.org.ph/liberalibrary/roadmap-for-asean-human-rights.htm> (last visited July 12, 2014).

126. See Petcharamesree, *supra* note 24, at 47–48 (describing a series of non-binding documents produced by ASEAN that mention human rights).

127. Aguirre & Pietropaoli, *supra* note 30, at 164.

128. WORKING GRP. FOR AN ASEAN HUMAN RIGHTS MECHANISM, *Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body*, <http://www.aseanhrmech.org/downloads/WGsubmissiontoHLP.pdf> (last visited Feb. 10, 2015) [hereinafter Working Group Proposal]; see WORKING GRP. FOR AN ASEAN HUMAN RIGHTS MECHANISM, *Working Group for an ASEAN Human Rights Mechanism Welcomes the Imminent Creation of the ASEAN Intergovernmental Commission on Human Rights*, <http://www.aseanhrmech.org/news/creation-of-asean-intergovernmental-commission.htm> (last visited July 12, 2014) (“It is apparent that the current [ASEAN Commission Terms of Reference] is not what we aspired for.”).

129. The Working Group stated that there should be a “credible timeframe for every stage of the evolutionary process” of the ASEAN Commission. Working Group Proposal, *supra* note 128, ¶ 19.

130. Maruah Singapore, a human rights NGO in Singapore, proposed that the representatives should “act as principals in their own right and not as representatives of their states.” Maruah Singapore, *Position Paper on the Proposed ASEAN Human Right Body* ¶ 33–34 (Sep. 9, 2008), <http://maruahsg.files.wordpress.com/2008/09/maruah-position-paper-10-sept-2008.pdf>.

131. ASEAN Commission T.O.R., *supra* note 22, art. 5.6.

132. Human Rights Nat’l Comm’n of Indon. [Komnas HAM], Human Rights Comm’n of Malay. [SUHAKAM], Comm’n on Human Rights of the Phil. [CHRP] & Nat’l Human Rights Comm’n of Thai. [NHRCT], Position Paper of the National Human Rights Institutions of Indonesia, Malaysia, Philippines and Thailand on Terms of Reference of the ASEAN Human Rights Body 2 (Sep. 11, 2008), available at <http://seanf.asia/index.php/component/attachments/download/33>.

strong mechanisms directly limits the feasibility of proposals for the ASEAN Commission, and this Note's recommendations are made in light of ASEAN's tendency to reject proposals.

II. LESSONS FROM OTHER REGIONAL SYSTEMS

Designing a human rights framework suitable for ASEAN also requires a survey of other Regional Systems, with a particular focus on how well they have worked and why. The three main Regional Systems—European, Inter-American, and African—have all adopted a three-pronged combination: convention, commission, and court.¹³³ Some have argued that a Regional System requires, at the very least, the three-pronged combination in order to be complete.¹³⁴ This is because conventions spell out the terms of states' commitments, commissions promote and monitor implementation, and courts adjudicate disputes and enforce the convention.¹³⁵ The European Regional System has seen much success using this framework.¹³⁶ The Inter-American and African Regional Systems have also benefited from the framework,¹³⁷ though they are still works in progress, as there have been some instances of state non-compliance.¹³⁸

It is important to note that Regional Systems evolve over time and do not apply the same standards and mechanisms to all countries, especially in their early years.¹³⁹ The three main Regional Systems did not adopt the three-pronged combination from the outset.¹⁴⁰ Instead, the progressive

133. Tan, *supra* note 110, at 244. As the European System evolved, it merged its commission into its court. John G. Merrills, *ENCYCLOPAEDIA BRITANNICA*, European Court of Human Rights (ECHR), <http://www.britannica.com/EBchecked/topic/196097/European-Court-of-Human-Rights-ECHR>.

134. See, e.g., Maruah Singapore, *supra* note 130, at 4.

135. See *id.*

136. See HaoDuy Phan, *The Evolution Towards an ASEAN Human Rights Body*, 9 ASIA-PAC. J. ON HUM. RTS. & L. 1, 1 (2008) (arguing that experiences from Europe, Latin America, and Africa show that Regional Systems bring more good news than bad, and the sooner a mechanism is put into effect, the more the population benefits from it).

137. *Id.*

138. For an examination of non-compliance within the Inter-American system, see Alexandra Huneeus, *Courts Resisting Courts: Lessons From the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 504 (describing the implementation crisis of the Inter-American system). For an example of non-compliance within the African system, see *infra* note 162–163 and accompanying text.

139. See Aguirre & Pietropaoli, *supra* note 30, at 177 (noting that the Inter-American and African systems “did not appear fully formed” but “represent a slow evolution of diverse views towards consensus.”); see also PHAN, *supra* note 17, at 171 (observing that participating in the Inter-American, European, and African Courts were optional for member states, and thus the courts only had jurisdiction over some but not all member states in the courts' early years).

140. For the European system, the convention first entered into force in 1953, then the commission was established in 1954, followed by the court in 1959, and in 1998, the commission merged into the

introduction of each prong took a significant period of time.¹⁴¹

For example, it took France, Greece, and Switzerland twenty-four years to ratify the European Convention.¹⁴² The legally binding American Convention only came into force thirty years after the American Declaration, which eleven Organization of American States (OAS) members have not yet ratified.¹⁴³ The African Charter establishing the African Commission was adopted eighteen years after the Organization of African Unity (now African Union) was established.¹⁴⁴ When the European Convention entered into force in 1953, only two countries recognized the European Court of Human Rights' (ECHR) jurisdiction, and the Court did not receive the required number of recognitions to exist until six years later.¹⁴⁵ In addition, there is no fixed order for introducing the three prongs. For example, the Inter-American Commission operated for about ten years without a convention through successfully applying a non-binding declaration.¹⁴⁶

All of the systems first implemented the least intrusive mechanisms and incrementally progressed to the strongest mechanism—the court.¹⁴⁷ For example, the Inter-American Commission had weak mechanisms during its initial years, but later used its ability to publish reports to forcefully indict and investigate member governments,¹⁴⁸ and even heads of states.¹⁴⁹ Even when the courts were eventually introduced, they did not apply to all member countries, but rather only to the subset that had consented through optional protocols.¹⁵⁰ The regional courts also started out with limited

court. PHAN, *supra* note 17, at 162–63. The African system started with the African Charter as its substantive instrument (adopted in 1981), which established the African Commission, and more than two decades later, the African Court was established in 2004. Catherine Renshaw, *Understanding the New ASEAN Intergovernmental Commission on Human Rights: The Limits and Potential of Theory* 18 (2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706451. The Inter-American system started with the American Declaration in 1948, established the commission in 1959 and then a decade later adopted the convention that created the court. PHAN, *supra* note 17, at 165 n.179, 165–67.

141. See *supra* note 140.

142. PHAN, *supra* note 17, at 162.

143. DONNELLY, *supra* note 106, at 96.

144. Renshaw, *supra* note 140.

145. PHAN, *supra* note 17, at 163.

146. *Id.* at 167.

147. See *supra* note 140.

148. See Tom J Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 510–12 (1997).

149. Aguirre & Pietropaoli, *supra* note 30, at 172.

150. See *supra* note 139 and accompanying text.

accessibility.¹⁵¹ Even the now-powerful ECHR did not accept individual complaints directly until 1998, and before then, it was part of a two-tiered system in which cases were funneled through a commission before reaching the Court.¹⁵²

Some scholars have proposed guidelines for Regional Systems based on the three main Regional Systems' best practices and commonalities,¹⁵³ which the ASEAN Commission could adopt. There are several lessons from the European experience. First, the most effective institutions "rely on prior sociological, ideological and institutional convergence toward common norms."¹⁵⁴ Second, the binding constraint on human rights enforcement is the lack of consensus rather than weak institutions.¹⁵⁵ Lastly, while waiting for a supranational court, "promising strategies may be to strengthen domestic civil society and political institutions, and to strengthen traditional international organizations that gather information and arrange consultations."¹⁵⁶

However, of the three main Regional Systems, the African and Inter-American systems are perhaps more useful because these regions share many similarities with Southeast Asia, including "high diversity of political regimes, different levels of economic development, and some serious human rights problems."¹⁵⁷ The African regional system is the newest and weakest of the three main systems,¹⁵⁸ and has faced challenges most similar to those of the ASEAN system. Its substantive instrument, the African Charter, is "riddled with clawback clauses that weaken the protection" of human rights, emphasize individual duties, and advances the idea of collective people's rights.¹⁵⁹ African states also espoused firm notions of state sovereignty and non-intervention in the 1960s and 1970s, during which the Organization of African Unity ignored alleged human rights violations in member states based on the principle of non-interference.¹⁶⁰

151. See *infra* note 152 and accompanying text. Individuals still do not have standing to file petitions directly with the Inter-American and African courts. Simone Wegmann, *Regional Human Rights Systems—A Comparative Analysis*, GENEVA LABORATORY OF POLITICAL SCIENCE 25, 28 (2012), available at <http://www.unige.ch/ses/spo/Publications/GreenLab/Wegmann.pdf>.

152. See Wegmann, *supra* note 151, at 25–26.

153. See Heyns & Kilander, *supra* note 86, at 25–27.

154. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L REL. 157, 178 (1995).

155. *Id.* at 181.

156. *Id.* at 182.

157. PHAN, *supra* note 17, at 161.

158. See DONNELLY, *supra* note 106, at 98.

159. *Id.*

160. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 156–58 (2d ed. 2012).

Yet, despite these difficulties, the African Commission has helped nudge African states towards accepting the legitimacy of regional scrutiny.¹⁶¹

Nevertheless, Africa's experience also cautions against using overly strong mechanisms before the time is ripe. For example, in 2011, the government of Libya used brutal force against civilian protestors in contravention of international human rights and humanitarian law.¹⁶² The African Court's provisional measures against Libya were "completely ignored,"¹⁶³ and although the Court's measures indicate that it will play an important role in addressing Africa's human rights crises,¹⁶⁴ this incidence shows that the risk of noncompliance is real when states lack commitment. When states consent to the court's jurisdiction without the requisite intent to follow through, the Regional System needs to turn to other actors to intervene, a conditionality that may not be realized for less egregious violations. States' perpetual delinquency could result in the institutionalization of noncompliance, detracting from the purpose of the Regional System. In sum, political will could be the single most important contributor to a strong Regional System.¹⁶⁵ Though the institution of mechanisms should not always be conservative, it should at least be informed by the sufficiency of the political will to comply with them.

III. AN INTEGRATED HUMAN RIGHTS FRAMEWORK FOR ASEAN

There is hope that the ASEAN Commission will be strengthened in the coming years, since its terms of reference were due for review in 2014,¹⁶⁶ and civil society and experts have advocated for stronger protection mandates.¹⁶⁷ So far, no changes have been made to the terms of reference, and Myanmar is only likely to conduct the review in 2016.¹⁶⁸

161. DONNELLY, *supra* note 106, at 99. This progress can also be attributed to the agitation caused by several dictators' human rights abuses, concern for human rights in international politics, and the democratization of some African states. VILJOEN, *supra* note 160, at 158–59. For the evolutionary process of the regional human rights framework in Africa, *see id.* at 151–69.

162. Dan Juma, *Provisional Measures Under The African Human Rights System: The African Court's Order Against Libya*, 30 WIS. INT'L L.J. 344, 364 (2012).

163. DONNELLY, *supra* note 106, at 99.

164. Juma, *supra* note 162, at 373.

165. Jack Donnelly, *International Human Rights: a Regime Analysis*, 40 INT'L ORG. 599, 636 (1986).

166. The ASEAN Commission's terms of reference was due for review five years after its entry into force. ASEAN Commission T.O.R., *supra* note 22, art. 9.6. The terms of reference entered into force in 2009. TAN, *supra* note 1, at 157.

167. Nyan Lynn Aung, *Calls Grow For Review Of Regional Human Rights Body*, MYNAMAR TIMES (July 4, 2014), <http://www.mmtimes.com/index.php/national-news/10894-calls-grow-for-review-of-regional-human-rights-body.html>.

168. *Id.*

ASEAN's regional framework must strike a difficult balance between being sufficiently tailored to local conditions while avoiding "the kind of arbitrary, political interpretation of actions that leads to human rights violations in the first place."¹⁶⁹ The framework proposed below is not intended to be the infallible or ultimate model. Rather, it is an attempt to contribute to the ongoing effort to find the right balance, which is an ambitious project, to say the very least.

Current research concerning the ASEAN human rights system recognizes the importance of an evolutionary approach.¹⁷⁰ Indeed, the Working Group recommends an evolutionary process for the ASEAN Commission's development, where the Commission would initially address only women and children's rights and its findings will not be binding.¹⁷¹ However, many other suggestions and ideas are thrown into the field without a comprehensive evaluation of how they could work together. Suggestions range from adopting only soft mechanisms to a full-fledged ASEAN court of human rights.¹⁷² Implementing a range of mechanisms by trial and error without delving into the complicated behavioral logic, effectiveness, and causality theories may seem harmless. However, this approach may undermine the system's purpose.¹⁷³ Sequencing and careful selection of mechanisms is important because some strategies could potentially be incompatible when used in combination. For example, coercive tactics can undercut efforts to foster acculturation.¹⁷⁴

This Note seeks to harness the processes of state socialization to improve regime design, and adopts Ryan Goodman and Derek Jinks' integrated model of state socialization.¹⁷⁵ There are three processes of social influence through which states and institutions may change the behavior of other states: material inducement, persuasion, and

169. Thio, *supra* note 19, at 38 (internal quotation marks omitted).

170. See Renshaw, *supra* note 144, at 18 ("ASEAN would not be the first of the world's regional human rights bodies to achieve an effective human rights body by accretion, not design."); Aguirre & Pietropaoli, *supra* note 30, at 177 (observing that other Regional Systems slowly evolved into what they are today).

171. Working Group Proposal, *supra* note 128, ¶ 17–18.

172. See Aung, *supra* note 167 ("[T]here were two schools of direction in reviewing and amending the terms of reference of [the ASEAN Commission]. The first one was making a radical change and the second was using the existing terms with creative interpretation."); PHAN, *supra* note 17 at 5 (recommending an ASEAN Court of Human Rights); Thio, *supra* note 19, at 78–79 (recommending softer mechanisms such as publicity and persuasion and arguing that a court is not likely to emerge in the foreseeable future).

173. See GOODMAN & JINKS, *supra* note 4, 123–24.

174. See *infra* note 194 and accompanying text.

175. GOODMAN & JINKS, *supra* note 4, at ch.9.

acculturation.¹⁷⁶ Material inducement involves using material rewards and punishments to change the behavior of states, and does not necessarily change the underlying preferences of the target state.¹⁷⁷ Persuasion occurs when states are convinced of the “truth, validity, or appropriateness of a norm, belief, or practice,” and change their minds to internalize the norm.¹⁷⁸ Acculturation is where states mimic the beliefs and behavior of the surrounding culture, “without actively assessing either the merits of those beliefs and behaviors or the material costs and benefits of conforming to them.”¹⁷⁹ Acculturation is driven by cognitive and social pressures to conform to a reference group, and may lead to outward conformity with a norm without privately accepting the norm or changing private practices.¹⁸⁰

The current ASEAN Regional System is likely the result of acculturation.¹⁸¹ ASEAN created the ASEAN Commission in part to catch up with the development of Regional Systems in the rest of the world, but the Commission is institutionally weak by design and the ASEAN Declaration seeks to redefine human rights from an ASEAN perspective. This indicates that ASEAN created its Regional System mainly due to acculturative pressures to conform to human rights developments in the rest of the world, without completely internalizing or agreeing with the substance of universal human rights norms. This decoupling of formal structures from internal demands is an empirical indicator of acculturation.¹⁸² Specifically, the current ASEAN Regional System exhibits category two decoupling—public conformity to global human rights that is disconnected from local practices because of incomplete acceptance.¹⁸³ A major concern is that acculturation is unable to eliminate this decoupling, leaving a perpetual gap between nominal commitment and actual implementation.¹⁸⁴

However, although acculturation can result in seemingly shallow or disingenuous commitment to universal human rights, it can also translate them into meaningful changes over time.¹⁸⁵ That is, decoupling need not be a permanent stage, but rather the first step towards deeper, progressive

176. *Id.* at 22.

177. *Id.* at 23.

178. *Id.* at 24.

179. *Id.* at 22.

180. *Id.* at 27–28.

181. *See* Munro, *supra* note 81, at 22.

182. GOODMAN & JINKS, *supra* note 4, at 43.

183. *Id.* at 140–41.

184. *Id.* at 136.

185. *Id.* at 136–37.

change.¹⁸⁶ Acculturative pressures can continue to compel actors toward conformity in the post-adoption, implementation stage.¹⁸⁷ Furthermore, several processes can translate shallow commitments into meaningful adoption of the global human rights model.¹⁸⁸ These include shifts in political opportunity structure, the “civilizing force of hypocrisy,” escalating demands of global civil society, and state learning.¹⁸⁹ The proposed framework incorporates these processes to accelerate progression. If these processes fail to eliminate decoupling, the framework suggests harnessing other socialization processes such as persuasion and material inducement to reduce the gap between formal commitment and actual practice, after acculturation has inspired commitment to human rights.¹⁹⁰

The proposed framework does not necessarily sacrifice effectiveness for political feasibility. Given ASEAN’s resistance towards adversarial or coercive intrusions into state sovereignty and a lack of political will for establishing binding enforcement mechanisms, the ASEAN Commission should start by engaging governments using mechanisms that appear least intrusive to state sovereignty. Some may argue that we should not give up on pushing for stronger mechanisms just because it is politically difficult. Indeed, material inducements signal that the community condemns the proscribed behavior, and the absence of punishment might signal that the community does not strongly support the norm.¹⁹¹ However, this expressive value of punishment might work only when the proscribed behavior is already “broadly, unequivocally, and manifestly understood as inappropriate.”¹⁹² Premature punishment, prior to the institutionalization of a norm, “can also result in a (greater) backlash by norm violators who feel unjustly penalized.”¹⁹³ Linking information about state violation to penalties can also force such information underground, incentivizing states to conceal the very information that would be useful to acculturation and persuasion.¹⁹⁴ Thus, material inducement and strong mechanisms may not necessarily be the best strategies for inducing compliance.¹⁹⁵ Instead, under certain conditions, “soft law” mechanisms could be more effective in

186. *Id.*

187. *Id.* at 156.

188. *Id.* at 144.

189. *Id.*

190. *Id.* at 160.

191. *Id.* at 175–76.

192. *Id.* at 176.

193. *Id.* at 181.

194. *Id.* at 126.

195. *Id.* at 123.

establishing durable norms¹⁹⁶ that persist even in the absence of material inducement.¹⁹⁷ Thus, progressing from softer mechanisms to stronger ones is not just born out of political necessity but also congruent with institutional design theories and effectiveness.

The proposed framework evolves in stages of increasing strength as sociocultural and ideological consensus builds around protection, and not just promotion of human rights. This allows acculturation to serve as the precursor to persuasion and material inducement, enhancing the effectiveness of the latter two processes.¹⁹⁸ After a global model is adopted by states through acculturation, social movements can persuade governments to uphold their commitments by framing their cause as “congruent with human rights principles that are now part of the nation’s existing value system.”¹⁹⁹ Acculturation can also “develop community-wide schema—for the evaluation of human rights standards, legal violations, and acceptable justifications—thus sharpening the framework needed by a system of material incentives to operate most effectively.”²⁰⁰ Indeed, the evolutionary path of the European Convention on Human Rights and its member states exhibits that the “delayed onset of material inducement” can be beneficial.²⁰¹

The Regional System should avoid reliance on a single entity—the ASEAN Commission. Gaps due to normative dissensus (category two decoupling) may require exposing multiple levels of society to global models of “appropriate human rights behavior.”²⁰² Engaging multiple complementary channels of influence and increasing coordination between them is essential to build support inside and outside ASEAN to create push and pull effects²⁰³ that effectively change state behavior. The push and pull effect is analogized from the Keynesian economic concepts of cost-push inflation and demand-pull inflation.²⁰⁴ In ASEAN’s human rights context, it refers to pressures from ASEAN’s internal and external spheres that “reinforce[] an equilibrium-imperative upon ASEAN to reject impunity by

196. *Id.*

197. *Id.* at 129.

198. *See id.* at 165, 182.

199. *See id.* at 165.

200. *See id.* at 182.

201. *Id.*; see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 314–17 (1997).

202. GOODMAN & JINKS, *supra* note 4, at 161.

203. This Note builds on push and pull effects proposed in 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 LAW* 77, 86 (2009).

204. *Id.*

‘universalizing’ core human rights norms.”²⁰⁵

In sum, the framework recommends a strategic sequence of human rights mechanisms and procedural reforms for the ASEAN Commission complemented by other actors that work along with or independently of the Commission. Section A contains the proposal for the ASEAN Commission’s stages of evolution, while Section B proposes strategies other actors and institutions can adopt to complement the ASEAN Commission.

A. Proposal for the evolution of the ASEAN Commission

A preliminary task for the ASEAN Commission is to assert itself in the norm-building process. Standards must be unified before they can be promoted and implemented through human rights mechanisms. By using its promotional mandate to uphold international human rights standards and enhance regional cooperation,²⁰⁶ the ASEAN Commission could draft general comments (as treaty monitoring bodies do)²⁰⁷ that give quasi-authoritative interpretations of the ASEAN Declaration in a progressive manner that is at least consistent with international human rights standards. General comments are important, especially given the need to unify and clarify the ASEAN Declaration’s fractured standards. The ASEAN Commission should also consider creative alternatives for norm creation, such as mainstreaming, if it meets roadblocks through traditional methods.²⁰⁸

The proposed plan for the ASEAN Commission is divided into human rights mechanisms and procedural reforms. These can be implemented independently and at different times, though they would serve to complement each other. Some of these reforms can be within the Commission’s existing mandate, but most would require further action by ASEAN member states. Procedural reforms may be easier to implement because they may entail fewer sovereignty costs and do not require substantive reforms. They also increase access to information and participation by other actors, which may spur the adoption of human rights mechanisms. The human rights mechanisms promote, monitor, or

205. *Id.*

206. *See* ASEAN Commission T.O.R., *supra* note 22, art. 1.5–1.6.

207. *See* DONNELLY, *supra* note 106, at 83–84.

208. *Id.* at 87–88. Mainstreaming is the process in which “human rights penetrate arenas of action that previously did not explicitly consider human rights questions.” *Id.* at 88. For example, some organizations that do not have explicit human rights mandates, such as the World Health Organization and the World Bank, engage in human rights work and employ human rights language, thus spreading human rights norms through non-explicit processes. *Id.* at 87–88.

implement human rights standards and are intended to be evolutionary; they can be implemented sequentially, independently, and progressively (not just over time).

1. Procedural reforms

The ASEAN Commission can reform (1) access to information and (2) participation.²⁰⁹ However, ASEAN may be unwilling to incorporate them as formal rights.²¹⁰ Nevertheless, the procedural reforms could still be gradually incorporated as more informal guidelines and processes in the existing ASEAN Commission protocol.

First, the ASEAN Commission could expand access to information for CSOs and the public. Currently, ASEAN has a set of guidelines for how CSOs and ASEAN can interact.²¹¹ These guidelines provide that qualifying CSOs may have access to official ASEAN documentation on a selective basis, and some documentation such as declarations and policy statements are available to the public through the ASEAN website.²¹² However, internal decision-making and discussions at the ASEAN Commission are kept secret and released only in the form of press releases.²¹³ The ASEAN Commission should create channels through which the public and CSOs can request for more information, and also make decision-making processes more transparent by providing access to meeting minutes.²¹⁴

Second, ASEAN could relax the rules on participation for CSOs and the public. Currently, qualifying CSOs can submit written statements or recommendations on policy issues to ASEAN and participate in ASEAN

209. These procedural reforms build on the three pillars of procedural rights outlined in the Aarhus Convention. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention]; see *Aarhus Convention: About the Convention: Content*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/env/pp/contentofaarhus.html> (last visited February 27, 2015) (explaining the three “pillars” of procedural rights in the Aarhus Convention); see also Tarik Abdel-Monem, *ASEAN’s Gradual Evolution: Challenges and opportunities for integrating Participatory Procedural Reforms For The Environment In An Evolving Rights-based Framework*, 29 U.C.L.A. PAC. BASIN L.J. 234, 259 (2012) (suggesting application of the Aarhus Convention to the ASEAN Commission). The Aarhus Convention includes a third pillar, justice, which will not be discussed here because it requires creation of judicial or administrative procedures that mostly overlap with the human rights mechanisms suggested *infra* Part III.A.2.

210. Abdel-Monem, *supra* note 209, at 270–71.

211. ASEAN, *Guidelines on ASEAN’s Relations with Civil Society Organizations*, http://www.uni-global-post.org/upload/meeting_in_manila_verweis8.pdf (last visited Feb. 17, 2015).

212. Abdel-Monem, *supra* note 209, at 272.

213. *Id.* at 273.

214. *Id.* at 273–74.

meetings at ASEAN's discretion.²¹⁵ To qualify, CSOs have to be officially affiliated with ASEAN and must "advance ASEAN interests and promote the awareness of ASEAN's principles and activities."²¹⁶ Critics have observed that state governments created many of these qualified CSOs, whose participation in dialogues is merely a symbolic gesture.²¹⁷ To date, the Working Group is the only human rights CSO affiliated with ASEAN.²¹⁸ ASEAN should allow more CSOs to qualify for participation in its decision-making processes. At the very least, the ASEAN Commission could give CSOs observer status in its meetings. In addition, the ASEAN Commission could allow the public or CSOs to submit written comments about their concerns and member state practices, and make these submissions publicly available.²¹⁹ This could function as CSO-driven annual reporting to the ASEAN Commission on human rights issues.²²⁰

Although the Terms of Reference for the ASEAN Commission do not mention participation rights, the ASEAN Charter explicitly refers to principles allowing for public participation in ASEAN community building.²²¹ The state-appointed internal advisory committee for ASEAN—the Eminent Persons Group—has also recommended that ASEAN enhance the participation of CSOs, academic institutions, and Parliamentarians in ASEAN Member States (AIPA).²²² Thus, these procedural changes could have sufficient support to be feasible in the short term.

2. Human rights mechanisms

The existing Regional Systems show that the strength of a Regional System is the consequence, not cause, of the strength of national governments' commitment.²²³ Also, there is an inherent tradeoff between the scope and strength of mechanisms; the wider the scope of countries covered, the weaker the mechanism.²²⁴ The ASEAN Commission has a wide scope of coverage; ASEAN prefers the inclusionary approach where all member states participate in the ASEAN Commission,²²⁵ which covers a

215. *Id.* at 274–75.

216. *Id.* at 275.

217. *Id.* at 275–76.

218. ASEAN, *supra* note 53 at Annex 2.

219. Abdel-Monem, *supra* note 209, at 276.

220. *Id.* at 276–77.

221. *Id.* at 269–70 (quoting the preamble of the Charter and other articles on the purpose of ASEAN).

222. *Id.*

223. See DONNELLY, *supra* note 106, at 99, 108.

224. *Id.* at 110–11.

225. See PHAN, *supra* note 17, at 233.

broad range of human rights issues. Consequently, the strength of the mechanisms will be limited.²²⁶

Thus, even though strong mechanisms such as regional courts would seem ideal for any Regional System, the ASEAN Commission should start with less intrusive, non-judicial mechanisms. The ASEAN Commission may be more successful if it engages governments in ways that appear less intrusive to state sovereignty, and then develop the system in stages. As other Regional Systems did not become strong overnight, the ASEAN Commission “would not be the first of the world’s regional human rights bodies to achieve an effective human rights body by accretion, not design.”²²⁷

The following table describes human rights mechanisms that could be adopted for the ASEAN system over time, in order of increasing strength.

Human Rights Mechanisms	Description
<i>Publishing best practices</i>	Apart from influencing the standardization of norms, ²²⁸ publishing best practices can provide states that are interested in fulfilling their obligations with useful information on effectiveness and implementation. This is a “highly soft” mechanism ²²⁹ that does not have coercive power and depends entirely on the willingness of states to make use of the available information. However, the emulation of best practices could be more durable than policy shifts caused by coercion and could persist even when pressure fades. ²³⁰ Publishing best practices could also lay the foundation for stronger mechanisms, by “establish[ing] standards of conduct around which coercive measures can be organized.” ²³¹

226. *See id.* at 168 (arguing that “[a]n inclusive approach generally produces a body with less power”).

227. Renshaw, *supra* note 144, at 18.

228. GOODMAN & JINKS, *supra* note 4, at 130.

229. *Id.* at 691.

230. *Id.* at 696.

231. *Id.* at 691.

<i>Review of state-initiated reports</i>	This mechanism primarily serves a “limited, noncoercive monitoring” function, ²³² where a state submits reports of its human rights record, actions taken to improve the human rights conditions within its borders, or compliance with a treaty. ²³³ This mechanism works by creating negative publicity (shaming) for states that are noncompliant. ²³⁴
<i>Fact-finding visits and/or investigative reports</i>	Unlike review of state-initiated reports, this mechanism does not give the state as much control over what information is collected on the state’s human rights record. However, it usually requires state consent for the relevant institution to access that information. ²³⁵ The states need not always adopt the recommendations from the investigations, and thus the mechanism depends on the willingness of states to cooperate. ²³⁶
<i>Friendly settlement procedure/mediation</i>	Some major human rights treaties and the Inter-American Commission provide for mediation, or “good offices” as an option for settling disputes and complaints. ²³⁷ This mechanism works through persuasion, where the institution’s high-level officials or commissioners seek to influence state governments by facilitating dialogue about controversial practices. ²³⁸

232. DONNELLY, *supra* note 106, at 82.

233. See *Basic Facts about the UPR*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (Jan. 20, 2015), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

234. DONNELLY, *supra* note 106, at 78.

235. See *Human Rights Bodies: Complaint Procedures*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (July 12, 2014), <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>

(“Inquiries may only be undertaken with respect to States parties who have recognized the competence of the relevant Committee in this regard.”). U.N. Special Procedures have to obtain an invitation from the particular government before conducting a country visit for fact-finding purposes. *Country and Visits of Special Procedures*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (Jan. 30, 2015), <http://www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx>.

236. DONNELLY, *supra* note 106, at 79.

237. Article 48(1)(f) of the American Convention on Human Rights and Article 28(1)(b) of the European Convention of Human Rights call for the friendly settlement of complaints, and Article 41(1)(e) of the International Covenant on Civil and Political Rights allows parties to use its good offices. Patricia Ravenhorst, *International Human Rights Law Versus National Sovereignty: Can The Friendly Settlement Mechanism Relieve The Tension?* 18 (2000) (unpublished M.S. thesis, Duke University) (on file with Library Service Center, Duke University).

238. GOODMAN & JINKS, *supra* note 4, at 127.

	<p>For the Inter-American System, states are incentivized to use this option and reach an agreement.²³⁹ Failure to settle in mediation would allow the Commission to take stronger actions, such as publishing detailed public reports and non-binding recommendations, or referring the dispute to the Inter-American Court, if the state has accepted the Court’s jurisdiction.²⁴⁰ The potential for private settlements makes mediation more palatable than the following mechanisms, which involve public shaming or formal adjudication.²⁴¹</p>
<p><i>Inter-state complaints, individual communications, and inquiries</i></p>	<p>These three mechanisms for complaints are standard for most U.N. treaty bodies.²⁴² The inter-state complaint mechanism allows <i>state parties</i> to complain to a treaty body about alleged violations by another state party.²⁴³ The individual communications mechanism allows “<i>anyone</i>”—individuals, and sometimes NGOs or other representatives—to file a complaint against a state party that has accepted this procedure, for rights violations covered by the relevant treaty.²⁴⁴ After a treaty body receives the complaint, it corresponds with the state, inquires with independent sources, and issues recommendations.²⁴⁵ However, the recommendations are not binding in international law, and states do not have to respond to the body.²⁴⁶ The inquiry mechanism allows a treaty body to initiate confidential inquiries on its own accord “if [it] ha[s] received reliable information containing well-founded indications of serious or systematic violations” of the relevant treaty.²⁴⁷ This mechanism depends on the “cooperation of the [s]tate party . . . at all stages” of the inquiry.²⁴⁸</p>

239. Ravenhorst, *supra* note 237, at 22–23.

240. *Id.*

241. *See id.* at 22–24.

242. *Human Rights Bodies: Complaint Procedures*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited July 12, 2014).

243. *Id.*

244. *Id.*

245. DONNELLY, *supra* note 106, at 85.

246. *Id.*

247. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 242.

248. *Id.*

<i>Binding adjudication</i>	<p>The strongest enforcement mechanism that Regional Systems have employed involves a court that can make findings of violations and legally binding decisions for states subject to its jurisdiction.²⁴⁹ Strong political will is a prerequisite for this mechanism, because it not only allows the human rights institution to publicly criticize the state, but also forces the state to adopt remedial procedures that may be costly. In addition, a binding instrument such as a convention or treaty that outlines the legal obligations of the state parties must precede the court before it can hold state parties legally accountable. The court's jurisdiction is based on state consent, and individuals may or may not have standing to sue states directly through the regional courts.²⁵⁰ The three main Regional Systems all have regional courts.</p>
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The mechanisms above persuade, encourage, or coerce states to comply with norms. They may have spillover effects on norm building but do not directly focus on the latter.²⁵¹ These mechanisms are by no means exhaustive and do not include the strategies that informal and diplomatic channels can employ.²⁵² The abovementioned mechanisms can be introduced in three stages, as categorized below—short-term, mid-term, and long-term.

a. Short-term evolution

Promotional activities are a natural starting point because they are less threatening to the status quo.²⁵³ Since the ASEAN Commission's mandate is mainly promotional, the Commission could use its existing powers to build and standardize norms. The Commission should encourage states to accept norms that are stronger than non-binding guidelines, by encouraging ratification of existing U.N. treaties relating to human rights, or further

249. GOODMAN & JINKS, *supra* note 4, at 123.

250. *See supra* notes 150–152 and accompanying text.

251. While activities that build on or standardize substantive legal norms are essential, the process of norm building is complex and entails a different set of considerations that calls for an independent study. Part III of this Note will offer some general suggestions as to when and where the norm-building process should happen in relation to the rest of the human rights mechanisms, for example, suggesting that the ASEAN Commission provide general comments to the ASEAN Declaration.

252. For example, tying Preferential Trade Agreements with human rights implementation. *See* Hafner-Burton, *supra* note 80, at 278; Hafner-Burton and Tsutsui, *supra* note 93.

253. Thio, *supra* note 19, at 76.

refining the ASEAN Declaration into more concrete practices and guidelines.²⁵⁴ The ASEAN Commission should also engage civil society to help form consensus around norms on national levels.²⁵⁵ As some negotiators have suggested, the ASEAN Commission can also expand on its existing work by creatively interpreting its mandate to perform functions that are not forbidden, such as investigating, reporting, and arbitrating.²⁵⁶

The ASEAN Commission could also start with “soft” mechanisms that have lower costs for state sovereignty, such as developing and publishing best practices. States with better human rights records or stronger political will could find these best practices useful, and if they start adopting them, other ASEAN states may be socialized to follow suit.²⁵⁷ The ASEAN Commission has started to encourage the sharing of best practices through workshops that involve other Regional Systems and civil society.²⁵⁸ However, the contents of these discussions are not publicized on the Commission’s website. This limits the public’s ability to monitor progress. Such best practices should be made public so that civil society can use them as a tool to accelerate state adoption of these practices.

The ASEAN Commission can then introduce the reporting mechanism to facilitate the “open exchange of ideas and experiences.”²⁵⁹ A state’s very process of identifying and reflecting on its human rights practices encourages compliance.²⁶⁰ All ASEAN states, as members of the United Nations, are already required to submit a report of their human rights conditions to the United Nations every four years.²⁶¹ States that have ratified human rights treaties have an additional obligation to submit reports to the relevant treaty-based bodies.²⁶² However, the ASEAN Commission’s mandate does not expressly authorize it to require states to

254. This would help solidify norms and bridge the gap between norms and implementation.

255. This is because domestic human rights development strengthens the Regional System. Aguirre & Pietropaoli, *supra* note 30, at 177.

256. Hadiprayitno, *supra* note 25, at 12–13.

257. This is mostly likely to occur as the social pressure of other states’ actions drive acculturation, where “actors adopt the beliefs and behavioral patterns of the surrounding culture.” GOODMAN & JINKS, *supra* note 4, at 22.

258. Press Release, ASEAN Intergovernmental Comm’n on Human Rights, *The AICHR Workshop on Regional Mechanisms: Best Practices on Implementation of Human Rights (with Partial Support from UN Women and Regional EU-ASEAN Dialogue Instrument)* (Nov. 21, 2014), <http://aichr.org/report/press-release-the-aichr-workshop-on-regional-mechanisms-best-practices-on-implementation-of-human-rights-with-partial-support-from-un-women-and-regional-eu-asean-dialogue-instrument/>.

259. GOODMAN & JINKS, *supra* note 4, at 127.

260. DONNELLY, *supra* note 106, at 82–83.

261. This refers to the U.N. Periodic Review process. *Id.* at 78.

262. *Id.* at 81.

report on their human rights records or review the states' reports.²⁶³ Thus, the ASEAN Commission would need to creatively interpret its mandate to add this mechanism to its toolbox.

To make the state-driven reporting mechanism more palatable, the ASEAN Commission could emphasize that, if given this power, it would serve to complement rather than duplicate the existing reporting obligations to the United Nations and treaty bodies. Some have argued that the reporting mechanism is likely ineffective against states with poor human rights records, since their civil society, which amplifies publicity of the reports, is less robust.²⁶⁴ Also, reporting does not impose sanctions apart from negative publicity, which may be insufficient to overcome the political benefits of violating human rights.²⁶⁵ However, the limited power of this mechanism may work in favor of its adoption. Because states prepare the reports, they have the power to pick and choose what goes into them. This is a chance for the states to skew the narrative in favor of their human rights records,²⁶⁶ at least before the ASEAN Commission reviews them. For states that want to reframe the narrative or are proud of some portion of their records, this opportunity may be too good to decline.

b. Mid-term evolution

After achieving a minimum degree of success at unifying human rights norms within ASEAN, the ASEAN Commission could move on to this stage when its role expands from promotion to protection. Since the ASEAN Commission could submit, in addition to an annual report of its activities, "other reports if deemed necessary," it could creatively interpret this language to include the power to submit investigatory reports of country conditions.²⁶⁷ Alternatively, ASEAN could expressly empower the ASEAN Commission to conduct investigations and determine violations to generate a report, with recommendations for state action. The three main regional commissions have all employed this mechanism,²⁶⁸ which shows that it could be feasible for the ASEAN system as well. Even though the states do not control the narrative of their human rights records at this

263. See Croydon, *supra* note 69, at 29.

264. See DONNELLY, *supra* note 106, at 83 (noting that reporting "is most likely to have an impact where it is not critically needed: that is, where human rights records are relatively good.").

265. *Id.*

266. States can do this through omission of bad facts, emphasizing areas of progress, and/or lying.

267. ASEAN Commission T.O.R., *supra* note 22, art. 4.13.

268. Although the European Commission of Human Rights has ceased to exist (since it merged into the European Court of Human Rights in 1998), it did employ the mechanism discussed here while it was in operation.

stage, they need not adopt the recommendations from the investigations.²⁶⁹ However, as long as the reports are made publicly available, the negative publicity generated from the findings could be sufficient to force states to respond to the situation.

For example, the Inter-American Commission demonstrated the power of the court of public opinion when it published reports of murderous political projects in Latin America in the 1970s.²⁷⁰ The Inter-American Commission construed its vaguely-worded mandate to empower itself with the ability to prepare reports on the human rights conditions in members states.²⁷¹ Using the reporting tool, the Inter-American Commission turned itself into an accusatory “[h]emispheric [g]rand [j]ury, storming around Latin America to vacuum up evidence of high crimes,”²⁷² shocking the repressive governments that created it.²⁷³ The reports drove some officials who were responsible for the violations to cease and flee the country.²⁷⁴ The major challenge would be changing the audience of the reports from being restricted to ASEAN Foreign Ministers²⁷⁵ to the general public. Again, ASEAN would have to muster sufficient political will to allow the public to examine its human rights record.

The ASEAN Commission should also fully utilize thematic or special working groups and subcommittees, such as the ASEAN Committee on Migrant Workers.²⁷⁶ Subcommittees cover a narrower range of issues and could thus employ stronger mechanisms early on, such as making reports and conducting fact-finding visits. These committees and working groups could include experts, CSOs, and academics, thereby delegating the difficult tasks away from the political ASEAN Commission towards more neutral, independent groups that could act more quickly. These working groups could emulate the best practices of the U.N. Human Rights Council’s special working groups and rapporteurs, who are individuals or small groups of independent experts that use this mechanism to investigate

269. DONNELLY, *supra* note 106, at 79.

270. Farer, *supra* note 148, at 511–12.

271. *Id.* at 511.

272. *Id.* at 512.

273. *Id.* at 511.

274. Aguirre & Pietropaoli, *supra* note 30, at 172 n.96 (citing Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights in Argentina*, pts. A(3), B, OEA/Ser.L/V/II.49 doc. 19 (Apr. 11, 1980)).

275. Currently, the ASEAN Commission can only submit reports to the ASEAN Foreign Ministers. ASEAN Commission T.O.R., *supra* note 22, art. 4.13.

276. In 2007, ASEAN established this committee, which meets annually. *ASEAN Committee on Migrant Workers*, HUMAN RIGHTS IN ASEAN ONLINE PLATFORM (Feb. 22, 2014), <http://humanrights.inasean.info/asean-committee-migrant-workers/about.html>.

human rights issues related to specific themes or countries.²⁷⁷

The inter-state complaint mechanism should likely not be used, given its zero utilization rate in treaty-monitoring bodies.²⁷⁸ It is also unimaginable that ASEAN's strong adherence to non-interference and peaceful resolution²⁷⁹ would permit states to accuse each other of violations. However, this stage could allow individuals to file human rights complaints with the ASEAN Commission.

The strength of the complaint mechanism could be limited by giving states the option to resolve the case privately through mediation. Instead of having the ASEAN Commission investigate complaints and make its recommendations public, using the ASEAN Commission as a mediator allows the state to reach a private resolution with the complainant. States would be motivated to respond to complaints and settle in mediation because failing to do so would result in the ASEAN Commission publicizing its findings and recommendations. If states refuse to settle in mediation or respond to the complaint, states will suffer the reputational costs of being declared a violator, but no sanction beyond that. It is difficult to threaten states with anything else, because ASEAN has been reluctant to sanction members, even for gross violations, such as those that occurred in Myanmar.²⁸⁰

Although the international community has largely ignored this procedure,²⁸¹ it could be highly relevant and feasible for the ASEAN system, which prefers peaceful and friendly resolutions with minimal intrusiveness. Furthermore, the Inter-American Commission has employed this mechanism successfully in a dispute involving Argentina, resulting in compensation for the victims.²⁸² Since states have a say in how the alleged

277. DONNELLY, *supra* note 106, at 78–79. There are thirty-nine thematic and fourteen country mandates as of October 2014, spanning civil, cultural, economic, political, and social rights. *Special Procedures of the Human Rights Council*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Jan. 30, 2015), <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

278. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 242.

279. *See supra* Part I.C.1.

280. ASEAN accepted Myanmar's application for membership despite the Myanmar coup and human rights violations associated with it. Thio, *supra* note 19, at 40. For a detailed account of Myanmar's acceptance into ASEAN despite its human rights record, including detention of opposition leader Aung San Suu Kyi, see Arendshorst, *supra* note 109.

281. Ravenhorst, *supra* note 237, at 5.

282. *See* Inter-Am. Comm'n. H.R., *Report on the Friendly Settlement Procedure in Cases 10.288, 10.310, 10.436, 10.496, 10.631, and 10.711*, No. 1/93, OEA/Ser.L/V/II.83, doc. 14 (1993). In these cases, the petitioners argued that the Argentine government failed to provide effective judicial remedies to victims of arbitrary arrest and detention, and the Argentine government agreed to the friendly settlement procedure. *Id.* The negotiations concluded with a commitment by the Argentine government to provide for the payment of compensation to the petitioners, and after the Inter-American Commission

violation is resolved, mediation is less intrusive upon state sovereignty and less adversarial when compared to court.²⁸³ Mediation could also provide a direct remedy for victims.²⁸⁴ However, the ASEAN Commission should closely monitor the mediation process to offset any coercive power differential between the government and the complainants. Mediation also has its drawbacks. Since mediation is confidential and settlements have no precedential value, it has the potential to shield states from national and international scrutiny, and does not contribute to the development of human rights law jurisprudence.²⁸⁵ Furthermore, compensation for victims places a monetary price on violations, allowing the states to purchase violations, treating compensation as the cost of doing business the way they prefer.²⁸⁶

c. Long-term evolution

This is the mature stage, which employs the strongest enforcement mechanism—a court. The regional court will issue binding decisions on states, possibly interpreting a binding regional instrument such as a convention. The ASEAN Commission could push for ratification of a regional convention, with an opt-in provision for submitting to a regional court’s jurisdiction. Although the court’s strength and jurisdiction could be restricted at the beginning, this stage nevertheless requires sufficient political will from states to allow a court to make substantial intrusions into state sovereignty.

Determining when to progress in the evolutionary sequence is a difficult task. It is impossible to propose a one-size-fits-all approach to this question, but lessons from other Regional Systems indicate that political will and ideological consensus are the requisite conditions that determine progress from one stage to another.²⁸⁷ These other Regional Systems counsel patience in waiting for conditions to ripen.

Yet, sometimes a progressive change is needed to prevent stagnation. Generally, softer mechanisms usually do not require much in terms of political will.²⁸⁸ However, to move from promotion to protection necessitates “significant sacrifices” from the states, and typically requires “external material power or internal substantive commitment” to overcome

monitored the government’s progress and actual payment, the Commission closed the case. *Id.*

283. Ravenhorst, *supra* note 237, at 16–17.

284. *Id.*

285. *See id.*

286. GOODMAN & JINKS, *supra* note 4, at 178–79.

287. DONNELLY, *supra* note 106, at 105–08.

288. *Id.* at 105.

“strong barriers at the threshold.”²⁸⁹ In addition, there has to be some level of homogeneity in sociocultural and ideological consensus²⁹⁰ so that the norms can be implemented in a consistent manner. At the very least, there needs to be a regional human rights “culture.”²⁹¹ Though these conditions can be difficult to satisfy, the ASEAN human rights system is not necessarily immobilized. Instead of passively waiting for ideal conditions to materialize, the ASEAN Commission could socialize states within ASEAN to best practices, and other actors and institutions could hasten or create the conditions necessary for the ASEAN Commission’s evolution.

B. Role of other actors and institutions

In other Regional Systems, national institutions, civil society, and external factors propelled the development of formal regional mechanisms.²⁹² These other actors can play an instrumental role in creating the conditions necessary for the ASEAN Commission to progress in the evolutionary sequence. There are four levels of actors and institutions—grassroots, national, regional, and international—that can generate the push and pull effects from inside and outside ASEAN.²⁹³ Grassroots and national efforts within ASEAN can generate an internal push towards building a regional consensus around norms and mechanisms. The international community and the Asia Pacific Forum, a network of NHRIs in the Asia Pacific,²⁹⁴ can generate an external pull from outside ASEAN towards similar ends.

1. Grassroots level: CSOs

CSOs should create a human rights culture that starts at the grassroots level and “permeates both the citizenry and [the] officialdom.”²⁹⁵ To achieve this, CSOs should continue to lobby for increased access to information and participation in official (inter)governmental dialogue and in the ASEAN Commission. The Working Group for an ASEAN Human Rights Mechanism, which currently has participatory rights in ASEAN, should leverage this opportunity to increase the voice of CSOs. CSOs also have an entry point in the Asia Pacific Forum,²⁹⁶ and could use the Forum’s

289. *Id.* at 108.

290. *Id.*

291. Thio, *supra* note 19, at 78.

292. Aguirre and Pietropaoli, *supra* note 30, at 177.

293. *See supra* notes 203–205 and accompanying text.

294. *See generally* Durbach et al., *supra* note 43.

295. *Id.*

296. Durbach et al., *supra* note 43, at 233.

influence on NHRIs to achieve bottom-up advocacy for human rights.²⁹⁷ Also, CSOs should fill the information gap in reporting, documenting, and researching local human rights conditions, so as to generate a concern for human rights from within ASEAN. A strong civil society and a culture of human rights could hold state governments accountable when they make disingenuous commitments,²⁹⁸ such as using the ASEAN Commission as a tool to relieve pressure for real change. ASEAN's creation of the ASEAN Commission and the ASEAN Declaration can result in a "shift in domestic political opportunity structure"²⁹⁹ by opening new avenues for domestic CSOs. Specifically, these formal commitments to human rights legitimize human rights norms and the CSOs that champion them. Furthermore, shallow commitments to human rights norms can evolve into deeper commitments through the "civilizing force of hypocrisy,"³⁰⁰ where the public demand for consistency in official commitments makes hypocritical commitment unsustainable.³⁰¹ CSOs can leverage citizens' expectation that public officials live up to their public rhetoric to turn hypocritical endorsement of human rights norms into actual commitments.³⁰² ASEAN states' shallow commitments to human rights represent partial victories for human rights movements. These victories, rather than relieving pressure from CSOs, can often have a ratcheting-up effect where civil society escalates its demands, enabling a norm that is merely acceptable to become encouraged, and eventually unequivocally required.³⁰³

2. National level: NHRIs and domestic courts

Member states should strengthen existing NHRIs and encourage the formation of new ones. NHRIs are beneficial because they can be monitored through the Paris Principles, which are international standards for NHRIs.³⁰⁴ Since they are also closer to the ground, they can experiment with creative ways to implement international human rights norms while respecting local culture.³⁰⁵ As laboratories for experiments, they can test out which ideas could work for the region, and then transmit them to the

297. See Hadiprayitno, *supra* note 25, at 15.

298. See *supra* note 93 and accompanying text.

299. See GOODMAN & JINKS, *supra* note 4, at 145.

300. *Id.* at 150; Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (Jon Elster ed., 1998).

301. GOODMAN & JINKS, *supra* note 4, at 150.

302. See *id.* at 150–51.

303. *Id.* at 155–56.

304. Durbach et al., *supra* note 43, at 237–38.

305. *Id.*

ASEAN Commission and the Asia Pacific Forum.³⁰⁶

Coordination among NHRIs is essential to prevent fragmented interpretation and enforcement of regionally-recognized rights. The ASEAN NHRI Forum, consisting of the four accredited NHRIs in the ASEAN region, should include Myanmar's NHRI in its activities and help Myanmar's NHRI achieve accreditation status.³⁰⁷ The ASEAN Commission could also support national courts that enforce human rights. For example, Indonesia has a human rights court that tries "gross violations of human rights that consist of genocide and crimes against humanity."³⁰⁸ However, in 2006, a U.N. Commission of Experts found that Indonesia's human rights court's prosecution lacked commitment and expertise in the subject matter.³⁰⁹ The ASEAN Commission could provide these national courts with resources such as training to boost their currently weak capacity for hearing human rights cases.³¹⁰ However, a key caveat for developing NHRIs and domestic courts is that they are highly dependent on states' willingness to grant them the level of independence and autonomy that they require.

3. Regional level: coordination with the Asia Pacific Forum and the ACWC

The ACWC's mandate and functions should be clarified to avoid any overlap with that of the ASEAN Commission, since such overlap could mean that neither organization can be held directly accountable for a lack of progress. This would require coordination between ACWC, the ASEAN Commission, and relevant ASEAN decision makers. A second regional actor is the Asia Pacific Forum. ASEAN regularly invites the ASEAN NHRI Forum to participate in consultations.³¹¹ The Asia Pacific Forum, through the ASEAN NHRI Forum, can influence ASEAN and has begun to function as a watchdog for ASEAN.³¹² Suggested functions for the Asia

306. Croydon, *supra* note 69, at 32.

307. Currently, Myanmar's National Institution does not conform to the Paris Principles, and thus does not have full membership in the Asia Pacific Forum. *See* ASIA PACIFIC FORUM, *supra* note 51. Helping Myanmar's National Institution achieve accreditation would strengthen Myanmar's human rights activism since accreditation requires independence from the state and a minimum standard of competence. *See* INT'L COORDINATING COMM., *supra* note 49.

308. Mahdev Mohan, HUMAN RIGHTS RESOURCE CENTRE, RULE OF LAW FOR HUMAN RIGHTS IN THE ASEAN REGION: A BASE-LINE STUDY⁹⁴, available at http://hrrca.org/system/files/Rule_of_Law_for_Human_Rights_in_the_ASEAN_Region.pdf.

309. *Id.*

310. *Id.*

311. Croydon, *supra* note 69, at 31.

312. *Id.* Some of the areas in which the Asia Pacific Forum has influenced human rights in ASEAN include: "encouragement of NHRIs compliant with the Paris Principles in ASEAN member

Pacific Forum include “becom[ing] the voice that seeks to enhance . . . ASEAN human rights institutions, . . . infiltrating the ranks of ASEAN and seeking to improve from within, generat[ing] greater pressure on the former externally . . . by regularly sending reports to the U.N. on the state of ASEAN’s initiative.”³¹³

4. International level: actors outside ASEAN

International pressure creates political will among ASEAN leaders to address human rights issues.³¹⁴ The U.N. bodies, the international community, and other Regional Systems could continue to assert lateral pressure from outside ASEAN through socialization techniques such as acculturation and persuasion. As international enforcement of human rights strengthens, ASEAN would likely feel pressured to keep up with the rest of the world—even if ASEAN lags behind the rest of the world on a relative level, ASEAN’s commitment to human rights could improve in absolute terms.³¹⁵ Also, as non-ASEAN states learn that ASEAN’s nominal commitment do not signal genuine acceptance of human rights norms, these states could require ASEAN to enact increasingly meaningful reforms to capture the same social benefits.³¹⁶

The international community can also increase the effectiveness of social pressure by increasing the strength, immediacy, and size of the reference group that ASEAN aspires to emulate.³¹⁷ ASEAN currently looks to the other Regional Systems as the reference group, specifically invoking the European Union (EU) as the group to aspire to.³¹⁸ The EU has and should continue to reach out to ASEAN to share its experience and best practices in human rights systems, as an extension of EU-ASEAN political and economic ties.³¹⁹ Other Regional Systems are also engaging with the ASEAN Commission, starting with simple dialogue and workshops.³²⁰

states where these still do not exist; monitoring ASEAN’s delivery on promises such as, for example, the one it made through the Cebu Declaration on the Protection and Promotion of the Rights of Migrant Workers; and correction of AICHR’s shortcomings with regards to power, mandate and output.” *Id.*

313. *See id.*

314. *See Aung, supra* note 167 (describing a Myanmar human rights activist’s view that “without international pressure, ASEAN leaders have no will to address human rights issues”).

315. *See* GOODMAN & JINKS, *supra* note 4, at 141–42.

316. *See id.* at 156.

317. *See id.* at 28.

318. Munro, *supra* note 81, at 23.

319. FOSTERING HUMAN RIGHTS AMONG EUROPEAN POLICIES [FRAME], REPORT ON THE MAPPING STUDY ON RELEVANT ACTORS IN HUMAN RIGHTS PROTECTION 42 (2014), <http://www.fp7-frame.eu/wp-content/materiale/reports/02-Deliverable-4.1.pdf>.

320. Experts from Inter-American, European, and African Regional Systems participated in a workshop to share and exchange best practices. *See The AICHR Workshop on Regional Mechanisms,*

Although non-ASEAN governments cannot fund the ASEAN Commission's protection of human rights, they can channel funds to local CSOs and other avenues that need resources. International civil society should also strengthen its relationship with ASEAN states. For example, encouraging membership in international nongovernmental organizations would publicize local violations and hold state governments accountable.³²¹

CONCLUSION

This Note examines a puzzle—how a region allergic to human rights could design an effective human rights system. It proposes an ASEAN regional human rights framework in light of ASEAN's regional particularities and challenges, its institutional limitations and fractured norms, and lessons from other Regional Systems. The result is a strategic choice and sequence of human rights mechanisms and procedural reforms for the ASEAN Commission, complemented by multilayered institutions and actors that exert external, internal, and bottom-up influence.

Although much care has been taken in designing this proposed framework, it is nevertheless limited by open questions in the institutional design literature. The institutional design of law, such as the degree of delegation and flexibility, involves tradeoffs not yet well understood.³²² Debates about the causal mechanisms through which regimes influence human rights, such as coercion and persuasion, are inconclusive.³²³ Also, there is a lot of variation in how states participate in legal regimes in terms of which regimes they choose and how deeply they commit.³²⁴ This variation, especially in the sovereignty costs of participation, may affect the suitability of legal flexibility mechanisms and is not yet fully explored.³²⁵ The proposed framework would benefit from future research in these relevant areas.

A Regional System has to garner enough state support to exist and function, but it cannot prostrate itself before the states and ignore state violations. The difficulty lies in striking the balance. The proposed framework seeks to help ASEAN's system find the elusive equilibrium—the delicate balance between global norms and local conditions—gradually and sequentially. The framework reconciles international standards and local particularities through selective sequencing and combination of multi-

supra note 258.

321. *See supra* notes 93–95 and accompanying text.

322. Hafner-Burton, *supra* note 80, at 279.

323. *Id.*

324. *Id.* at 271.

325. *Id.*

layered actors. This approach may be relevant to developing human rights systems for regions that still lack them, such as the Arab Middle East and Asia as a whole.