

## CHAPTER 3

# A Legal Analysis of Cultural Necessity to Complete the Human Rights System in ASEAN

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## 1 Introduction

The opinion that a group of states that share history, geography, political views, tradition and culture are more likely to enjoy a shared understanding of human rights was initiated by the United Nations General Assembly to call upon states to establish “regional arrangements” to promote and protect human rights.<sup>1</sup> The goal was to provide remedies in the absence of ones at the national level or where such national mechanisms are inadequate or do not provide the necessary redress. One of the regions attempting to make such efforts is the Association of Southeast Asian Nations (ASEAN) through the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, which aims to promote and protect human rights and fundamental freedoms in the ASEAN region.<sup>2</sup>

1 Resolution 41/153, 1986 on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region.

2 Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Article 6.8.

While regional human rights regimes have been in operation for some time in Europe, the Americas and Africa, in Southeast Asia such a regime has been absent. Despite setting a new stage for rights development in the region (Nugroho, 2013) since its establishment in 2009, the AICHR has not fully functioned as a regional human rights mechanism that meets civil society's expectations.

The AICHR itself has been seen to focus only on promotion and not on actively protecting individuals whose rights have been violated or on addressing past wrongs (Mathew, 2014). One of the reasons is that the Term of References (TOR) of the AICHR provides no explanation on how exactly the AICHR protects human rights in ASEAN. The dialogue on human rights in ASEAN<sup>3</sup> expresses the ineffectiveness of the AICHR to provide protection to the people of Southeast Asia.<sup>4</sup> The AICHR and ASEAN member states are thus called on to significantly improve the human rights commission in order to strengthen its protection mandate to benefit all people in the region.

As a normative study using a statute and conceptual approach, the analysis of this chapter is divided into three parts. Part I will address the ineffectiveness of the AICHR by providing evidence on ASEAN's failure in addressing human rights violations and abuses committed by state parties, such as crimes against the Rohingya and other religious and ethnic minorities in Myanmar, enforced disappearances, extra-judicial killings in the Philippines attacks on the independent media, dissolution of the legal

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3 The high level dialogue was organised by Asian Forum for Human Rights and Development (FORUM-ASIA), ASEAN Parliamentarians for Human Rights (APHR) and Centre for Strategic and International Studies (CSIS).

4 Report from Asian Forum for Human Rights and Development, ASEAN Parliamentarians for Human Rights, Joint Statement: ASEAN needs a stronger Human Rights Mechanism, May 10 2019.

opposition and the shrinking of the civic space and freedom of expression in the region. The situation is deteriorating, but all issues remain unaddressed by the AICHR. The question is why? Therefore, Part II analyzes the view of human rights in the region where the universality of human rights is denied, prioritizing the national interest of each member state through different interpretations of the limitations of human rights. Such differences may weaken the establishment of the mechanism, however in Part III, it is argued that a cultural perspective could help complete the system through a method of interpretation.

## 2 The Ineffectiveness of the System

From 2010 to 2019, there were no significant improvements in human rights made through the activities of the AICHR to protect the people of ASEAN. The human rights situation in the region has been deteriorating, but all the issues remain unaddressed by the AICHR. To describe the physiognomy of human rights in Southeast Asia, the term ambivalence has been used (Muntarbhorn, 2002). There are many factors that contribute to this, such as substantive and procedural factors. There are three factors regarding the limitations of the substantive factors.

First is the the narrow interpretation of the principle of sovereignty and nonintervention (Jati, 2017). In Southeast Asia, human rights and international supervision by human rights mechanisms have always been viewed as a threat to the sovereignty of the state and therefore considered a domestic issue (Caballero-Anthony, 1995). AICHR representatives strongly adhere to the principle of noninterference (Hsien-Li, 2012) where there is a high degree of respect for the right of every member state to lead its national existence free from

external interference, subversion and coercion. According to many Southeast Asian states, no one can dictate or make judgments on others about human rights, and the international community has no right to intervene, including the AICHR. Indeed, the deeper regional integration is, the more vulnerable ASEAN member states are to exposing their domestic affairs to each other and the world. Being open is a constitutive implication of regional integration. This, however, scares some countries in ASEAN as they will be the subject of international criticism (Wahyuningrum, 2014). In relation to this, ASEAN member states have been reluctant to engage in direct confrontation with the United Nations (UN), stressing national sovereignty and protesting western dominance in the UN (Eldridge, 2002). Furthermore, several ASEAN governments have also criticized the 1948 Universal Declaration of Human Rights because many member states were not yet independent and therefore had no part in its formulation (Gai, 1995).

Second is the limitations of human rights that are incompatible with international human rights instruments. Limitations of human rights are also regulated in the ASEAN Human Rights Declaration (ADHR). Similar to other regional human rights charters,<sup>5</sup> the exercise of human rights and freedoms can be limited by law for the purpose of securing the recognition of human rights and the freedom of others, which meet the requirements of national security, public order, health, public safety, morality as well as the general welfare of the peoples of a democratic society.<sup>6</sup> However, while international law subjects such limitations to three strict tests, the condition of legality, legitimacy and proportionality, this

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5        Such as the African Charter on Human and People's Rights and The European Convention on Human Rights.

6        ASEAN Human Rights Declaration, Article 8.

is not the case in ASEAN. Moreover, different from other international human rights instruments, the AHRD does not apply this restriction to a selective number of rights, but to every right.

Third is the lack of determination to ratify core treaties. The ASEAN family is divided into two groups on the issue of human rights. Indonesia, Malaysia the Philippines and Thailand are positively more open to human rights and norm change. They have ratified many of the core international human rights treaties, have national human rights institutions in place and in terms of democracy and development are not at the bottom of the scale. On the other side is Cambodia, Laos, Myanmar and Vietnam, a distinct group in which the standard of living, GDP, human rights and standards of rule-based governance are substantially below other ASEAN member states (Jones, 2008). Brunei and Singapore are somewhere between the camps (Koh, 2008). Despite that the TOR of the AICHR clearly states that ASEAN member states are encouraged to accede and ratify international human rights instruments,<sup>7</sup> there is a lack of determination among them. Among all 10 members, only Indonesia, Cambodia and the Philippines have adopted all major international human rights treaties.<sup>8</sup>

In the view of establishing a regional human rights regime and improving human rights standards,

7 Terms of Reference of ASEAN Intergovernmental Commission on Human, Article 4.5

8 International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination Against Women (CEDAW); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Protection of the Rights of Migrant Workers (CMW), Convention on the Rights of Persons with Disabilities (CPRD) and Convention on the Protection of all Persons from Enforced Disappearance (CPED).

	ICCPR	ICESR	ICERD	CEDAW	CAT	CRC	CMW	CPRD	CPED
<b>Brunei</b>	-	-	-	A	S	A	-	R	-
<b>Cambodia</b>	A	A	R	A	A	A	S	R	A
<b>Indonesia</b>	A	A	A	R	R	R	R	R	S
<b>Laos</b>	R	R	A	R	R	A	-	R	S
<b>Malaysia</b>	-	-	-	A	-	A	-	R	-
<b>Myanmar</b>	-	R	-	A	-	A	-	A	-
<b>Philippines</b>	R	R	R	R	A	R	R	R	-
<b>Singapore</b>	-	-	R	A	-	A	-	R	-
<b>Thailand</b>	A	A	A	A	A	A	-	R	S
<b>Vietnam</b>	A	A	A	R	R	R	-	R	-

Figure 3.1. [ASEAN Member states Commitment to International Human Rights Law]

Key: - : (neither signed nor ratified); A: Accession; S: (signed but not ratified); R: (Signed and Ratified)

ratification of international human rights treaties is a critical factor (Hashimoto, 2004) because it displays a prima facie acceptance to international human rights norms. However, mere ratification is no guarantee for acceptance or implementation of international human rights norms. The above table may give us an idea of the national interest of each state through its way to consent to be bound to certain international conventions. Moreover, the substantive reservations to several conventions by some member states shows us the differences and nonuniform understanding and approach among ASEAN member states.

On the other hand, there are also two procedural factors, namely the structure of the AICHR with a lack of independence and weak mandates for protection (Phan, 2012).

First, there is a lack of independence in the system. Any human rights mechanism requires independence from political organs, such as national government. This standard requirement should also apply to ASEAN through the AICHR. However, this is not the case given



that the AICHR is a consultative intergovernmental body.<sup>9</sup> Despite the need to be able to provide opinions and receive information independently from its constituent governments, as a consultative body the AICHR is structured in a way that functions to accommodate its close relationship with member states' governments. This is problematic as the AICHR functions in a way that allows the promotion and protection of human rights to be influenced by the political will of its member states. The conflict of interest between the AICHR's members, governments and victims of human rights abuses interferes with the AICHR's impartiality when performing its duties.

Second is the broad and weak mandates of the TOR. The ASEAN human rights regime mainly focuses on promoting human rights rather than protecting them (Beyer, 2015). Some argue that the mandates were formulated using the promotion first, protection later approach (Wahyuningrum, 2014), where it focuses more on the promotional aspect. So far, AICHR activities have only ranged from disseminations, workshops and discussions with stakeholders, namely governments, the people and NGOs. The Rohingya crisis, for example, was not touched on by the AICHR. Instead, environmental rights have been the focus for seminars and workshops in Myanmar (Arifin, 2016). The AICHR cannot move beyond this area. None of the stipulations in the TOR of the AICHR talk about the capacity to monitor human rights practices in ASEAN member states, such as the power to investigate, monitor or enforce.

The AICHR does not provide a protective mechanism in receiving complaints from individuals or groups (Muntarbhorn, 2013). That is why the AICHR has not actively been involved in dealing with in human rights

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9 Terms of Reference of ASEAN Intergovernmental Commission of Human Rights, July 2009, Article 3.

violations in the region. The case of the mistreatment of the Rohingya in Myanmar has been one of the examples where ASEAN and especially the AICHR have been criticized for being unable to fully address the continuation of human rights violations in the region (Gamez, 2017). In other words, the AICHR fails to recognize the concept of the responsibility to protect. The summary of the factors, both substantive and procedural, that contribute to the ineffectiveness of the ASEAN human rights system can be seen in the table below.

No.	Substantive Factors	Procedural Factors
1.	Narrow interpretation sovereignty and principle of nonintervention	Lack of independence in the human rights system
2.	Limitations of human rights incompatible with international human rights instruments	Broad and weak mandates of the AICHR TOR
3.	Lack of determination to ratify core human rights treaties	

Figure 3.2. [Contributing Factors to the Ineffectiveness of the ASEAN Human Rights System]

On the other hand, while some core international human rights treaties have been signed by some ASEAN member states, implementation remains poor (Aguirre & Pietropaoli, 2012).

### 3 The Interpretation of Cultural Relativism in Southeast Asia

The debates on the universalism versus the cultural relativism of human rights are dominated by two schools of thought (Steiner, Alston, & Goodman, 2007). The main question of the debate between the extremes is whether cultural adjustments are needed to legitimate human rights action, or that this cultural diversity would form a threat to the effective guarantee of universal human rights



standards (Addo, 2010). The first school supports the idea that human rights are universal, i.e. that they apply to all human beings regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Tomuschat, 2008), and that all human beings are born free and equal in dignity and rights.<sup>10</sup> The second school claims that human rights are not universal (Tharoor, 2000), but rather can be differentiated on the grounds of national and regional particularities.<sup>11</sup> This concept of cultural differences challenged the dominant paradigm of universal human rights by positing a differential and hierarchical philosophy of rights directly in opposition and offering an alternative to Western hegemonic rights values (Jones, 2014). Therefore, cultural relativity intends to weaken the very universality of human rights. As there is no universal culture, in consequence there is no universally valid standpoint on any moral issue. Furthermore, because human rights are moral entitlements, they cannot have a universal quality, but must vary according to the cultural environment in which they originate and function (Davidson, 2001).

The majority of Southeast Asian countries, despite being parties to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>12</sup> -- all of which recognize and uphold the principle of universality -- clearly support the cultural relativism school of thought. This is closely related to the discourse of “Asian values”.

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10 Universal Declaration of Human Rights 1948 Article 1.

11 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 17 December 1991, para 8 (Bangkok Declaration).

12 See Figure 3.1, ASEAN Member states Commitment to International Human Rights Law, p.4.

The concept of specific Asian values is often used as a reason or even a legitimation as to why Asian states do not adopt human rights. In essence, Asian values have been used to promote cultural relativism as an argument against the universality of human rights. Cultural relativism, embodied in the notion of Asian values, has often been used as an argument to dismiss the western concept of democracy and human rights as unsuitable for the Southeast Asian context (Mauzy, 1997).

Evidence of this can be found in the text of several legal documents. Through the Bangkok Declaration,<sup>13</sup> Asian countries ‘recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of internal norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

Similarly, the TOR of the AICHR states that:

1. “To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.”

This position was reconfirmed by the secretary-general of ASEAN at an international event in 2010, stating that (Pitsuwan, 2010):

“I think we have to go back to the very fundamental concept of individual rights and human rights where I think the two traditions, East and West, have some fundamental differences. I am saying this not arguing that we do not have universal norms for human rights. I’m just saying that universal norms are being evolved and developed to serve our particular stages of social, economic and political development.”

The AHRD adopted in November 2012, which saw international criticism toward its culturally relativist aspect (Clarke, 2019), also mentioned that:<sup>14</sup>

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13 The Bangkok Declaration 1993, Article 8.

14 ASEAN Human Rights Declaration, Article 7.

“At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”

The AHRD requires that individual rights be balanced by corresponding duties, which is used as a tactic to impose restrictions on rights and freedoms.<sup>15</sup> Furthermore, the instruments recognize that human rights and freedoms can be conditioned by measures designed to uphold national law, national security, public order, public health, public safety and public morality,<sup>16</sup> without subjecting these measures to tests of legality, legitimacy and proportionality. The legal provisions above along with public statements show the paradox of universal human rights in ASEAN, which is recognized as universal in principle but particular in application. They are frequently cited to illustrate the cultural relativist stance, or situational uniqueness, of Asian governments when it comes to human rights. This limits the universal implementation of human rights in favor of cultural interpretations. In other words, ASEAN promotes and protects human rights and fundamental freedoms as long as they do not contradict the history, politics, religions or economic context of the member state in question.

The rights of ASEAN’s peoples must be compromised so as to conform to a particular history, political system or set of development goals (Bui, 2016). While some argue that the establishment of a human rights system in ASEAN is slow, one may see this through a different view using the so-called margin of appreciation doctrine.

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15 Ibid, Article 6.

16 Ibid, Article 8.

## 4 The Cultural Necessity to Establish a Human Rights System

The establishment of a human rights system will not be effective without a human rights court. Courts may offer effective enforcement of human rights in line with regional needs, experiences and legal traditions. In Southeast Asia, the need for a human rights court to promote legally enforceable human rights is crucial. One issue is the ASEAN Charter shows a lack of a clear enforcement mechanism and that there is no provision for suspension or expulsion of members who do not comply with the Charter. Furthermore, the purpose of the AICHR to protect human rights seems to have lost its way because it lacks an institutional framework in the region. But even if the protection mandates of the AICHR were strengthened, it still could not replace the role of a court because only courts are able to provide legally binding decisions. Thus, while commissions might offer remedies, the establishment of a court is needed to provide effective and enforceable remedies.<sup>17</sup>

Much has been discussed by scholars on the necessity of a court to complete the human rights system in ASEAN, including the improvements needed to accommodate such a court. In this regard, it is important to note that localized circumstances such as cultural differences, religious traditions, economic development and the nature of legal and political institutions makes implementation effective and enforceable only when it finds support in localized and regional particularities. However, these differences have caused a lack of a uniform approach to interpret human rights norms among ASEAN member states. Other regional particularities also face this

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<sup>17</sup> Ibid, p.143

situation. In Europe, it is impossible to find a uniform European stance on moral issues to guide the human rights court's interpretations (Peerenboom, 2006). Taking this into consideration, the important question is what about ASEAN? How will the court in Southeast Asia interpret human rights? Does using cultural aspects undermine a universal standard? To analyze this, one might look into the application of international law principles and standards within ASEAN, as well as the application of cultural values and differences through the margin of appreciation doctrine and how this could affect the interpretation of judges in a future Southeast Asian human rights court.

## 5 ASEAN Human Rights Standards

The international community adopted the Vienna Declaration and Program of Action (VDPA), which was endorsed by all states, including ASEAN member states. States affirmed unreservedly that the universal nature of all human rights and fundamental freedom was beyond question. They agreed that it was the duty of states, regardless of their political, economic and cultural systems, to promote and protect all rights and freedoms. This declaration was widely seen as having firmly rejected the contention of a very few that human rights are relative in nature. This was one of the key aims of the Vienna Declaration: to forge a new vision for global action on human rights into the next century. Yet the AHRD attempts to undo the Vienna consensus by requiring that human rights be conditioned on regional and national particularities. ASEAN member states generally guard sovereignty and cultural relativity specific to each member state. This fragmented positioning was represented in the AHRD and AICHR negotiations leading up to the AHRD

(Jones, 2017), through the so-called Asian ways or values.

The use of Asian ways or values in the AHRD can be seen as a specific form of cultural relativism. Asian values was a term devised by several Asian leaders and their supporters to challenge civil and political freedoms of a Western style (Bauer & Bell, 1999). However, the Asian way is seen as a fatally flawed document where scholars and experts argued that it undermined rather than reinforced universal standards (Ilona, 2012). Several major flaws include:<sup>18</sup> (a) imposing overarching limitations and conditionality on the enjoyment of rights; (b) subjugating rights to national laws; (c) a restricted and excluding provision for nondiscrimination; (d) failure to protect the rights of specific groups; and (e) provisions for specific rights that are vague, weak or otherwise fall below international standards.

While the VDPA did express that the significant different backgrounds should be borne in mind, it does not impose any obligation to consider human rights in regional or national contexts. On the contrary, it stressed that it was the duty of states, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Under international law ASEAN member states have the duty, regardless of their political, economic or cultural systems, to respect and protect all human rights and fundamental freedoms.<sup>19</sup>

Furthermore, international law allows certain rights to be subjected to limitations only under specific and narrowly defined situations. For example, under the

18 Civil Society Joint statement, ASEAN Human Rights Declaration must not provide protections lower than international human rights law and standards, Sept. 13 2012; See also Report from UN Human Rights Council, ASEAN Human Rights Declaration should Maintain International Standards, Nov. 16 2012

19 The ASEAN Human Rights Declaration, Questions and Answers, International Commission of Jurist, July, 2013



ICCPR, to which 167 states are party to, including six of the 10 ASEAN member states, only a few rights are subjected to such limitations. These include freedom of movement, freedoms of association, expression and peaceful assembly and freedom to manifest one's religion. But even limitations on these rights are subject to tight conditions of necessity and proportionality: they must be strictly necessary for protection of national security, public order, public health or morals or to protect the rights of others. The AHRD extends that all rights have the possibility to be limited, even those that are absolute under international law, such as freedom from torture and cruel, inhuman and degrading treatment and punishment. Rather than applying a condition of strict necessity, principle 8 merely states that limitations have to be imposed for the purpose of meeting the just requirements of national security and other purposes. The declaration, unlike the ICCPR, allows for limitation on the bases of general welfare of people in a democratic society. This category is so broad that it could be interpreted to encompass almost all state activity. This was also emphasized by the Human Rights Council experts where restrictions may not put in jeopardy the right itself or apply to rights that are non-derogable under international law.<sup>20</sup> However, Southeast Asian countries continue to support the cultural relativism approach.

## 6 Cultural Necessity and Margin of Appreciation

Differences in interpretation on human rights among states exist based on the sovereignty of each state. However, it is important to analyze how states could meet

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<sup>20</sup> Report from UN Human Rights Council, ASEAN Human Rights Declaration should Maintain International Standards, Nov. 16 2012

the international standard, at least as a minimum standard, if there is any. How could it be evaluated? And to what extent is it legitimate? To mediate this issue requires the margin of appreciation doctrine.

The margin of appreciation is a doctrine or key concept in determining whether limitations upon human rights are necessary in a democratic society. This doctrine is designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of contracting states within the European context (Bakircioglu, 2007). It seeks to balance the primary of domestic implementation with supranational supervision (Baik, 2012). It is applicable in the absence of a uniform European conception of the implications of the convention (De Schutter, 2010). Member states enjoy a certain margin of appreciation in asserting whether and to what extent differences in otherwise similar situations justify different treatment in law, with European supervision embracing both the law and the decisions applying it. Under this doctrine, the jurisprudence of the European Court of Human Rights (ECHR), there is a realistic judicial self-restraint in recognition of the obligation to respect within certain bounds, the cultural and ideological variety, as well as the legal variety characteristic of Europe (Steiner & Alston, 2000). In addition, the margin of appreciation doctrine has been transplanted to the jurisprudence of other international human rights mechanisms, such as the United Nations Human Rights Committee and the Inter-American Court of Human Rights.

Hence, it allows states to have a measure of diversity in their interpretation of human rights treaty obligations. The doctrine refers to the latitude that national authorities enjoy in evaluating situations and the provisions of the ECHR. It is also approved as the minimum standard by the member states of the Council of Europe, which have

more or less common traditions of democracy and human rights. The margin of appreciation doctrine has been developed to find the right balance between the national approach to human rights and the uniform application of the values of the ECHR.

In response to the explanation above, Asian states do not take uniform stances toward morally controversial issues framed as human rights issues. The issue of capital punishment, for example, differs, where Thailand, Singapore, Malaysia and Indonesia retain the death penalty, while the Philippines and East Timor have abolished it. This is evidence of the lack of general consensus that is necessary to support customary international legal norms. This sharp divergence in matters implicating public morality is to be expected in a plural world. The margin of appreciation leaves a matter to the domestic deliberation of contracting states where little or no common ground exists between them with respect to sensitive issues. This stems from the cultural, historical and philosophical differences of these states. In a more diverse global setting, a global margin of appreciation may be deployed to manage politicized rights claims in acknowledging fundamental value divergences and the importance of pluralism, democratic politics and subsidiarity (Thio, 2018).

Southeast Asia needs to have a regional human rights court, the jurisdiction of which is to assess whether member states apply the so-called Asian values enshrined in the ADHR proportionately in pursuit of international human rights law (Rachminawati, 2014). ASEAN can nonetheless retain an analogous margin of appreciation. Article 8 acknowledges the margin of appreciation by requiring human rights be exercised with due regard to the human rights and fundamental freedoms of others.<sup>21</sup>

21 Thus the margin of appreciation doctrine allows states a certain measure of discretion in such instances. See J. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights*:

The scope of the margin of appreciation depends on the nature of the rights in question. The scope becomes wider where there is no consensus among member states as to how a particular right should be protected in a particular situation, as well as where important state interests are at stake. In this way, the margin of appreciation offers a way of mediating between the need to protect human rights and the need to respect state concerns about loss of sovereignty, particularly in relation to critical issues such as national security. To balance national sovereign concerns against regional supervision of human rights, the European experience provides nuanced lessons for Southeast Asia, as greater attention is paid there to working out the interaction between sovereignty and the external human rights mechanism (Saul, 2011).

## 7 Conclusion

Both substantive (the narrow interpretation of sovereignty and the principle of nonintervention, the limitations of human rights incompatible with international human rights instruments and the lack of determination to ratify core human rights treaties) and procedural factors (the lack of independence in the human rights system as well as the broad and weak TOR of the AICHR) contribute to the ineffectiveness of the ASEAN human rights system.

While several international conventions on human rights have been signed and ratified by ASEAN member states, the implementation of those rights and the responsibility assigned in the conventions remain poor. Furthermore, while recognizing the universality of human

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Threat to the Rule of Law, 2005, *Columbia Journal of European Law*; A Legg, *The Margin of Appreciation in International Human Rights Law*, 2009

rights, the interpretation among ASEAN member states continues to be based on cultural relativism, meaning that the promotion and protection of human rights are based on aspects such as history, culture and religion. However, to complete the human rights system in the region, the establishment of a human rights court is necessary. Thus, there is a need to set a standard that is agreed on by the member states. As there is an absence of such an agreed standard, the margin of appreciation doctrine initiated by the ECHR could be a basis to interpret human rights according to conditions in Southeast Asia.

Regarding the human rights commission, the AICHR needs to make major institutional changes and take genuine steps toward fulfilling the promises behind its establishment. The AICHR should actively devise methods and strategies to be the human rights standard-setting institution of ASEAN. If the standard is based on cultural necessity, then the region needs to have a common baseline on how human rights in the AHRD are defined, interpreted and implemented. The use of the margin of appreciation doctrine may be an alternative way to resolve the standard that can contribute and accelerate the development of ASEAN's human rights system. However, further research on this matter needs to be done.

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