
Theorising Human Rights: An Analytical Framework for ASEAN

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“[there was no] issue that took up more of our time, [no issue] as controversial and which divided the ASEAN family so deeply as human rights” Singaporean ambassador at large Tommy Koh

Abstract: *The ASEAN Intergovernmental Commission on Human Rights set up in 2009 signaled a path breaking achievement for human rights. It was the first of its kind, in the last region of the world to adopt a mechanism for human rights protection. However, with the ASEAN Human Rights Declaration of 2012 hopes of a robust and effective regional mechanism for the promotion and protection of human rights in Southeast Asia were essentially dashed. The perplexing question to which an increasing number of academics and scholars are asking is why establish a mechanism that only promotes and offers little or no human rights protection? This paper seeks to provide a theoretical framework for future research and analytical conceptualization of regional human rights and its attendant mechanisms in ASEAN. Beginning with a critique of mainstream theories realism and constructivism, this paper will move on to offer a blended version of regime analysis for studying AICHR. Hopefully this will provide clarity and a theoretical pathway for future substantive research on the absence of human rights protection in the newly established regional human rights mechanism.*

Keywords: ASEAN, AICHR, regional integration, Regime Theory, IR Theory

1. Introduction

Discourse surrounding ASEAN human rights dates back to the early 1990's encompassing international dialogue, relativist 'Asian Values', regional crisis and rejuvenation to the first regional mechanism for human rights in Asia and its subsequent blueprint for a declaration of rights (Hsien-Li

2011: chapter 1).¹ With increasing regional integration in ASEAN the nature of regionalism integration efforts in Southeast Asia is becoming ever more prescient to study. Within this context, the ASEAN Charter and creation of Communities covering expansive policy domains ranging from the material (economics and trade), to substantive (security and immigration), to moral/ethical (human rights) are being ever more institutionalized in this march toward regional integration. This has increased the need for frames of theoretical analysis to best suited for the study of ASEAN and its regional projects.

Human rights in ASEAN is a highly contentious issue representing an interesting puzzle given the disparate nature and standing of its member states in terms of political systems and, economic development.. The ASEAN Charter seeks to provide an organisational framework around which to bring together state driven conservative politics and highly cosmopolitan objectives such as democracy and human rights. The larger question is how to reconcile these seemingly paradoxical principles within the very real context of ASEAN. Presently the groupings' members include the semi-liberal Philippines, the military junta in Myanmar, several single party communist states, an absolutist Islamic Sultanate and a coup installed government of Thailand. ASEAN is a puzzle engendering schizophrenic qualities but nonetheless has proceeded to create a human rights mechanism and produce a declaration inclusive of 3rd generation rights.

This paper seeks to find a pathway for studying ASEAN by combining elements of agency and structure of regime theory in order to provide a framework for studying AICHR that allows for a nuanced view into the broader dynamics of regional human rights integration. The aim is to provide a framework which goes beyond structural analysis and considers internal dynamics of personal agency that allows for multi-actor engagement outside of AICHRs structure to

¹ It should be noted that "Asia" is a highly contested terminology which can refer geographically to the Middle East, South/Central/East Asia and everything in-between. However, for this paper "Asia" pertains to Northeast, South and Southeast Asia; two of which have representative sub-regional organizations, ASEAN and SAARC respectively.

influence the regional human rights mechanism. To achieve this, this paper is organized to first provide a short historical background to the human rights discourse and institutionalization in ASEAN. From there it will offer a critique of major existing theoretical methods demonstrating both their strengths and weaknesses. Leading on from this the paper will attempt to construct an alternate pathway for future research by providing a regime theory framework for analyzing ASEAN's regional mechanism for human rights, AICHR.

2. Human Rights and ASEAN

Considerations for a human rights regime in ASEAN date back to the immediate post-Cold War period with various regional NGO meetings running up to the 1993 World Conference on Human Rights in Vienna. The 1993 NGO Declaration put forth many progressive rights (indigenous persons), substantive recommendations (women's rights and protection, abolishing the death penalty, preventing torture), administrative/legal (enforcing and changing laws, judicial independence) as well as advocacy and support for training, planning and awareness. Organizationally, the declaration recommended establishing a regional human rights mechanism that was open and transparent with powers of investigation, reporting, receiving petitions, independence from government and inclusive of NGO recommendations for personnel/reporting and a separate adjudication mechanism (Bangkok Declaration 1993). The Vienna Declaration and Programme of Action adopted these recommendations with particular reference to the need to consider creating regional and sub-regional human rights mechanisms where these did not already exist, thus inferring Asia by default (VDPA 1993: para 37). Immediately following Vienna, ASEAN ministers at their 26th ministerial meeting in 1993 reiterated wholesale the bargain in Vienna while stating that they "should also consider the establishment of an appropriate regional mechanism on human rights" (ASEAN 1993: para 18).

In 2004 ASEAN ministers drafted the VAP which proposed modest steps for the promotion and protection of human rights in ASEAN. The VAP proposed connecting, networking and building linkages among existing

mechanisms and organizations while addressing migrant workers through consideration of an instrument establishing thematic specific commissions for women and children (VAP 2004: Annex 1). Gains of the VAP took place against the backdrop of calls by Singapore and Thailand to reinvigorate ASEAN integration for fear of the organization sliding into irrelevance and most notably for increased economic integration (Collins 2007: 204, Ravenhill 2003). The VAP was a direct outcome of the consensus arrived at in 2003 via the Bali Concord II which stipulated the creation of an ASEAN Community comprised of a tri-pillar structure reminiscent of the European Union post Maastricht (ASEAN 2003: Article 1). Implicit in this early blueprint document is the primacy of economic prosperity and linkage between economics and political stability. This is demonstrated by the recognition that “sustainable economic development requires a *secure political environment* based on a strong foundation of mutual interests generated by *economic cooperation and political solidarity*” [italics mine] (Ibid Preamble: supra 9). Furthermore, the understanding of “Prosper Thy Neighbour” and the abovementioned linkage shows that separate pillars of an ASEAN Community are not mutually exclusive as issue areas. In fact they support one another in order of primacy, importance and ability to find common ground. This can be evidenced by the order of arranging the community blueprints and ground work within BCII as Communities beginning with Security, followed by Economic and lastly almost as an afterthought Socio-Cultural. If one considers the ASCC is based around functional cooperation generated through project based undertakings rather than at a high political level of policy (ISEAS 2004: 15).

In 2005 in Kuala Lumpur, ASEAN officially decided to push integration forward by committing to establish an ASEAN Charter. It commissioned an Eminent Persons Group to draw up plans for a constitutional document to consolidate ASEANs fragmented instruments (ASEAN 2005: supra 10). The EPG was thus charged with creating a blueprint document which mentioned human rights no less than 15 times in its report citing the need to include this into principles, objectives, people centering and most importantly to realize ASEANs Vision (ASEAN 2006a). It was

decided in 2006 at the 39th AMM that a High Level Task Force would be commissioned to create a working draft that was “bold and visionary” (ASEAN 2006b). With positive recommendations from foreign ministers towards drafting, the HLTF called for a human rights body leading to a Terms of Reference for the High Level Panel to create a HRB (Thanh 2009: 103). The recommendation for creating an ASEAN Human Rights Body took place against the understanding that human rights as an internal affair took on external foreign policy and diplomatic significance. Hence creating a HRB with standards for protection and promotion would ensure regional autonomy so that human rights would “not be an excuse for outsiders to intervene into ASEAN’s own affairs” (Ibid). With the signing of the ASEAN Charter in 2007, human rights came into the legal mainstream with the go ahead to create a HRB (ASEAN 2007: Article 14). Subsequently, in 2008 at the 41st AMM the decision was made to commission the HLP with its ToR for the creation of an ASEAN Human Rights Body (ASEAN 2008a: supra 3, 2008b). Final substance to a HRB was given at the 42nd AMM in 2009 whereby ASEAN officially signed off on the HLP recommendations and created a HRB with ToR (ASEAN 2009a: supra 7). With the ToR complete, AICHR came into being and was commissioned as the overarching umbrella organization which would coordinate sectoral and thematic human rights issues and organizations within ASEAN (ASEAN 2010: supra 9). Hence, the ASEAN Intergovernmental Commission on Human Rights signaled a path breaking achievement for human rights. It was the first of its kind, in the last region of the world to adopt a mechanism for human rights protection. See Table 1.

Table 1. Comparative Regional Human Rights Mechanisms

Region	Name	Year Est.	Regional Court	Investigative Power	Monitoring Power
Africa	African Commission on Human and Peoples’ Rights	1987	Yes	Yes	Yes
Asia	ASEAN Intergovernmental	2007	No	No	No

	Commission on Human Rights				
Europe	European Commission on Human Rights	1954	Yes	Yes	Yes
America's	Inter-American Commission on Human Rights	1960	Yes	Yes	Yes

With the completion of the ToR the first AICHR was mandated with formulating and drafting a regional declaration on human rights. This was completed and adopted in 2012 at the 21st ASEAN Summit. See Table 2 for ASEAN human rights timeline.

Table 2: Chronology of ASEAN Agreements relating to Human Rights and Principle Outcome

Year	ASEAN Document	Outcome
1993	Joint Communiqué 26 th ASEAN Ministerial Meeting	First official discourse of human rights
2003	Bali Concord II	Blueprint for 3 pillar ASEAN Community
2004	Vientiane Action Plan	Calls for creating human rights mechanisms
2005	Kuala Lumpur Declaration on the Establishment of the ASEAN Charter	Formulation of Eminent Persons Group
2006	Joint Communiqué 39 th ASEAN Ministerial Meeting	Formulation of High Level Task Force
2007	12 th ASEAN Summit	Declaration on the Protection and Promotion of the Rights of Migrant Workers, Establishment of ACMW
2007	13 th ASEAN Summit	Signing of ASEAN Charter
2008	Joint Communiqué 41 st ASEAN Ministerial Meeting	ToR of High Level Task Force
2009	Joint Communiqué 42 nd ASEAN Ministerial Meeting	ToR of AICHR, ACWC
2009	15 th ASEAN Summit	Establishment of AICHR with mandate to draft human rights declaration

2012	21 st ASEAN Summit	ASEAN Declaration on Human Rights
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AICHR was reconstituted in 2013 with new representatives being appointed from Cambodia, Lao PDR, Singapore, Thailand and Vietnam. New AICHR representatives comprise an interesting mix with the Cambodian representative having a strong human rights background along with the Thai representative. The other three comprise a mix of strong government/bureaucratic backgrounds and academic managerial with the Singapore representative. This not much of a shift and represents a relative status quo ante with the first AICHR in terms of human rights experience, backgrounds and since, relative engagement with CSOs.

In 2013, the 2nd AICHR conducted a limited number of meetings centered around workshops, thematic study of migration and from the Thai representative engagement with CSOs and youth. 2014 has seen an increase of activities with deeper substance such as continued engagement with CSOs, consultative meetings concerning rights of women and migrants and consultation between AICHR and the ACWC. Networking has become evident by AICHR consultation with its thematic commission as well as finishing its thematic study on CSR and human rights and engagement with youth. Most importantly AICHR has begun meetings for a thematic study on the right to peace, sharing experiences from the recently completed round of universal periodic review and negotiations on AICHRs 2^{EU} Institutions, Development & Politics PowerPoint ToR. The latter is most crucial to gauge how much 'evolution' has taken place over the previous 6 years. AICHRs forthcoming revised ToR will set the tone for ASEANs regional human rights mechanism for the next 5 years and be indicative of whether norms are changing in allowing greater protection powers for AICHR.

3. Regime Analysis & ASEAN

The primary problem of constructivist and rational realist lies in the huge umbrella with which these theories seek to explain. The sheer complexity of the international system and the diverse nature of ASEAN according to Katzenstein

and Lebow “requires theoretical eclecticism rather than parsimony in making selective use of the insights of sociological, liberal and realist styles of analysis” (Katzenstein 2002: 105, Lebow 2005: 303). As such an eclectic theoretical view that can capture portions of behavior which straddle rationalism, constructivism and acculturation is needed, especially for a field as politically contested as human rights.

In this section I will outline the strengths of a problem-structuralist approach in studying AICHR. This will be contextualized by examining AICHR within a larger framework of international politics, economic performance and security. This approach centers AICHR as a medium for conflict management bridging different issue-areas within the context of regional human rights integration. I will first lay out my theoretical perspective and then provide evidence along a five tiered analytical approach drawing on Munros’ (2011) prior analysis. I will add to this an additional independent variable of actor perspective which brings agency into AICHR’s. The blended theoretical framework which I propose relies heavily on a problem-structural approach which has as its central consideration perceptions of actors towards issue-area specific phenomena with conflict management being the primary consideration of regime formation. In addition to this, I propose to draw on cognitive and realist strains of regime theory which stress the ideational and interests based nature of actor needs respectively. A purely ideational purview will be relaxed in that actor beliefs concerning issue-area phenomena will be the focus of agency centered regime dynamics while mixing with state-centered regime structure.

Problem-structuralist have at the center of their approach the understanding that behavior of states can be attributed to the nature of issue-areas and actions that states take in accordance with their perceptions and interests. Accordingly, issue areas are “one or more, in the perception of the actors inseparably connected objects of contention and of the behavior directed to them. The boundaries of issue-areas are determined by the perception of the participating actors” (cited in Hasenclever, Mayer and Rittberger 1997: 60-61).

Central to this understanding is that issue-areas constitute areas of conflict and are connected between actors. Conflict in this sense does not refer to behavior or attitudes but rather positional differences among actors that lead to a need for conflict management, hence regime formation. In terms of issue-area typologies Czempiel (1981) identifies two levels of policy domains with three aspects that help to explain cooperation along issue-area lines (Hasenclever, Mayer and Rittberger 1997:61). There is a security dimension which comprises an external physical dimension of threats from without and an internal dimension classified as *rule* that allocates political goods and liberty to people. This said, problem-structuralist would contend that economic value issues are highly conducive to regime formation while internal security issues such as human rights would be least conducive and external security would occupy a middle point where regime formation takes place (Hasenclever, Mayer and Rittberger 1997: 62). To classify conflict typologies a further aggregation is proposed, namely, conflict of means (common goal but different ways to pursue), conflict of values (incompatible beliefs regarding action/practice legitimacy) and conflict of interests (value placed on a good and benefits either relatively or absolutely gained from cooperation) (Ibid). Conflicts of means and values are considered to be *dissensual* conflicts where cooperation of means occupies a middle point of regime formation probability and value having low probability of regime formation (Ibid).

With this framework the need to define issue-areas comes into focus as the *perception of the actors* regarding objects of contention defines the boundaries of issue-areas (Efinger and Zürn 1990, Efinger, Rittberger, and Zürn 1988, Zürn, Wolf, and Efinger 1990 cited in Hasenclever, Mayer and Rittberger 1997:61). Perception of actors in this regards refers to the perception of states in relation to the issue-area in question, in this case human rights. In as far as issue-areas are defined a further disaggregation of specific policy domain and conflict typology allows for testing of regime formation and cooperation (Hasenclever, Mayer and

Rittberger 1997:62). I contend that boundaries are not perpetual but can change and shift and as such perception is a continuing phenomenon of regimes that determine their changes, shifts and structures. Human rights are then an absolutely assessed good within the policy domain of rule (freedom and individual political participation). This allows for scope, frame and nature of conflict typology and management schematic to be mapped. This may then provide insight into the conjunction where external influence (structure), internal (domestic), regional (actor perception and action), membership criteria, regional structure join in regime formation, shape, function, boundaries and scope.

With this framework I contend that the core object of contention is regional autonomy and relevance of ASEAN within the policy domain of human rights. This is because every ASEAN state is party to one or more core international human rights treaties. This indicates some level of legitimacy given to the international human rights regime. The policy domain is contested around rule, meaning norms of conduct, standards and mechanisms for the adherence to legitimate principles. The conflict type is dissensual centered on means indicating a medium level of regime probability formation. Given that human rights is both contested and linked to politicized internal stability and sovereignty issues there must be further consideration of factors leading to the regime type and why it took the shape it did. I argue that dependent variables of ideas, boundaries, power, membership and perceptions of security explain AICHRs regime type. Independent variables of interests and perceptions of actors coningle to provide answers to regime boundaries, scope and function of its mechanisms. A deeper analysis of the interaction between these independent variables suggests that while the regime type and scope appears rigid there can be independent actor agency within AICHR outside of the official structure which may allow for regime change or 'evolution' to take place. This is of course firmly within the domain of ASEAN member states to control but nevertheless deserves investigation into the interplay of structure and agency of AICHR. The purpose of this analytical framework when expanded out to include multiple issue-areas as is intended later is that with the ASEAN

Charter there was the formation of three separate communities, AICHR being firmly placed in the Political-Security Community and the two other sectoral human rights commission (Women and Children, Migrant Workers) in the Socio-Cultural Community. Economic cooperation has come to dominate ASEANs agenda, while human rights is split between functional and security regimes. Given the multiple regime format of ASEAN communities it can be assumed that at some level support and legitimacy is provided to and between ASEAN communities. This said the problem-structural approach allows for considering regional realities and attempting to answer the larger question of, why was AICHR created?

4. Human Rights in ASEAN: Between Politics and People

This section will attempt to find plausibility, strengths and weaknesses of constructivist and rationalist arguments for analytical parsimony in relation to AICHR. It is my argument that these two mainstream theories cannot analytically assess the human rights regime in ASEAN and a possible alternative is to blend elements of these within a problem-structural regime theory analysis. The relevancy of approaching human rights in this regard is to find viable paths for analysis that allow for insight into why regimes are established and the ultimate form they take. Within this the problems regarding human rights protection or abuse can be viewed as products of conflict to be managed at the state level or at the regional level. Put another way if one can understand the regime, its capabilities and possible end points one can focus study more pointedly to the sources of conflict and whether management is taking place and how or not it is being handled. I will develop my argument for regime analysis by critiquing the two major strains of IR theory used to study ASEAN and build an analytical framework for my own theoretical study beginning with considerations of AICHRs structure and ending with membership and perspectives.

4.1. Claims to Community: Constructivist

Human rights in ASEAN can at best be considered a nascent regime derived from fragmented regional human rights standardization and embedded illiberal politics region wide. This can be seen in the fragmented international human rights treaty ratification behavior and reservations put on these instruments which coalesce around sovereignty and cultural arguments (Jones 2014). Kupchan (2010) has stated, rather deftly, that “a consensus does exist among scholars that ASEAN constitutes a security community” (Kupchan 2010: 231). This could not be further from the truth; debate especially from early 1990’s to present is lively as to which theoretical tools are best suited towards analyzing ASEAN.¹ Constructivism takes a social theoretical view towards international relations and its attendant phenomenon. From the perspective of Karl Deutsch the ultimate end of a security community is the successful management of conflict, in other words making war unthinkable among its members (Deutsch 1988: 276). This stems from the building of a collective ‘we’ feeling among its members who share similar socio-cultural norms, values and ideas/ideologies which find expression and traction in frequency and density of interactions between and among its members. Transactionalism stems from social interaction which breaks down barriers of understanding between members thereby building trust, thus escaping the realist security dilemma of cyclical mistrust borne out of anarchy (Deutsch 1961). Constructivism allows for a reading of international relations which puts agency into play and shifts the entire contextual understanding of how and why states do as they do. Ideas and values are at the center of constructivism allowing active agents to shape the world around them. More importantly contextual understanding is central as phenomenon can shift dependent on the contextual meaning derived from the culture in which it is bound (Wendt 1999: 176). Implicit in this understanding is that self-help behavior and power are institutions and not

¹ See Acharya 2009, Acharya and Stubbs 2006, Chiou 2010, Eaton and Stubbs 2006, He 2006, 2008a, 2008b, Jetschke 2009, Khong 2005, Kim 2011, Kivimäki 2008, Narine 2006, Simon 1995. These texts provide a view to the rich debate which scholars studying ASEAN have been engaging in for paradigmatic primary and are by no means exhaustive of the literature.

core essentials of anarchy, as such “anarchy is what states make of it” (Wendt 1992: 395).

This take off point informed the majority of constructivist scholars studying ASEAN who posit that ASEAN is a nascent security community whose central focus is to build a burgeoning identity in Southeast Asia promoting peace, stability and regional autonomy (Acharya 1997, 2000, 2001, 2004, 2005). Derived from this analysis is the supposed success of ASEAN in exporting its internal norms and socializing external actors within the context of its newer members as well as external partners (Ba 2005, Busse 1999, Stubbs 2008). Of late constructivists have attempted to add more descriptive tools to their analytical frameworks by watering down their original thesis of identity formations by adding “strange” vocabulary to account for deviation from their prior assumptions of cultural norm specificity. The latest attempt to rejuvenate constructivism is by accessing norm subsidiarity and ‘constitutive localization’ (Acharya 2004) which seeks to explain the difference in imported external norms that influence domestic actors via framing, grafting and pruning to achieve legitimacy and create a hybrid third set of localized norms.¹ Perhaps most compelling is the constructivist claim of an endpoint of identity formation as the constitutive underpinning of security communities but its complete failure to identify what identity it is they are speaking of. Acharya (2002) asserts that “ASEAN remains an illiberal security community” but is hopeful that intrusive economic integration will somehow liberalize a hitherto group of states lacking qualified unity. Put another way, if ASEAN’s “identity” is illiberal (Adler and Barnett 1998: 423) then what can the fruitfulness of studying ASEAN be from liberal perspectives? Or for that matter tracing liberal norm cascades (Finnemore and Sikkink 1998, Sikkink 1998) that get emasculated, ignored or undermined without using as a

¹ It would seem constructivists scholarship is beginning to undermine its original strength as a quasi meta-theory of international relations theory. Debates surrounding keeping theories on academic life support are not bound only here but are engaged in studies of European integration as well see Joseph Jupille et. al. (2003) Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union for such an assessment of current EU regional scholarship.

starting point ASEAN being illiberal and asking why it so? A better line of reasoning takes the ideational focal point of state power and ASEAN elites usage of ASEAN to be a tool of states to blunt external power and ideas while simultaneously building internal stability seems to be a more sensible starting point.

I argue that constructivism is not incorrect in its assertions of ideas, values, culture and agency but that it cannot capture fully state behavior in ASEAN concerning human rights. This is due to the lack of including power contexts, primacy of culture and power resistance to sovereignty eroding norms of human rights enforcement. To discount state primary and assertions of power that flow from regional interstate relations in ASEAN is either nefarious or naïve to regional realities. As such constructivist variables should be seen as second order phenomenon which are ordered by power relations and interests which emanate externally and are driven by internal needs. According to Acharya (2001) ASEAN's purpose for its member states is to retain regional autonomy and uphold sovereignty. The exercise of power and final authority within member states as regional autonomy by definition seeks to allow a maximum of state behavior without external interference. By this logic mainstream constructivist arguments contradict themselves in seeing sovereignty as some ephemeral phenomenon delinked from power politics. This is not so as ideas do not exist in a vacuum but are linked to politics and power from their inception to operationalization into policy. Koh (2009) has shown that human rights and AICHR was a reasonable backstop so that external intervention in the region would not take place with human rights as an excuse. Constructivist would view AICHR an end point in socialization among its states that supposes a degree of similarity in outlook and perspective. This is not so, Koh (2009) has shown that during the negotiations for a HRB in the HLTF ASEAN was split along three pathways with Cambodia, Laos, Myanmar and Vietnam opposed to a commission; Indonesia and Thailand in favor; and Brunei, Malaysia, Philippines and Singapore occupying the middle ground (Koh 2009: 58-59). With positions taken by the Philippines that AICHR should be given investigatory

powers, while CMLV countries opposing with purely consultative powers, (Durbach et. al. 2009: 252, Koh 2009: 58) it becomes quite obvious that socialization concerning human rights is nowhere near complete according to the constructivist thesis. Furthermore, if one is to take a stand that ASEAN's identity and intersubjective meaning stemming from localization, cascades or spirals of norms then constructivist are even harder pressed to explain the divergence in their theory. In order to fill in constructivist gaps of understanding one can turn to realist/rationalist for an explanation as differing state positions must stem not only from different ideas but also different understandings of what ASEAN is and meant for as well as differing interests and purposes based domestically.

4.2. Claims to Community: Rationalism

Rationalist theory posits material forces as having primary effect on the motivations of states and their relative behavior in defining national interests and hence the creation of international institutions is an extension of state interests in their image and needs (Koremenos et. al. 2001). Central to this conceptualization of cooperation and conflict is the matrix of information flow and accessibility in determining state behavior. Rationalist posit external influence and structural (Waltz 1979: 118,121) determinism for influencing state actions (Glaser 2010: 53). Later studies relax these constraints by offering socialization norm calculations (Checkel and Zürn, 2005) but with indeterminate status in ordering actor interests by being 'intervening variables' (Schimmelfennig, 2000, Schimmelfennig et al. 2003, 2006). Davies (2013) argues that ASEANs human rights norms are politically driven actions to deal with regional problems and that norms do not dictate how different actors actually engage those norms and for what purpose/s. Davies (2012) demonstrates the weakness of socialization thesis's in human rights by pointing to the inability to influence Myanmar but fails to account for Myanmar's adoption of the ASEAN Charter or the 2012 Human Rights Declaration.

The underlying weakness of rational/realist is that within ASEAN there is firstly no hegemon that can leverage

resources to alter behavior. Secondly, ASEANs constitutive norms allow for maximizing state power vis-à-vis other members.¹ Rationalist explanations of AICHR by default lie in material motivations such as foreign aid or other material inducements that alter behavior. Given the status of Myanmar as a pariah state, ASEAN support for its regime and the inability of sanctions to change the regime's behavior it would be an overstatement to simply state that Myanmar's generals somehow decided to give in after 40 years of civil conflict and western sanctions. More viable alternatives which rationalist do not account for is prestige and signaling of ASEAN states in their drive to rejuvenate regionalism while not altering structural or procedural norms (Collins 2013, Haftel 2010, Manea 2009). Rationalist narrow focus either seeks to conceptualize AICHR as an individual institution or ASEAN as an organization. The problem with this is that human rights does not stand alone as an issue area. This is evidenced by AICHR being within the political-security community and ASEANs own formulation of human rights as leading to "peace, stability and development" thus linking implicitly human rights to politics, governance, economics and national development" (ASEAN 2006a supra 23, 55, ASEAN 2007 Article 2).

I posit that these authors are correct in their assumptions that states and actors do act rationally within the context of interest driven motives which may be internally and/or externally driven but that rational choice theory offers explanatory power without providing a proper analytical frame. Rationalist claims often take for granted the primacy of external power ordering of interests for internal usage as well as material inducements for producing action. Material inducements can take many forms whether it is foreign aid, trade relations, market access, prestige and mimicry. However to simply place behavior on one area is to disregard a wide range of possible triggers. Further, this discounts the agency of individual actors acting within given parameters of state positions in negotiations which in the case of ASEAN can produce significant give and take.

¹ For rich studies on how ASEAN states define and use the ASEAN Way for shielding and maximizing state interests see Gertsl (2010) and Varkkey (2012, 2013, 2014).

This places the regional level of analysis in a precarious place as it would seem to serve indeterminate interests and offer states limited value for choice calculations and maximizing of domestic interests or skip regional levels altogether in favor of international structures of anarchy. Second, the problem of states being treated as abstracts is highly problematic as the ASEAN region has strong political characteristics driven by individual actors and/or bureaucracies which act on agency and not just structure alone. Thirdly, the location on one independent variable of norms does not do justice in explaining the limits to cooperation, power and information asymmetries or calculated use of power and under what conditions is this limited or enhanced. The problem for this is that rationalist fail to take into account the nature of ASEAN by treating it as an independent entity rather than a site of networked cooperation and conflict management based on its rules and domestic political circumstances that lead to contestation and least optimal design of its regimes (Duffield 2003). Lastly, norm calculation is perhaps not given enough emphasis for this region as constructivist may be correct especially from the perspective of Barnett and Adler (1998). To simply take for granted an 'identity' as constructivist do or dismiss norms as simply intervening as rationalist do does not provide a conclusive answer as to why ASEAN states act as they do and often contradict their rhetoric. The reason for this is that ASEANs norms may be illiberal and ASEAN states often do contradict their rhetoric but rationalist fail to provide a frame of analysis grounded in ordering principles to answer their question. Collins (2013), Roberts (2013) and Nischalke (2002) have conclusively demonstrated that ASEAN is not a security community but rather a tepid and varying set of regimes.

As such I posit that rationalists are indeed correct but that their analysis would be enhanced by applying regime analysis to provide a strong frame of analytical reference. ASEAN constitutes many regimes with varying degrees of institutionalization and to simply state in umbrella type fashion or by cherry-picking case studies is dangerous without providing issue area regime characteristics, limitations and variables. Simply stated rationalist can

improve their calculations and in fact be subsumed into regime analysis by studying ASEAN as it is, an organization composed of states that create different regimes with different characteristics for issue area specific implementation.

4. Regimes & AICHR: Structural & Contextual Reading of AICHRs Terms of References

The ASEAN Charter stipulates the formation of a human rights body (ASEAN 2007: Article 14) whose ToR were adopted in 2009 within the framework of the Political-Security Community. This community is a purely intergovernmental pillar, allowing for state control over final decision-making authority (ASEAN 2009b: supra 15, Petcharamesree 2013). AICHR's ToR provides for among others: (ASEAN 2009c: supra 4)

1. developing strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community
2. developing an ASEAN Human Rights Declaration
3. enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information
4. promote capacity building for the effective implementation of international human rights treaty
5. engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN
6. consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights
7. obtain information from ASEAN Member States on the promotion and protection of human rights
8. including civil society organisations and other stakeholders, consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights

9. develop common approaches and positions on human rights matters of interest to ASEAN
10. prepare studies on thematic issues of human rights in ASEAN

These mandated criteria appear to have created an extremely weak body in line with ASEAN's statement that "AICHR is an inter-governmental body and an integral part of the ASEAN organizational structure. It is a "consultative body" (ASEAN 2009c: supra 3) bound by principles *inter alia* of ASEAN; sovereignty, non-interference, independence (ASEAN 2009c: supra 2.1.a) thus limiting AICHR effectiveness. A more contextual reading reveals vague legal language with no self-executing qualities. Further, it demonstrates a significant degree of internal flexibility as its members are "appointed and accountable to the appointing Government" (ASEAN 2009c: supra 5.2). This flexibility is dependent on the government which may appoint a non-government representative who by their own agency may demand and be allowed a great degree of autonomy. This was best seen by the composition of the first AICHR which brought together civil society NGO advocates (Rafendi Djamin – Indonesia), government/government connected representatives (Awang Hj. Ahmad bin Hj. Jumat – Brunei, Kyaw Tint Swe – Myanmar, Nguyen Duy Hung – Vietnam), long-time high level politically connected advocates (Rosario Gonzales Manalo – Philippines) and academic (Sriprapha Petcharamesree – Thailand). Within this varied composition of persons the degree and levity of action taken was highly dependent on the state in question and agency of the representative to act.¹ For instance in the run up to the AHRD while AICHR did not meet with CSOs Sriprapha, Rafendi and Abdullah initiated dialogue with NGOs prior to and after AICHR meetings in order to provide transparency and allow indirect policy engagement. It was explicitly stated that this was done on a basis of personal initiative within their AICHR representative role rather than a collective AICHR basis (Asian Forum 2013: 30).² The importance of this is that CSO's have little formal space in ASEAN policy-

¹ Personal communication with AICHR representative September-December 2013.

² Personal communication with AICHR representative September-December 2013.

making as is attested to by limited ASEAN accredited CSO's. Direct agent interaction with CSO's allowed for information flows and political space opening with advocacy networks associated with or through other networks connected to AICHR representatives.

Within the context of the AHRD draft it is instructive to note that one of AICHR's purposes is "to promote human rights within the regional context, bearing in mind regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities" (ASEAN 2009c, Article 1.4). This view is articulated in the Declaration which states that 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" but are "universal, indivisible, interdependent" (ASEAN 2012: supra 7). These references find their origin in the 1993 Bangkok and Vienna Declaration's but also the context of contested notions of human rights and discourse of Asian Values. The apparent dichotomous relationship in the declaration and framing of human rights was the result of internal dynamics inside AICHR among its representatives. As noted by Muntarbhorn (2013) "one of the less liberal countries wanted explicit reference to "ASEAN Values" (parallel to "Asian Values"), but was not supported by the majority view in the drafting process" (Muntarbhorn 2013: 130). Muntarbhorn further sees the ASEAN Way of consensus as incapable of gently nudging obstinate members who are major violators of rights thus supporting the lifeline of Asian Values to persist (Ibid: 171). The above was confirmed and further noted that members of AICHR, specifically the Chair supported by two other countries that countered by stating that having explicit provisions referencing anything approximating Asian Values was unacceptable and as such this strong proposal was negated.¹ This points towards the understanding that there exists at present very different perceptions of human rights regionally and how they should be addressed. In this case, a regional declaration on human rights does not directly allow for cultural relativism but maintains a precarious balance

¹ Personal communication with AICHR representative February 2014.

between liberal and illiberal normativity as per Article 7 of the AHRD. Muntarbhorn has also stated that a liberal interpretation of the ToR can be undertaken in time as “while the ToR may not contain the usual language of protection, what it does not prohibit is not forbidden; hence, there are openings for protection activities” (Muntarbhorn 2009). Protection in this context is constrained to enhancing public awareness, promoting capacity building, researching and disseminating information. This can be seen as a syncretic pathway to engage with persons, speak to, receive complaints and pass on information. The open-ended application of the above can be individual representatives receiving complaints or informing on avenues of redress. The somewhat conflicting nature of the ToR is due to the bargain struck between supporters of a HRB (Indonesia, Philippines, Thailand) and those opposed (Cambodia, Myanmar, Lao, Vietnam). The agreement being that with the creation of a HRB it would be weak and constrained in the Political-Security Community. But there would avenue of amendment every five years in exchange for concessions on an Economic Community which Singapore and Thailand were pushing for and Socio-Cultural Community which was of interests to the Philippines (Koh 2009, Volkmann 2008).

4.1 Regimes & AICHR: External & Internal Pressure

During the drafting of the Charter, ASEAN was undergoing a period of external pressure and internal exasperation of attempting to create a viable organization to keep ASEAN relevant under while dealing with the Myanmar regime which was threatening to derail the entire project. The degree of increased connectedness and need for organizational coherence was echoed by former ASEAN SG Surin Pitsuwan as early as 1997 stating that ASEAN should open up, become more mainstream stating that “Thailand faced formidable impersonal forces that heed no borders...we either reform ourselves to meet international standards, or we can resist and be overwhelmed in the end, with no control over the pace or direction of change.” Because “delays and setbacks in one country can affect the region as a whole” (Pitsuwan 1998). The pertinent situation of interconnectedness was brought to a head after years of

intractability by the Myanmar government culminating in what Jones (2008) terms ‘critical disengagement’ whereby ASEAN was ready to essentially abandon its pariah member in the face of repression of the 2007 uprising and dismissal of aid in the aftermath of Cyclone Nargis (Jones 2008: 283). Coupled with threats of US Senate sanctions, calls to expel Burma from ASEAN (Head 2007) and Secretary of State Rice’s shunning of ARF meetings ASEAN closed ranks behind an organizational veil of solidarity not necessarily for the liberal cause of rights but the “impact on the region’s economic and diplomatic standing” (Jones 2008: 284). It is important to take note that external diplomatic influence was at work on a prestige level rather than simple economic level as western sanctions were essentially window draping and ASEAN investment was not that impressive at only \$6 Billion from 2005-2007 largely in gas and oil (Jones 2008: 288). Internally the need to consolidate the regional enterprise was centered on fear of direct external intervention in the region, as such the Charter and its reference to a HRB and the future creation of AICHR is centered on the need to promote regional autonomy so that human rights would “not be an excuse for outsiders to intervene into ASEAN’s own affairs” (Thanh 2009: 103).

4.2 Regimes & AICHR: Membership and Perceptions

The membership of AICHR is by default universal for two reasons; one structural and one functional. Structurally, ASEAN operates according to consensus, as such any agreement creating a HRB would necessitate full membership agreement. Functionally, ChalermPALUPAP has commented that “human rights cooperation requires full participation of all its Member States...it is not desirable to try to do it on the basis of “ASEAN minus X” (ChalermPALANUPAP 2009). Constructivists would view mandatory membership as an opportunity for social learning but would be at pains to explain why a rather progressive AHRD encompassing 1st, 2nd and 3rd generation rights was produced. This thesis can be countered on two fronts by first looking at ASEAN states treaty ratification behavior prior to and after the Charter (Jones 2014) and considering human rights behavior and violations which has also not improved

thus negating the socialization thesis (Human Rights Watch 2007-2012). Mimicry would state that ASEAN states created AICHR to mimic behavior of other regions for prestige purposes. This is half correct in that ASEAN uses the same language of the EUs 'pillars' to keep ASEAN relevant by institutionalizing. But for what purpose is relevance needed? I argue that it is tied to rationalist considerations of external power expressions and connected to ASEANs pillar of economics, trade and development. The underlying feature is the historic view that economic stability parallels political stability in the form of 'performance legitimacy' (Beeson 2003: 369, Case 2009, Reisman 2009: 179). As such human rights is connected to regional and by default domestic political stability as seen by AICHRs inclusion in the Political-Security Community. The linkage of economics and political stability is shown by the understanding that "sustainable economic development requires a secure political environment based on a strong foundation of mutual interests generated by economic cooperation and political solidarity" [italics mine] (ASEAN 2003: Article 1).

Rationalist/realist would view AICHR membership in terms of material benefits accruing to members. Benefits would include increased information flows with calculations of risk diminishing among members and external actors. Secondly, reputation would have monetary value in that having a positive human rights record would reflect positively on external partners in their dealings with regime members. Universal membership in the rationalist case be a net negative as states with good reputations in human rights would have their own good names tarnished by the inclusion of gross violators. Secondly regime coherence by having a disparate membership would lessen the prestige factor and negate the positive qualities of AICHR. (ASEAN 2009c: supra 4.2). As noted prior material sanctions had been threatened by both America and the EU in their ongoing FTA negotiations by linking Myanmar's gross violations to trade deals. This is a dubious assertion, as of 2007 the EU had already shifted its FTA strategy from bi-regional negotiations to bilateral due to the intractability to find consensus among

ASEAN members on trade related issues.¹ This narrow focus loses the larger picture of regional integration and how politics interact with perceptions of actors influencing the behavior of representatives, hence states at AICHR. This is best exemplified by the reform process in Myanmar which by 2007-08 was underway and by 2010 had provided a shift in position of Myanmar's AICHR representative from one of supporting Cambodian, Laotian and Vietnamese positions to one of supporting Thailand, Philippines and Indonesia to a large extent.²

By applying problem-structuralism with a view that AICHR is a conflict management mechanism rather than a problem solving one then one may begin to untangle the nature of ASEANs human rights regime. Human rights as evidenced by ASEAN documents links politics and security at the regional level to provide autonomy and deflect calls for external intervention. It also provides domestic stability for national systems to aspire to engage if they so wish.

Table 3. ASEAN Member States International Human Rights Treaty Ratifications & Reservations

	ICCPR	R/D	ICESCR	R/D	ICERD	R/D	CEDAW	R/D	CRC	R/D	CAT	R/D
BN	X		X		✓*		✓	2	✓	3	X	
ID	✓	1	✓	1	✓	1	✓	1	✓		✓	
KH	✓		✓		✓		✓		✓		✓	
LA	✓	3	✓		✓		✓		✓		✓	5
MM	X		X		X		✓	1	✓		X	
MY	X		X		X		✓	3	✓	5	X	
PH	✓		✓		✓		✓		✓		✓	
SG	X		X		X		✓	8	✓		X	
TH	✓	2	✓	1	✓	2	✓	1	✓	1	✓	4
VN	✓	1	✓	1	✓	3	✓	1	✓		X	

Source: adapted from UN Treaty Database

*signed and ratified by UK

Note: ASEAN Member States are listed on the y axis and International Human Rights Treaties and reservations are listed on the x axis. R/D stands for reservation, declaration, interpretive declaration to the correlated human rights treaty and indicates the countries

¹ Personal communications with European Union trade delegation member of European Commission delegation Thailand March 2007

² Personal communication with AICHR representative September-December 2013.

manifest resistance to the treaty articles in question. X indicates non-ratification, ✓ indicates ratification.

5. Conclusion

This paper has attempted to demonstrate some of the various complexities both in the setup, design and function of AICHR as well as provide a critique of the two primary strains of theoretical analysis to show how they are incapable of providing a comprehensive explanation for AICHR. Theoretical eclecticism and midrange theorizing is needed to provide depth of insight into why ASEAN regimes are formed and what factors are impacting them. While there are areas in which both are applicable, it nevertheless demonstrates that theoretical heterogeneity is needed to provide a reasonable answer that can evolve along with ASEANs regime surrounding not only human rights but also its larger regional project. While problem-structuralism has not fully been expanded upon the author believes that regime analysis is flexible and grounded in regional realities.

This is where future research is needed and I believe a fruitful way forward can be achieved by using regime analysis. The outlines of this have been alluded to in terms of actor perceptions, hubs and cliques of actor behavior that have influenced outcomes with the ASEAN Charter, AHRD and internal dynamics of AICHR with reforms undertaken in Myanmar. The methods to achieve this is not by abstract metatheorizing alone but by combining unit level analysis with interaction models to analyze meta-regime rules/boundaries and how these interact with sub-system actor agency based on a premise of perceptions + beliefs/interests = action model. Networks stand as a promising field as AICHR does not exist alone but rather in conjunction with sectoral mechanisms of the ASEAN Commission on Migrant Workers located in the political-security pillar and the ASEAN Commission on Women and Children located in the socio-cultural pillar. These must also be investigated and explained in conjunction with the larger framework of ASEAN pillars to explain the larger question of why was AICHR created in the context of ASEAN regionalism?

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