University of New South Wales

University of New South Wales Faculty of Law Research Series 2010

Year 2010 *Paper* 53

Understanding the new ASEAN Intergovernmental Commission on Human Rights: the Limits and Potential of Theory

Catherine Renshaw*

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps10/art53

Copyright ©2010 by the author.

^{*}University of New South Wales

Understanding the new ASEAN Intergovernmental Commission on Human Rights: the Limits and Potential of Theory

Catherine Renshaw

Abstract

In 2007, to the surprise of many, leaders of ASEAN states (including Myanmar, Cambodia and Vietnam), agreed to establish a 'regional human rights mechanism.' Commentators from inside and outside the ASEAN region have made overwhelmingly negative assessments of the ability of this new body to further the implementation of human rights. This paper explores the various theoretical approaches which have been taken to studying developments in the region. I argue that the key concerns of international human rights law - legitimacy and compliance – have been neglected in these approaches, and I suggest that greater attention should be paid to social theory and empirical research that goes to the question of key actor's beliefs about the authority and power of the institution. In my conclusion, I suggest that the origins, design, structure, and functions of an institution do not necessarily determine and delimit its potential to effect change or advance the cause of social justice. Legitimacy can also occur accretionally, as institutions engage in processes of rule-making that are seen to be fair, transparent and inclusive. The interpretation of certain key provisions in the Terms of Reference for ASEAN's new human rights institution will be critical to expanding or constraining the strength, power and legitimacy of ASEAN's new regional human rights body, with significant consequences for protection of the human rights of citizens of the region.

Understanding the new ASEAN Intergovernmental Commission on Human Rights: the Limits and Potential of Theory

Catherine M. Renshaw

Research Fellow, University of New South Wales

Abstract

In 2007, to the surprise of many, leaders of ASEAN states (including Myanmar, Cambodia and Vietnam), agreed to establish a 'regional human rights mechanism.' Commentators from inside and outside the ASEAN region have made overwhelmingly negative assessments of the ability of this new body to further the implementation of human rights. This paper explores the various theoretical approaches which have been taken to studying developments in the region. I argue that the key concerns of international human rights law legitimacy and compliance - have been neglected in these approaches, and I suggest that greater attention should be paid to social theory and empirical research that goes to the question of key actor's beliefs about the authority and power of the institution. In my conclusion, I suggest that the origins, design, structure, and functions of an institution do not necessarily determine and delimit its potential to effect change or advance the cause of social justice. Legitimacy can also occur accretionally, as institutions engage in processes of rule-making that are seen to be fair, transparent and The interpretation of certain key provisions in the Terms of Reference for ASEAN's new human rights institution will be critical to expanding or constraining the strength, power and legitimacy of ASEAN's new regional human rights body, with significant consequences for protection of the human rights of citizens of the region.

I Introduction

In 2007, state leaders of the ten Southeast Asian nations signed the *ASEAN Charter*, which confirmed ASEAN's international legal personality, deepened processes for cooperation between states, provided new frameworks for decision-making, and committed states to the establishment of a regional

¹ Chapter II, Article 3, Charter of the Association of Southeast Asian Nations, 20 November 2007 ('the ASEAN Charter').

² Articles 8-10, the ASEAN Charter.

³ Article 8, the ASEAN Charter.

human rights body."⁴ On 23 October 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was inaugurated, as a "consultative inter-governmental body"⁵ with a mandate to promote human rights and fundamental freedoms. The Terms of Reference of the AICHR (TOR) stipulate a constructive, non-confrontational and evolutionary approach to developing human rights norms and standards in ASEAN.⁶

The establishment of the AICHR marks an extraordinary evolution. In 1967, ASEAN was a loose association of five states⁷ bound by twin principles of preserving state sovereignty and promoting regional security.⁸ By its fortieth birthday, a ten-member ASEAN was embracing goals of "strengthening democracy, enhancing good governance and the rule of law, and promoting and protecting human rights and fundamental freedoms." The Charter marks ASEAN's ascension to the ranks of those regions (Europe, the Americas, Africa and the Arab states), which have constructed bodies to sit above the state system, to monitor and protect human rights. The potential for mechanisms of regional oversight to advance the implementation of human rights is clear. Regions act as an 'intermediate protection level,' between the state, which possesses powers of coercion but is inclined to act in self-interest, and the international level, which lacks resources and enforcement measures. Within the ASEAN region, where there are serious violations of human rights and where states have proven to be resistant to

⁴ Article 14, the ASEAN Charter.

⁵ Article 3, Terms of Reference of ASEAN Inter-governmental Commission on Human Rights. Adopted by the ASEAN Ministerial Meeting, 20 July 2009, available at: http://www.aseansec.

org/DOC-TOR-AHRB.pdf (last accessed 9 May 2010). (Terms of Reference of the AICHR').

⁶ Article 2, Terms of Reference of the AICHR.

⁷ The Association of Southeast Asian Nations (ASEAN) was established in 1967, when the leaders of Indonesia, the Philippines, Malaysia, Thailand and Singapore, announced in the 'Bangkok Declaration' that they intended cooperating to achieving accelerated economic growth and regional peace and stability.⁷ In 1984, Brunei Darussalam became a member of ASEAN, followed by Vietnam in 1995, Lao PDR and Myanmar in 1997 and Cambodia in 1999.

⁸ Article 2 Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) sets out "fundamental principles" to guide the relations among member states.

⁹ Article 1(7) of the ASEAN Charter.

¹⁰ Sienho Yee 'The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: the European and Asian models as illustrations' (2004) 8 *SYBIL* 157-164 at 158.

international influences toward greater human rights oversight, a regional mechanism to promote and protect human rights has significant potential.

But commentators from within¹¹ and from outside¹² the ASEAN region have made overwhelmingly negative assessments of ASEAN's decision to establish a human rights body. 13 They have drawn pessimistic conclusions from the 'consultative' nature of the body, its emphasis on non-intervention and preservation of sovereignty, its primarily 'educative' and 'promotional' functions, the lack of enforcement powers, triggers for sanctions and system of reprisals. These factors, together with the time lag between ASEAN's 1993 announcement that it intended to create a human rights body and the eventual establishment of the AICHR in 2009, and the failure of many ASEAN states to ratify international human rights treaties, 14 are read as signalling a reluctance on the part of ASEAN states to become part of a legalized regime such as those which exist in Europe, or the Americas. For critics, the inclusion of a reference to a 'human rights body' in the ASEAN Charter was a plausible response to external pressure; "when the ASEAN countries agreed in July 2007 to stipulate in the Charter the creation of such a (human rights) body, they were concerned about their international image." 15 What little is known of negotiations surrounding the inclusion of reference to a human rights body in the ASEAN Charter is used to support this claim; Philippine Foreign Secretary Alberto Romulo, stated that his government called for the creation of such a body because it would "give ASEAN more credibility in the international community," 16 while Malaysian Foreign Minister Syed Hamid Albar expressed

¹¹ Tan Hsien Lee 'The ASEAN Human Rights Body: Incorporating Forgotten Promises For Policy Coherence and Efficacy' (2008) 12 SYBIL 239-255.

¹² Andrea Durbach, Catherine Renshaw and Andrew Byrnes 'A Tongue But No Teeth? ASEAN's New Human Rights Body' (2009) 31 *Sydney Law Review* 211.

¹³ For a less pessimistic assessment, see Simon S.C. Tay 'Between National Sovereignty and the Region's Constitutional Moment' (2008) 12 SYBIL 151 at 163.

¹⁴ There are only two international human rights treaties to which all ASEAN states are party: the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

¹⁵ Agence France-Presse 'Image Worries pushed ASEAN on rights' Manila 31 July.

¹⁶ Associated Press 'Southeast Asian countries struggle to end differences on human rights' Manila 28 July.

view that ASEAN members "should not be *seen* to be unsupportive of human rights." (italics added)." ¹⁷

In this paper, I draw on three of the central key concerns of this workshop – how legal developments are translated into social change, the difference between 'law-in-books' and 'law-in-action', and the utility of social theory in examining legal questions - to explore the potential for state compliance with the AICHR. I argue that in international law, the idea of 'legitimacy' is the central determinant of compliance and that the presence or absence of legitimacy in an institution or rule signals whether or not legal developments will effect social change. From this perspective, I question the utility of the recent raft of international relations theory-driven efforts to understand and explain ASEAN's new human rights institution. I suggest that a sociological approach attuned to the confluence of domestic and international influences, and the experiences and understandings about human rights and institutional authority which exist amongst state representatives, civil society activists and regional human rights Commissioners, may be helpful to understanding key concerns of legitimacy and compliance. Such an approach has the potential to deepen our understanding of the power and potential of the AICHR, which is dependent upon the body's perceived legitimacy.

The paper begins with a history of the establishment of ASEAN's Intergovernmental Commission on Human Rights (AICHR), highlighting the key contextual concerns; (1) the economic and political context in which the idea of a regional human body was developed; (2) the 'Asian values' debate; (3) the part played by domestic and regional civil society organisations. The paper then discusses the structure and powers of the AICHR, before moving to an analysis of key provisions in the Terms of Reference of the AICHR and the potential for different interpretations of these provisions to impact on perceptions of legitimacy. I then provide an overview of theoretical attempts to understand and explain the developments in the region. I conclude that the dominant international relations theories are of only partial assistance in understanding issues of legitimacy and compliance.

Il The Evolution of ASEAN's Regional Human Rights Body

⁻

¹⁷ Associated Press `ASEAN braces for hurdles in formation of human rights body' Manila 31 July 2007.

Those who recount the (slow) progress of ASEAN in moving toward the establishment of a human rights body, tend to document the rhetorical support for the idea and the lack of tangible progress toward its implementation over a significant period of time. 18 Most scholars trace ASEAN's progression to the establishment of a regional human rights body to the 1993 Vienna Declaration on Human Rights, which emanated from the Vienna World Conference on Human Rights. 19 ASEAN states were amongst the 171 state representatives who adopted, by consensus, the Vienna Declaration, affirming the "universality, indivisibility, and interdependence and interrelatedness of all human rights,"20 while noting "the significance of national and regional particularities and various historical, cultural and religious backgrounds."21 Amongst other proposals, the Vienna Declaration recommended that resources be made available for the establishment of regional arrangements for the promotion and protection of human rights.²² One month later, at the Twenty-Sixth ASEAN Ministerial Meeting in 1993, ASEAN's Foreign Ministers announced that "in support of the Vienna Declaration and Programme of Action," ASEAN should "consider the establishment of an appropriate regional mechanism on human rights."23

The process of "considering the establishment of an appropriate regional mechanism" was to last for more than a decade. In their 1998 Joint Communique, which coincided with the United Nations 'Five-year review of the implementation of the Vienna Declaration and Programme of Action', ASEAN state leaders recalled their earlier pronouncement about the possibility of establishing a regional human rights mechanism. But there had been, at that time, no state-level activity directed toward the establishment

1

¹⁸ See Johan Saravanamutta 'Whither the ASEAN Security Community? Some reflections' (2005) 1 *IJAPS* 44 and Durbach et al, 'A Tongue But No Teeth', above n 12.

¹⁹ Vienna Declaration and Program of Action, United Nations Documents A/CONF.157/23 ('Vienna Declaration').

²⁰ Article 5, Vienna Declaration.

²¹ Ibid.

²² Article 76 Vienna Declaration.

²³ 'Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting' (23-24 July 1993) at para 16, http://www.aseansec.org/2009.htm.

of a regional human rights body.²⁴ Formalising regional arrangements in general, however, was a long-term aspiration of ASEAN states. leaders were determined to create a Charter which would be ready for signing by state parties at ASEAN's 40th birthday celebrations in 2007. transnational character of events of the region between 1991 and 2007 – in particular the 1997 Asian financial crisis and the 1997 environmental disaster of Indonesia's forest fires, provided impetus for greater regional cooperation in relation to certain issue areas. The 11 September 2001 attack on the World Trade Centre in New York, followed by the Bali bombings on 12 October 2002, provided a new common ground for security cooperation within ASEAN,²⁵ but also convinced leaders, such as Malaysia's Deputy Prime Minister Tun Musa Hitam, that "human rights must take a back seat" to winning the war on terror.²⁶ With some exceptions,²⁷ human rights remained a matter for each state. The principles of state sovereignty and non-interference, which had began to be questioned in relation to regional finance, environment and security, remained sacrosanct in relation to human rights.

There was resistance to the idea of a regional human rights mechanism from both the recently admitted and some of the founding members of ASEAN. The Indochine states (Vietnam, Myanmar, Laos PDR and Cambodia), "all of authoritarian hue," 28 had subscribed to ASEAN for the economic benefits of closer ties, reassured by ASEAN's mantra of non-interference in the internal affairs of other states. 29 Supra-state oversight of their internal affairs had not been part of the bargain when they joined ASEAN. Vietnam, under single-

²⁴ 'Human rights and obligations' as a means of achieving a 'peaceful political environment,' were also mentioned in the text of the 2004 Vientiane Action Program, drafted to realise the ASEAN Vision 2020.

²⁵ Col Francisco N Cruz Jr 'Combating Transnational terrorism in Southeast Asia the 'ASEAN Way' (2008) Philippine Institute for Political Violence and Terrorism Research Paper Series July 2008.

²⁶_Maznah MOHAMAD, "Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment" (2002) 24 *Contemporary Southeast Asia* 230.

²⁷ See the ASEAN Plan Of Action To Combat Transnational Crime, available at http://www.aseansec.org/16133.htm and the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children.

David Martin Jones 'Security and Democracy – the ASEAN Charter and the dilemmas of regionalism in Southeast Asia' (2008) 84 (4) *International Affairs* 735. Martin writes at 744; "Cambodia, Laos, Burma/Myanmar and Vietnam constitute a distinct group whose standard of living, GDP, human rights and standards of rule based governance are substantially below those of their ASEAN partners."

²⁹ Lee Jones 'ASEAN Intervention in Cambodia: from Cold War to Conditionality' (2007) 20 (4) *Pacific Review* 523.

party communist rule, was admitted to ASEAN in 1995. Laos, governed by the Lao People's Revolutionary Party (LPRP), and Burma/Myanmar, controlled by the military junta's 'State Law and Order Restorations Council', were admitted to ASEAN in 1997. Cambodia, also scheduled to become a full member of ASEAN in 1997, had entry to ASEAN delayed by Hun Sen's coup d'etat against the elected government of Prince Norodom Ranariddh. Cambodia was finally admitted to ASEAN in 1999.

It was not only ASEAN's newer members who were ambivalent about the idea of a regional mechanism for monitoring human rights. During the early 1990's, ASEAN leaders such as Prime Minsiter Lee Kuan Yew, (Singapore) and Prime Minister Mahathir (Malaysia), were publicly decrying 'Western' conceptions of human rights and arguing that a different model of rights implementation should apply to the (fast) developing nations of Asia. The 'Asian Values' debate provided regional leaders with an excuse to prevaricate about the substance and form of any future human rights body. When the Asian values debate subsided in the wake of the Financial Crisis of 1997, new issues arose to highlight the contested nature of human rights within the region. In 1999, Indonesia found itself the the subject of world-wide condemnation for atrocities committed by the Indonesian military after the East Timorese vote for independence in a United Nations-brokered referendum. Indonesia was ASEAN's most populous member state, one of ASEAN's founding members and one of its longest-established democracies, and had been one of the region's most forthright critics of human rights abuses in Myanmar.

Not only were there dissonant views from ASEAN member states on the subject of human rights and mechanisms of regional oversight, there was also discord from civil society organisations in the ASEAN region. The 'Working Group for an ASEAN Human Rights Mechanism' originally recommended the establishment of an independent, Regional Human Rights Commission with seven members working for a single, non-renewable term of five years, 30 with commissioners empowered to investigate allegations of human rights violations suo motu and on individual petition after exhaustion of local remedies, the preparation of reports and communication with states, issue recommendations to states and requests to foreign ministers for appropriate action to ensure compliance. By 2002, Workshop participants had formed the view that "prolonged silence on the issue implies that the governments

³⁰ (Draft) Agreement on the Establishment of an ASEAN Human Rights Commission, http://www.aseanhrmech.org/downloads/draft-agreement.pdf

are not yet ready to opt for a human rights body," and proposed a set of initiatives such as "human rights education, enhanced cooperation between governments and civil society, creation of interim thematic functional groups, establishment of a Joint Working Group on the issue composed of both government and civil society representatives, and creation of national working groups for an ASEAN human rights body in all ASEAN countries." 31 Two years later, Workshop participants acknowledged that the proposal for a Regional Human Rights Commission had been premature,³² and adopted a 'Roadmap for an ASEAN Human Rights Mechanism,' which advocated a multi-track approach to developing support for the idea of a regional human rights body; a Joint Working Group between government representatives and civil society, establishment of an Eminent Persons Group, and the creation of an ASEAN Commission for the Promotion and protection of the Rights of Women and Children.³³ The 'Asian values' ³⁴ discourse also weakened the cohesion of civil society groups, some of whom feared that any regional mechanism would articulate a conception of human rights that diverged from the standard of rights protection recognised in the *Universal Declaration* on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.³⁵

Nonetheless, the question of establishing a regional human rights body was on the agenda as part of the process of constructing a new legal framework for ASEAN. 36 In 2005 at the ASEAN Summit in Kuala Lumpur, leaders

³¹ Hao Duy Phan 'The Evolution Towards an ASEAN Human Rights Body' (2008) *Asia-Pacific Journal of Human Rights and the Law* 1 at 6.

³² Working Group for an ASEAN Human Rights Mechanism, Third Workshop's Summary of proceedings para. 15 (Bangkok, May 28-29, 2003).

³³ The ASEAN Commission on the Protection of the Rights of Women and Children was inaugurated on 7 April 2010.

³⁴ See Karen Engle 'Culture and Human Rights: The Asian Values Debate in Context' (1999) 32 New York Journal of International Law and Policy 291. Richard Klein 'Cultural Relativism, Economic Development and International Human Rights in the Asian Context' (2001) 9 Touro International Law Review 9. Kenneth Christie 'Regime Security and Human Rights in Southeast Asia' (1995) 43 Political Studies 1 204-2 18.

³⁵ This difference was most clearly articulated in the 1993 *Bangkok Declaration*, prepared at a conference organised by Asian states in the lead-up to the United Nation's *Vienna World Conference on Human Rights*. The *Bangkok Declaration*, signed by over forty Asian states, "(s)tressed the universality, objectivity and non-selectivity of all human rights" but rejected "the application of double standards" and "politicization" in their implementation.

³⁶ Johan Saravanamutta 'Whither the ASEAN Security Community? Some Reflections' (2005) 1 *IJAPS* 44.

committed to the creation of an *ASEAN Charter*, which would confer legal personality on ASEAN and restate long-valued goals such as "the right of every state to lead its national existence free from external interference, subversion or coercion and non-interference in the internal affairs of one another." ³⁷ But leaders also agreed that "the promotion of democracy, human rights and obligations, transparency and good governance and strengthening democratic institutions" were goals of ASEAN. Despite misgivings from some quarters, civil society argued strongly that realising such a goal required the establishment of a regional body dedicated to this purpose.

In Singapore in 2007 the Charter was presented, to come into effect upon ratification by all ten member states.³⁸ To the surprise of many, Article 14 of the Charter providing for the establishment of 'an ASEAN human rights body', to be created '(i)n conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms.' The task of determining the human rights body's Terms of Reference (TOR) was assigned to the ASEAN Foreign Ministers Meeting, who appointed a High Level Panel (HLP) for the purpose. In 2009, the TOR for the establishment of an ASEAN human rights body were adopted and approved by ASEAN's Foreign Ministers. The 'ASEAN Intergovernmental Commission on Human Rights' was inaugurated during the ASEAN Summit in October 2009 and soon afterwards ASEAN member states appointed the first representatives to the AICHR. One of the body's first tasks was to draft 'an ASEAN Declaration on Human Rights.'³⁹

III Structure of the ASEAN Intergovernmental Commission on Human Rights

Pursuant to the TOR, the purpose of the AICHR is to "promote human rights and fundamental freedoms of the peoples of ASEAN,"⁴⁰ and to do so "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."⁴¹

Hosted by The Berkeley Electronic Press

³⁷ The Kuala Lumpur Declaration on the Establishment of the ASEAN Charter.

³⁸ The Charter came in to effect on 21 October 2008.

³⁹ Article 4.2, Terms of Reference of AICHR.

⁴⁰ Article 4.1, Terms of Reference of the AICHR.

⁴¹ Article 1.4, Terms of Reference of the AICHR.

The rights to be upheld are those "prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties." ⁴² There are only two international human rights treaties to which all ASEAN states are parties; the *Convention on the Rights of the Child* and the *Convention on the Elimination of all Forms of Discrimination against Women*.

The Principles embodied in Section 2 of the ASEAN Charter are to guide the AICHR. These include: respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; non-interference in the internal affairs of ASEAN Member States; respect for the right of every Member State to lead its national

existence free from external interference, subversion and coercion⁴³ and respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.⁴⁴ The TOR state that "the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State,"⁴⁵ and that a "a constructive and non-confrontational approach" to enhance promotion and protection of human rights,⁴⁶ should be adopted, with an "evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN."⁴⁷

The TOR characterize the body as 'inter-governmental' and 'consultative,'⁴⁸ comprised of state representatives who are "accountable to the appointing government."⁴⁹ The functions of the AICHR are promotional and educative, and include; developing strategies for the promotion and protection of human rights;⁵⁰ enhancing public awareness of human rights among the

http://law.bepress.com/unswwps-flrps10/art53

⁴² Article 1.6, Terms of Reference of the AICHR.

⁴³ Article 2.1(a), (b) and (c), Terms of Reference of the AICHR.

⁴⁴ Ibid.

⁴⁵ Article 2.3 Terms of Reference of the AICHR.

⁴⁶ Article 2.4 Terms of Reference of the AICHR.

⁴⁷ Article 2.5 Terms of Reference of the AICHR.

⁴⁸ Article 3 Terms of Reference of the AICHR.

⁴⁹ Article 5.2 Terms of Reference of the AICHR.

⁵⁰ Article 4.1 Terms of Reference of the AICHR.

peoples of ASEAN through education, research and dissemination of information;⁵¹ promoting capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;52 encouraging ASEAN Member States to consider acceding to and ratifying international human rights instruments;53 providing advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;⁵⁴ engaging in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders.55

Included in the functions are some provisions which offer scope for the AICHR to undertake independent and potentially significant inquiries. These include Article 4.12, which empowers the body to "obtain information from ASEAN Member States on the promotion and protection of human rights" and Article 4.13, which mandates the preparation of "studies on thematic issues of human rights in ASEAN. Article 4.14 provides that the body may perform any tasks assigned to it by the ASEAN Foreign Ministers Meeting.⁵⁶ The AICHR is also required to develop an "ASEAN Human Rights Declaration."57 There is no power to investigate individual complaints and country-specific situations.

Representatives to the AICHR are appointed by member states, who must pay 'due consideration to gender equality, integrity and competence in the field of human rights; '58 independence is not a prerequisite. Representatives are appointed for a three-year term, with the possibility of a single reappointment. Article 5.5 provides that "the appointing government may decide, at its discretion, to replace its Representative." Decision-making within the Commission is based 'on consultation and consensus in accordance with Article 20 of the ASEAN Charter. 159

⁵¹ Article 4.3 Terms of Reference of the AICHR.

⁵² Article 4.5, Terms of Reference of the AICHR.

⁵³ Article 4.6, Terms of Reference of the AICHR.

⁵⁴ Article 4.7, Terms of Reference of the AICHR.

⁵⁵ Ibid.

⁵⁶ Article 4.14, Terms of Reference of the AICHR.

⁵⁷ Article 4.3 Terms of Reference of the AICHR.

⁵⁹ Article 6.1, Terms of Reference of the AICHR. ⁵⁸ Article 5.3, Terms of Reference of the AICHR.

IV Legitimacy and Compliance

The ASEAN Eminent Person's Group reported in 2006 that "ASEAN's problem is not one of lack of vision, ideas or action plans. The problem is one of ensuring compliance." Compliance – voluntary adherence in the absence of coercion, the extent to which obligations are felt, "not simply imposed through a hierarchy of sources of law" - is a central concern of international human rights law. Mechanisms for enforcement do not usually exist and the implementation of human rights usually comes at some cost to those who hold power. It is clear that compliance is not determined by the mere existence or non-existence of a legal rule.

State compliance follows from a perception that a rule-making body has authority in a particular sphere (the norms it promotes and the mode of exercising power are accepted) and the body is legitimate. From the acceptance of authority and legitimacy, comes rule-following behaviour, even in cases where there is no immediate benefit. The concepts of both authority and legitimacy are captured in Franck's definition of legitimacy, as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process." 62 At the core of Franck's definition is the concept of "belief," which distinguishes legitimacy as a basis of compliance from rational persuasion and power, and turns our attention to inter-subjective understandings of political authority.

The Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights has been described as "a political document born of negotiation and compromise." ⁶³ Lacking coercive powers, the potential of the AICHR to effect change within states and to protect human rights, will

⁶⁰ Report of the ASEAN Eminent Person's Group (2006) available at http://www.aseansec.org/19247.pdf.

⁶¹Martha Finnemore and Stephen J, Toope 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *International Organisation* 743-758 at 755.

⁶² Thomas Franck The Power of Legitimacy Among Nations (1990) Oxford University Press.

⁶³ Wigberto Tanada 'The Operationalization of the AHRB's Promotion and Protection Functions: An Outlook' (2009) Paper presented to the eighth workshop on the ASEAN regional mechanism on human rights, Bangkok, 14-15 July 2009, available at http://www.aseanhrmech.org/downloads/Mr.%20Wigberto%20E.%20Ta%Flada.pdf

depend on whether stakeholders believe the body to be legitimate; to have a 'right to rule' on the subject matter of human rights within their region and within their state borders. If they believe this, then ASEAN states will act upon the reports of the AICHR and support its rulings and recommendations. In those ASEAN states that can be characterised as 'authoritarian,' (Myanmar, Cambodia, Vietnam), it will be the perception of state leaders that matters. In democratic states, where governments are responsive to public opinion, the opinions of other groups ('society-at-large', NGOs, the media, the judiciary), will also be relevant.

To study 'belief,' the questions that we might ask include the following: what do the relevant actors think? On what basis do they think that the AICHR has the right to rule? Does the mandate of the body reflect widely known and accepted values? Do the decision-making processes of the body have integrity? Are they transparent? Was there participation in the design of the body by those who will be affected by its decisions? Is the body accountable? Are its decisions seen as 'just'? Are there shifts in belief along temporal and situational trajectories? Are the bases of legitimacy universal or (as is more likely), do state leaders prioritise consent as a basis of legitimacy, whereas NGOs prioritise independence of the commission and its members from government?⁶⁴ Is legitimacy static –or does it evolve as the institution sets about its work? How do the answers to these questions differ amongst different actors who engage with, shape, or are effected by the institution?

Looking forward, it is possible to identify four issues in relation to which questions such as these might be relevant. The first is the yet-to-be-delivered ASEAN Declaration on Human Rights. If the Declaration articulates rights which derogate from those contained in the Universal Bill of Rights, it is likely that civil society, regional and national NGOs and the international community, will impugn the Declaration and its drafters and the AICHR will suffer a consequent lack of legitimacy. Second, the way states interpret some articles in the Terms of Reference will be critical. Article 5.5, for example, provides that "the appointing government may decide, at its discretion, to replace its Representative." If states use this provision to remove activist Commissioners or to disrupt the effectiveness of the AICHR, or as a form of punishment for critical reports emanating from the AICHR, then critics will rightly question the body's ability to operate independently within the

⁶⁴ As Bodansky writes: "factors that may help to legitimise an institution in the eyes of non-state actors may help to de-legitimise it in the eyes of state-actors. Daniel M. Bodansky 'The Concept of Legitimacy in International Law' (2007) *University of Georgia School of Law research Paper Series* Paper No 07-013 available at http://ssrn.com/abstract=1033542.

present legal framework. Third, Article 5.2 provides that Commissioners are "accountable to the appointing government." Accountability" is ambiguous; on one reading, it indicates merely a requirement that members report to their government; on another, it goes to the independence of commission representatives to be critical of governments. Contrary to the assumption of critics, the independence of the body is as yet an untested factor. Finally, if the AICHR's early reports and recommendations are ones where consensus is achieved easily within the AICHR itself and where states are capable of complying without severe political ruptures, then one imagines that this might encourage legitimacy. Compliance itself breeds legitimacy: without compliance, the law is made ridiculous, and is perceived as illegitimate anyway.⁶⁵

V Theoretical Approaches to ASEAN's Regional Human Rights Body

In 2005, Donald Emmerson wrote of the "voluminous but traditionally atheoretical field of ASEAN studies." The field is changing. Since 2007, theorists have scrambled to provide a framework for understanding ASEAN's move toward greater integration and institutionalization and its establishment of a regional human rights body. Explaining ASEAN appears to offer rich pickings for theorists dedicated to expounding all of the current major theories of international relations; realism, liberalism and constructivism. These theories interest international lawyers, who have for some time been enjoined to draw on the offerings of international relations theorists so that they can better understand the field.66 How far do existing theories about ASEAN and its new human rights body take us, in understanding the issues of legitimacy and compliance discussed above?

Different varieties of realist explanation predominate in the field of recent ASEAN studies. Realism assumes that "international policy outcomes are determined by the distribution of material power capabilities among states." ⁶⁷ State action is the result of rational decision-making on the basis of interests; norms (such as human rights) and non-state actors (non-

⁶⁵ Franck above n 62.

⁶⁶Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 American Journal of International Law 367-397.

⁶⁷ Hans Peter Schmitz and Kathryn Sikkink 'International Human Rights' (2005) in Walter Carlsnaes, Thomas Risse and Beth a Simmons (eds) *Handbook of International Relations*, Sage Publications, 2nd Ed. 2005, at 521.

governmental organisations and international non-governmental organisations) are viewed as largely insignificant forces in international relations. In this vein, Gerstl, for example, argues that the establishment of a regional human rights body by ASEAN states "does not reflect a fundamental conceptual or political shift (on the part of ASEAN states), but is rather a logical evolution of the neorealist, state-centric interpretation of politics in Southeast Asia. "68 On this reading, ASEAN states have been driven to adopt human rights policies by pressure from great powers (the United States and the European Union), whose material capabilities (economic power and trade capabilities) have provided incentives for the spread of human rights norms. On the part of ASEAN states, there is "at heart a reluctance to implement liberal reform" 69 and this disinclination explains the reason why there have been few concrete measures to implement reform plans and why the human rights institution finally created, is weak.⁷⁰

From a realist perspective, the decision to establish the AICHR is an illustration of rational choice. ASEAN states appeased the international community by articulating a commitment to democracy, good governance, rule of law, human rights and fundamental freedoms,⁷¹ but designed an institution which lacks the power to challenge deep-seated norms which the Association wishes to preserve (sovereignty, non-intervention). ASEAN states saw the creation of the body as being in their interest, a self-conscious calculation to preserve sovereignty, a cosmetic move to ease internal pressure toward liberalism and human rights, an attempt to create a more positive international image, a largely rhetorical defence to international condemnation for the poor human rights records of states such as Myanmar. From their assessment of these motivations, these scholars make a pessimistic prognosis about the body's potential to influence state implementation of international human rights.⁷²

⁶⁸ Alfrted Gerstl 'The Depoliticization and "ASEANization" of Human Security in Southeast Asia: ASEAN's Counter-Terrorism and Climate Change Policies. Working Paper1, prepared for Standing Group on International Relations, 7th Pan European International Relations Conference, Stockholm 9-11 September 2010 'The Copenhagen School revisited.'

⁶⁹ Hiro Katsumata 'ASEAN and Human Rights: resisting Western pressure or emulating the West?' (2009) 22 *The Pacific Review* 619 at 628.

⁷⁰ Ibid at 629.

⁷¹ Preamble to the Charter of the Association of Southeast Asian Nations.

⁷² Durbach et al. above n 12. See also Yi-hung Chiou 'Unravelling the Logic of ASEAN's Decision-Making: Theoretical Analysis and Case Examination' (2008) 3(2) Asia Politics and Policy 371 at 371.

Realist explanations do not draw out the extent and nature of the influence of the more liberal ASEAN states (Indonesia, Thailand, the Philippines, Malaysia), in relation to those states still under largely authoritarian political structures (Cambodia, Vietnam, Laos, Brunei). Nor do they explain the differentiated influence of international calls for the creation of regional human rights bodies, or why ASEAN states responded as they did, at the time they did, to these calls. In these respects, liberal theories provide an important antidate to the realist assumption of the pre-eminent role of the state. Liberal theories of international institutions operate in two ways; to explain how domestic factors drive state decisions to create or become a member of an international institution, and to describe how institutions function to disseminate norms and to facilitate cooperation. Like realists, liberal theorists assume that states act on the basis of rational choice, but they emphasise the domestic sources of state preferences. 73 Unlike realist explanations, which emphasise states as the only significant actors in the evolution of the AICHR, liberal theorists emphasise the role played by regional networks of civil society activists and NGOs, and the region's national human rights institutions (of Thailand, the Philippines, Malaysia, Indonesia), as significant in state's decisions to create the AICHR and in shaping the form that the body took. Liberal theories are sensitive to the fact that state responses to domestic influences vary amongst different ASEAN members; within some states, the presence and impact of regional civil society groups was nonexistent (Myanmar, Laos), while in others, NGOs and the domestic political effect they had, determinedly shaped that state's mode of negotiating.

Liberal theorists assume that the dissemination of human rights norms is more effective in liberal democracies, which have "access points" for actors seeking to introduce change. They also assume that cooperation is more likely between liberal democracies, because leaders have a political mandate for peace. Liberal institutionalists would point out, for example, that strongest support for the establishment of an independent regional human rights body came from those ASEAN states which have already established national human rights institutions (NHRIs), independent, state-based bodies with a mandate to promote and protect international human rights.⁷⁴ For liberal scholars, this suggests that the experience of these new democracies

⁷³ Andrew Moravcsik 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51(4) *International Organisation* 513-553.

⁷⁴ Malaysia, Thailand, Indonesia and the Philippines have established NHRIs which comply with the United Nations 'Paris Principles.'

in engaging with autonomous domestic human rights bodies (albeit ones within the state), prepared them for the idea of a regional body for human rights oversight. Liberal theory would also suggest that these states will better engage with a regional human rights institution and accept its reports and recommendations: "the success of human rights norms is mainly a function of pre-existing resonating and compatible domestic structures." 75

Liberal scholars view international institutions, once established, as "more than instruments of statecraft and the products of regional stability." ⁷⁶ Institutions shape the boundaries of state action, and may have unintended consequences; "the weakening of national sovereignty and the gradual ceding of authority to supranational institutions were not what most of the European leaders sought at the start, but rather were the product of the institutions they established." ⁷⁷ Some scholars from within the ASEAN region, such as Simon S.C. Tay, hope that the ASEAN region will follow Europe's pattern of development. Tay offers liberal institutionalism as "the most appropriate to understand the ASEAN Charter." He argues that:

"ASEAN has not arrived at a destination described by constructivist theory where ideas make the group cohere and guide its actions in a coordinated manner. While the statist anchor of realism has been pulled up, the ideas in the charter remain more of a compass for the present. It is neither the realist nor the constructivist who can best understand and explain the charter. It is instead, the moving, fluid and deepening interactions that are better understood and prescribed by neoliberal institutionalism that are most appropriate to understand the ASEAN charter, both in its text and its present and evolving context of practice."

'Constructivist theory' to which Tay refers, stands distinct from the rationalism of realist and liberal theories. ⁷⁹ The key insight of constructivists is that state

⁷⁵Schmitz and Sikkink above n 67.

⁷⁶ Tav above n 13 at 164.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ The authors describe constructivism as a 'meta-theory,' grounded in an assumption about the social world and about theory-building, rather than by specific hypotheses. Ruland and A Jetschke: 40 years of ASEAN (2008) 21 (4) *The Pacific Review* 397.

interests are constructed and defined by social norms and principled ideas ('a world culture'),80 which has a constitutive effect on the identity formation of actors. The argument is that realism and liberalism can explain the form of international order, but not the content.⁸¹ In relation to human rights, constructivists argue that the realist 'logic of consequences' cannot adequately explain long-term systemic change; "why do deeply entrenched cultural and social practices such as foot-binding in China, global slave-trade, discriminatory practices against women, or communist regimes in eastern Europe, lose their legitimacy?" 82 Theer are two major branches of constructivism which offer explanations for such phenomena. The first branch, (sociological institutionalism), suggests that states, unsure of what to do when presented with new ideas, adopt rules that have been scripted by other actors; they "mimic" others, adopting norms based on a superficial 'logic of appropriateness' while not altering fundamental beliefs about identity. There are two possible results which might occur as a result of 'mimicking.' The first is 'decoupling,' where after a period of time or in the face of political pressure or crisis, state behaviour diverges from the rhetorical support for a norm. The second is actual change in identity, which occurs as a result of the (uncomfortable) dissonance between rhetoric and action, which leads actors to negate their pre-existing identity and assume the new one. second branch of constructivism, offered by socialization theorists, depicts a process of socialization and internalization, as new norms become part of the identity of actors,83 causing profound change about fundamental ideas of how citizens and others should be treated.

In relation to explanations of ASEAN's regional human rights developments, the views of sociological institutionalists, such as Katsumata, ⁸⁴ are more common than those of socialization theorists. ⁸⁵ Katsumata draws on the

⁸⁰ Georg Krucken and Gili S. Drori *World Society: The Writings of John S. Meyer* (2009) Oxford University Press.

⁸¹ John Ruggie 'International Regimes, Transactions and Change: Embedded Liberalism in the - Economic Order' (1983) 36(2) *International Organisation* 379-416.

⁸² Schmitz and Sikkink above n 67 at 12.

⁸³ Risse, Ropp, Sikkink *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge University Press.

⁸⁴ Katsumata, above n 69.

⁸⁵ Cf Maria-Gabriela Manea 'How and Why Interaction Matters: ASEAN's Regional Identity and Human Rights' (2009) *Nordic International Studies Association Online Publications* available at http://cac.sagepub.com/cgi/content/abstract/44/1/27.

literature of sociological institutionalism to explain ASEAN's decision to embrace liberal human rights values and their concomitant institutions. The decision, Katsumata argues, was the result of institutional isomorphism, which occurs in a normative environment where certain structures signal legitimacy and where those seeking legitimacy adopt or emulate these structures to secure their identity as "legitimate members of the community."86 Katsumata argues that ASEAN states "have been 'mimetically' adopting the norm of human rights which is championed by the advanced industrialized democracies, with the intention of securing ASEAN's identity as a legitimate institution in the community of modern states....for the same reason as cashstrapped developing countries have luxurious national airlines and newly independent countries institute national flags."87 According to Katsumata, "there is a discrepancy between the actual institutional development of the association and their ambitious promises for liberal reform, which are consistent with the external norm. According to Katsumtata, "ASEAN has been losing its credibility since the late 1990's, on the ground that it has not been able to deal effectively with a new set of challenges, including the Asian financial crisis, internal conflicts, terrorism, non-traditional security issues such as pandemics, diseases and most importantly, human rights abuses in Myanmar. Thus, it has been imperative for the ASEAN members to salvage the credibility of their association, so as to reverse its trend of losing credibility."88

VI Conclusion: the Limits of (Some) Theories

The theories outlined above attempt to provide frameworks for understanding the confluence of events which led to the creation of the AICHR, at this particular time, in this particular form, and the particular context in which the body will operate. But as Acharya writes, "(n)either power politics nor functional imperative adequately explains the institutional trajectory and outcomes of Asian regionalism." ⁸⁹ The questions asked by realists, liberal institutionalists and sociological institutionalists, do not speak to the central concept of belief; of state leaders, of citizens, of activist groups, of potential rights violators. None of the theories capture the subjective

⁸⁶ Katsumata above n 69 at 625.

⁸⁷ Ibid.

⁸⁸ Katsumata above n 69 at 626.

⁸⁹ Aimtav Acharya *Whose Ideas matter? Agency and Power in Asian Regionalism'* (2009) Cornell University Press.

complexity of the regime's evolution from the perspective of the actors involved. They do not ask questions which go to the different, particular and changing beliefs of these actors about the purpose of the AICHR, and the relationship the institution will / should have with states and communities and the region. These explanations fall short, therefore, in attempts to understand (1) how the powers and processes of the AICHR might impact upon states in the region and upon their citizens, (2) whether or not the AICHR be a powerful institution, (3) whether or not the body's decisions will be implemented by states, (4) whether the AICHR's existence will this result in greater protection of human rights for people within ASEAN states (5) whether or not the present structure and form of the AICHR will enhance or restrict its power. In summary, on the key issues of legitimacy and compliance, these explanations fall short.

More broadly, the theories outlined above are closed to the possibility that an institution which performs effectively can garner legitimacy, perhaps in spite of structural limitations inherited at its birth. The AICHR and its reports and recommendations will generate processes of interaction amongst various actors within the region; states, NGOs, civil society. Even if this interaction takes the form of resistance from some states, this resistance has the potential to generate change: Kratochwil argues that "(f)ollowing a rule involves argumentation (or rhetoric) and not mere blind obedience, through argumentation, the inter-subjective validity of norms is established." From this interaction, shared meanings can emerge and solidify. 91

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. The Organization of African Unity was established in 1963. It was not until 1981 that the African Charter on Human and People's rights was adopted, establishing the African Human Rights Commission. The African Court on Human and people's rights was established in 2004 and the Court's first judges elected in 2006. In 1948, the Organization of American States was created under the Charter of the Organization of American states. It was not until 1978 that the American Convention on Human Rights entered into force, establishing the inter-American Court of Human Rights. Tom Farer writes of

⁹⁰ F Kratchowil *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University press, 1989), at 181-211 at 69.

Stephen J. Toope 'Emerging Patterns of Governance and International Law' in Michael Byers (ed) *The Role of Law in International Politics: Essays in International Politics and International Law* (2000) Oxford University Press.

the "murderous political projects" of the Latin American regimes, which were investigated, uncovered and condemned by the Inter-American Commission in the early years following its creation:

"how, they must have wondered, could this organ of an association of governments, including their own, an association implicitly consecrated at birth to the defense of the West against the very revolutionary forces that they were busy repressing, be calling *them* to account? How could these conservatively dressed, middle-aged gentlemen, nominated and elected by the region's regimes, be harshly indicting various of their electors? It was Frankenstein's monster all over again."92

ASEAN's human rights regime was constructed by actors with diverse and conflicting goals. Within ASEAN, there exists no shared understanding about the appropriate level of supra-state oversight of understandings of human rights and rights-implementation are still-contested. The body's form and powers are a true reflection of the reservations felt within ASEAN about ceding sovereignty to a regional human rights institution. But for some members of ASEAN, the debate surrounding the establishment of the AICHR has already shifted patterns of expectation about the citizen / state relationship and shifts in understanding will continue to occur as actors respond to and engage with this new human rights actor.

In this paper I have argued for caution in the application of paradigms, and advocated the adoption of supple and open-ended empirical approaches to studying the processes of legal change, to capture the fluid, subjective and multifarious perceptions which matter in considering questions of legitimacy and compliance with human rights regimes.

⁹² Farer, Tom J. "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox." Human Rights Quarterly 19.3 (1997): 510-546 at 510.