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From commitment to compliance: ASEAN's human rights regression?

Abstract

Whether it is the persecution of the Rohingya, the disappearance of human rights activists, the general limiting of freedom of speech across the region, or the resumption of the arbitrary use of the death penalty, Southeast Asia can be said to be facing a human rights crisis. This human rights crisis is though occurring at a time when the region's institution, the Association of Southeast Asian Nations (ASEAN), has never been so interested in human rights. After a lengthy period of time in which ASEAN either ignored, or paid lip service to human rights, the Association has created a human rights body – the ASEAN Intergovernmental Commission on Human Rights (AICHR) – and adopted an ASEAN Human Rights Declaration (AHRD). In this article I utilise the Spiral Model to explain how, when ASEAN member states are regressing in their commitment to human rights, an intergovernmental body continues to promote their commitment and lay the ground work for their compliance.

Introduction

The terminology in the article's title, "from commitment to compliance", is the sub-title in the publication, *The Persistent Power of Human Rights* (PPoHR) (Risse, Ropp and Sikkink, 2013). This is the follow-up publication to *The Power of Human Rights* (PoHR) (Risse, Ropp and Sikkink, 1999), which introduced into the literature the Spiral Model. The key purpose of this article is to utilise the Spiral Model to explain how, when ASEAN member states are backtracking on human rights, ASEAN's Intergovernmental Commission on Human Rights (AICHR) is continuing to promote human rights. A divergent trajectory would appear implausible because ASEAN is an intergovernmental organisation that reflects the stance of its member states. With regression prevalent in its member states the expectation is ASEAN too will regress from the commitment shown with the ASEAN Human Rights Declaration (AHRD) to backing its member states' actions by deflecting internal and international criticism. The anodyne September 2017 ASEAN Chairman's statement on the Myanmar

government's use of violence against the Rohingya would indeed suggest that this is the case. However, the argument posited is because ASEAN has a human rights body that consists of "independent-minded" representatives that remain committed to its mandate to promote human rights, there is evidence of activities that indicate a movement from human rights' commitment to human rights' compliance. The argument is not that AICHR can halt member states' regression. Not only is it too soon to know the outcome of various activities, such as the rights of the disabled, but also AICHR cannot implement plans; the decision to comply with human rights ultimately rests with the member states. The argument is that while human rights are regressing in Southeast Asia, AICHR is continuing to reaffirm, on behalf of its member states, a commitment to human rights and by agreeing regional action plans preparing the ground for their compliance. Compliance ultimately rests with such regional action plans informing national action plans.

In order to determine AICHR's capacity to turn a commitment into compliance I utilise the Spiral Model, which the PoHR authors hoped would be transformational for our understanding of how states' engagement with human rights proceeds from repressing human rights to being compliant with international legal standards safeguarding human rights. In the follow-up publication, PPOHR, the authors focused on what stopped states, and other actors, from turning a commitment to abide with international standards of human rights into acting in compliance with them. I have complemented this textual analysis with interviews conducted with past and current AICHR representatives.¹

The article proceeds with the following structure. First, I explain the various phases of the Spiral Model and introduce two new variables from PPOHR that detail what tools are available to actors pressurizing states to engage with human rights (called mechanisms) and

the different contexts that apply to states that help explain the likely success of these tools (called scoping conditions). Couching this discussion in terms of state compliance is helpful in clarifying the model's core assumptions, specifically the inherent contestability of norms, and PPOHR's evolution of the model. It will also help with the charting of the region's engagement with human rights in the article's second part. However, the application of the model will be different in the third and final section of the article where the mechanisms and scoping conditions are applied to AICHR.

In the second part I use the model to chart ASEAN's engagement with human rights and thereby reveal member states' progression and their subsequent regression. Currently the literature on ASEAN's human rights record does not systematically use the Spiral Model, and none do so with the updates contained in PPOHR, although it does get a brief mention by Mathew Davies (see 2014a and 2014b) and Catherine Renshaw uses it to frame a specific examination of human trafficking in Southeast Asia (2016).

In the final part I show how the model, with the new variables from PPOHR, can be used to interpret the actions of AICHR representatives to reveal how they are seeking to uphold member states commitments to human rights and even lay the groundwork for their compliance. This adds to the literature on AICHR, which is primarily concerned with why and how it was created (Munro, 2011; Poole, 2015; Tan, 2011a; Tan, 2011b).

1. Spiral Model, Mechanisms and Scoping Conditions

The Spiral Model posits a spectrum of five phases along which states can be plotted according to how they engage with human rights (Risse et al., 1999, p. 20, p. 32). At one extreme this engagement is simply to disregard the human rights of its citizens and this first phase is called repression. The second phase is denial where the state acknowledges that something terrible is happening but denies that it is a human rights abuse. The third phase is called tactical concessions and marks the first time that the state has shown a commitment to human rights. However, as the name suggests, this commitment is purely an instrumental one to relieve pressure rather than an indicator that the state sees an inherent value in respecting human rights. This stage is often marked by such actions as the release of political prisoners or the holding of a show trial. The fourth phase is prescriptive status and this is where the state signs and ratifies international human rights treaties and begins the process of adjusting domestic legislation to reflect its treaty obligations. The final phase is called rule-consistent behaviour and this is where the obligation to safeguard human rights is both institutionalised in the public and private sectors and habitualised within the state's society.

The process, and it is a three-stage process, that explains how a state moves through these phases is one of socialisation (Risse et al., 1999, pp. 12-17). In the earlier phases (repression through to tactical concessions) the state's motivation to engage is based on a logic of consequence as it determines the benefits and costs of withstanding or succumbing to the pressure exerted on it from domestic civil society activists and international bodies. This is called instrumental rationality and while it is possible that the state will adapt its behaviour because of pressure, this is done to deflect criticism and assuage other states with the elite having little intention of abiding by the human right's norm in the long-term. It is a tactical concession that may reflect a rhetorical change that amounts to little more than window dressing. However, once the state has shown a commitment to human rights by making

tactical concessions then PoHR argues that while state leaders may regard talk as cheap they can become entrapped by the rhetoric they endorse, and thus in the long run find they cannot so easily explain away a gap in their rhetoric and actions. This is where the second explanation arises. Governments respond to continuing criticism by engaging in dialogue over the meaning of the particular human rights norm. They are in effect engaged in argumentative discourse; which is the second stage of the three-stage process. The key point is that the debate has shifted over whether the government intends to act in accordance with the human rights norm at all, to how it will abide by it. The existence of a dialogue also indicates that the government takes the opposition actor(s) more seriously and treats them as valid interlocutors. The stage of argumentative discourse is, according to PoHR, the most important. Here the debate clarifies the prescriptive essence of the human rights norm and thus how the government should behave by abiding with it. Argumentative discourse is thus prevalent in phase 3 (tactical concession) and 4 (prescriptive status) and is considered so important because this is where contestation over what the human rights norm means and how it can be implemented occurs. It could be that this is never fully resolved and partly explains why some states get “stuck” in phases 3 and 4 (see Jetschke and Liese, 2013). According to PoHR once the meaning of the human rights norm has become understood then a logic of appropriateness replaces the logic of consequence as the state both pursues policies that institutionalise the human rights in domestic laws and practices, especially those adopted by enforcement agencies, and educates society so that compliance becomes a habitual practice of citizens and enforced by the rule of law. This is the final stage of socialisation and is called institutionalisation and habitualization.

The follow-up publication, PPOHR, recognised that this progression, especially from commitment to human rights (phase 3) to compliance with human rights (phase 5) was overly

simplistic and that it reflected the optimism about the power of human rights prevalent by the end of the 1990s. PPOHR was published in 2013 and here its optimism was tempered by a decade in which the most powerful democracy in the world had engaged in systematic abuses of human rights, notably kidnapping (extraordinary rendition), indefinite detention without a fair trial (Guantanamo Bay detention camp), and torture (enhanced interrogation techniques). This regression in human rights, coupled to a series of empirical studies using the Spiral Model that indicated some states did not reach phase 5, lead PPOHR to introduce two new variables; mechanisms and scoping conditions.

There are four mechanisms, three of these are the tools that domestic activists and international bodies and networks can use to pressure unwilling states to commit to human rights, and one mechanism can assist states that are willing but just unable to comply with human rights. The first three are coercion, changing incentives and persuasion, while the fourth, is capacity-building. Coercion is the use of force, such as provided by Responsibility to Protect, or a legal instrument, such as the Rome Statute of the International Criminal Court, that requires the state to adjust its behaviour or action will be taken against the elite. Changing incentives is the use of sanctions or rewards to encourage change. Examples of this include attaching conditions, such as evidence of improving human rights, to foreign aid packages. These first two mechanisms rely of instrumental rationality to induce change. The third, persuasion, is the use of argumentative discourse to alter the state's belief about the validity of the human rights norm. While this is likely to begin in combination with one or both of the previous mechanisms, it is more likely to accomplish state compliance with human rights if it emerges as the dominant mechanism. This is because ultimately compliance is more stable if the state is in compliance because it believes in the inherent value of human rights rather than seeing them as the better of two evils, or the necessary, but

unwanted, condition attached to an aid package. The fourth, capacity-building, is the provision of resources to enable states to engage in the education and training of its citizens, and the development of bureaucratic procedures and the infrastructure to implement the human rights obligations it has committed to by signing and ratifying human rights treaties.

The scoping conditions, of which there are five, refers to the context surrounding the target state. The first, and the most important, is regime type. While PPOHR adopts the widely held opinion that democracies are more willing to commit to and comply with human rights because they empower their citizenry by making them part of the political process (governments have to be responsive to the peoples' needs and accountable to their electorate, for example), they note that it is not the case that the more robust the democratic regime the more likely it is to support human rights. Instead they argue, as a consequence of George W. Bush's administration's blowback on human rights, that robust democratic regimes, just as with robust authoritarian regimes, can engage in powerful counter-narratives to human rights without fear that this will endanger the regime. In the case of the Bush Administration the counter-narrative of national security (War on Terror) trumped the narrative of human rights and the USA moved to phase one (repression) as evidenced by the torture committed at the Abu Ghraib prison. It has been particularly resistant to pressure since and even after two terms of the Obama presidency the USA still practices indefinite detention and sending detainees to countries that employ torture. It is at best back to phase four (Sikkink, 2013). The finding of this scope condition is that it is regime transition which provides the window to exert pressure. Emerging democratic regimes that have replaced authoritarian ones are more amenable to committing to human rights because they are predisposed to seeing human rights as symbols of their new identity.

The second and third scoping conditions have similar outcomes. The second is limited statehood, which means that the government may have territory that is notionally under its control but in reality it is not governed by the state. This captures failing states where the monopoly on the use of force is not centrally held or in those states where the regime lacks capacity to enforce its rule. The third scope condition is decentralisation, a global development where political power is devolved to local power centres. In both cases such conditions mean that although the state might commit to human rights the extent to which this is accepted throughout the territory is either unknown (limited statehood) or the interpretation of the human right is contested (decentralisation) and implemented in a manner that could be inconsistent with international standards.

The fourth and fifth conditions are also similar in that they are concerned with the severity of the target's vulnerability to external pressure. The fourth is material vulnerability, which concerns the extent to which the state's material wealth enables it to resist coercion or incentives. In this instance, China's economic growth has helped it resist pressure to improve its human rights record. The fifth condition is social vulnerability, which replaces material wealth with social worth and prestige. The more upholding human rights are central to a state's identity, or membership of an international organisation, the more socially vulnerable it is to accusations that its behaviour is unbecoming. Here persuasion in the guise of naming and shaming might be an effective tool.

It is then appreciating that certain mechanisms are going to be more effective depending upon the target's scoping conditions that PPOHR employ to show how a move from commitment to compliance can be accomplished. It should be noted that these variables are also applicable to the earlier phases of the Spiral Model as well.

The Spiral Model is certainly not without criticism and it has been critiqued for being linear, unidirectional and underestimating the degree of contestation that is prevalent throughout the adoption of human rights. While the authors refute the accusation of the model being linear (Risse et al., 2013, p. 33), it is not unusual for descriptions to move through the phases in sequence (see Sikkink, 2013). While there is no reason to believe a state must move from phase one through to five in sequence they do note that phase 4 is a necessary precursor to phase 5 (Risse et al., 1999, p. 31). They accept the accusation of the model being unidirectional – that is the inexorable power of human rights – and the overly optimistic view that the stronger human rights’ arguments would prevail in argumentative discourse (Risse et al., 2013, p. 15). This is not to suggest that in PoHR they did not expect considerable resistance. They did, and they acknowledged that movement through the phases may slow and even drift backwards, but ultimately these would be temporary setbacks before the power of the human rights’ discourse shifted the state down the path towards phase 5. In PPOHR this unidirectional view of the Spiral Model is problematised and there is a recognition that regression in human rights is possible because persuasive counter-narratives can be launched by the state. This is reflected in the current norm literature, which has increasingly focused on norm degeneration (Panke and Petersohn, 2011) and has revealed that states are adept at using counter-narratives to resist and pushback against human rights advocates. For example, Fernando Nuñez-Mietz and Lucrecia Garcia Iommi (2017) note how, in the case of LGBT rights, some state authorities were able to discursively construct these rights as a threat to their national identity. Having done this, they were then able to adopt legislation that would make it more difficult for advocacy groups to promote LGBT rights. Nuñez-Mietz and Garcia Iommi refer to this as norm immunization as the state pre-empts the challenge of a human rights discourse by (a) establishing a discursive terrain that is unfavourable and (b) creating a

legal environment in which advocacy is hindered. Interestingly they argue that because the state is preparing for the contestation ahead of the battle – its preparations are like a vaccine – once discursive battle commences the state is able to identify the activists promoting the human rights’ norm as the threat as much as the norm itself. Once the domestic advocacy groups are identified as a threat to the state’s society then their links to regional or international networks can be used against them as evidence of foreign intervention. This reveals that well-orchestrated campaigns, backed by foreign donors, can paradoxically create greater resistance. Not only can this explain regression of human rights commitments but, as Rochelle Terman writes, it can also lead to a counter-narrative that alters beliefs and preferences about the norm itself. Terman refers to this as defiance, and argues that rather than regressing human rights the argumentative discourse alters the target state’s (and its society’s) normative preferences and so creates a ‘new constellation of intersubjective beliefs, practices and institutions’ (2017, p. 7). In this instance what constitutes the human rights norm has been altered, so it does not regress, instead, in the guise promoted by human rights advocates, it dies.

The final critique concerns the Spiral Model’s proposition that the argumentative discourse stage of socialisation ultimately ends as a logic of appropriateness underpins the institutionalisation and habitualisation of human rights by phase 5. If the USA can deploy counter-narratives around national security to rollback on habitually and institutionally understood breaches of human rights, such as kidnapping and torture, then contestation, or at least the possibility of contestation, never ends. This suggests that a logic of consequence is at play as the counter-narrative competes with the current belief about the appropriateness of the norm. By positing that there are benefits from defecting on the norm, or costs associated with continuing compliance, contestation reveals that the logic of consequence can be evoked

in phase 5. It could be that the state engages in a discourse that reinterprets the meaning of the norm in a particular context, thus avoiding the accusation of norm violation (see Dixon, 2017). The Bush Administration was able, for example, to argue that the war on terror produced a changed context that made extraordinary rendition and enhanced interrogation techniques permissible. A similar argument is made with regard to slavery by Islamic extremists, who argue that in times of war the women of the opposing side can rightfully be considered chattels for the victorious. Hence the claim, 'Slavery is a part of Islam' (WND, 2003) and the re-establishment of slavery by ISIS and Boko Haram (CNN, 2014; Christopher, 2014). Of course, Muslims contest these views and this is not to argue that slavery is likely to return as a legal trade, rather, those arguments for and against abuses of human rights remain contestable even in phase 5.

The Spiral Model has therefore evolved and while the phases and stages of socialisation remain useful in understanding progression and regression, it is pertinent to note that because contestation remains possible across all phases, even with the most deeply-embedded norms, narratives, counter-narratives and rhetorical strategies adopted by advocates and state elites are on-going. It is perhaps therefore less the persistent power of human rights and instead the persistent battle for human rights. In this respect a significant finding emerges from combining the scoping condition, Regime Type, with Nuñez-Mietz and Garcia Iommi, as well as Terman's, findings that counter-narratives (immunization, defiance) are more effective when the advocates for the human rights norm are at their strongest. That is, the more definitive the advocacy the more the state elite are able to present it as a threat, and they are more capable of doing this the stronger, or more stable, their regime. A stable regime is thus better able to marshal its resources to present the advocacy as a threat, possibly by foreigners, to the state's identity than a regime undergoing transition. This implies that in

those situations where the regime is strong, advocacy is more likely to achieve success from those actors that make it harder for the state elite to present it as a threat to the state's identity. This does not mean weak advocacy, but rather targeted advocacy where resistance is likely to be less. This maybe assisted if the source of the advocacy comes not from an outsider institution, but rather from a regional, inter-governmental, institution whose *raison d'etre* is to buttress the stance of its member states. In part three this will be AICHR, but before examining this the second part will chart ASEAN's engagement with human rights. The progression through the phases, and subsequent regression, provides the context for appreciating different member states understanding of why AICHR was created and what it can, and cannot, do.

2. The Spiral Model in action

ASEAN's engagement with human rights

While not without contention it is relatively easy to plot ASEAN's engagement with human rights along the Spiral Model's spectrum. ASEAN's core principles in support of state sovereignty, especially non-interference, ensured that for much of its history the Association ignored human rights abuses. Indeed, it could be argued that by doing nothing while state leaders such as Ferdinand Marcos of the Philippines and Suharto in Indonesia abused their peoples' human rights ASEAN tacitly supported the repression of human rights. The emergence in the 1990s of an international discourse on human rights, initiated by the 1993 Vienna Conference, resulted in a willingness in ASEAN to discuss human rights but this discussion amounted to a denial of a problem. For the member states this is captured most

strongly in the Asian Values debate over what constituted universal human rights and whether they were indeed universal; Mahathir Mohamad of Malaysia and Lee Kuan Yew in Singapore were two of the most outspoken regional leaders in defence of Asian Values. This denial resonates with the PPOHR findings that when regimes feel strong they are more capable of resisting. The 1990s were the time of the Asian Tigers and the regimes of both Mahathir and Lee were regarded as successes. Both regimes were to feel less assured after the 1997-98 financial crisis and the Asian Values debate became less prominent and, as will be noted below, initiated ASEAN's move to the next phase. While Asian Values captured the member states' denial, for the Association itself denial was subtler. Following the Vienna Conference, the ASEAN Foreign Ministers made the Association's first explicit reference to human rights in their Joint Communiqué at the 26th ASEAN Ministerial Meeting in July 1993. In addition to considering the creation of a regional human rights regime the communiqué also stressed 'that ASEAN should coordinate a common approach on human rights' (ASEAN, 1993). This was to become known as baselining; seeking to establish some degree of harmonisation of the differences among the ASEAN members over what constituted human rights. ASEAN outsourced this to a semi-official, track-II, body – ASEAN-ISIS Colloquium on Human Rights – and after ten years little progress had been made. It was a form of denial; not an outright rejection but rather an inability to make progress on committing to human rights because the Association had not yet achieved a consensus on what its members understood constituted human rights.

The 1997-98 financial crisis was to provide a change of context that made the move to tacit concession possible. Not only did it undercut some of the confidence about Asian Values - Lee was moved to admit that nepotism is a Confucian weakness, and Amitav Acharya writes, '*guanxi* – roughly, the use of personal connections to one's advantage outside the legal

framework – is now said not to be a good Asian value’ (1999, p. 422) – but it also brought down the Suharto regime and ushered in a period of regime transition to democracy in the *primus inter pares* of ASEAN. This leads to the adoption of the Vientiane Action Programme (VAP) in November 2004; Tan Hsien-Li refers to it as a ‘turning point’ (2011b, p. 140) and Mathew Davies as a ‘remarkable change in how ASEAN thought about human rights’ (2013, p. 385). The significance of the VAP is not only that it places human rights in the context of achieving security, thus placing human rights at the core of ASEAN’s purpose, but it also reveals the ability of well-placed, elite, norm entrepreneurs – in this instance the Working Group for the Establishment of an ASEAN Human Rights Mechanism (the Working Group) – to influence ASEAN’s stance. The Working Group utilised previous ASEAN commitments on human rights to cajole state elites; that is, entrapping them in the rhetoric they had previously endorsed. However, the audience for the Working Group was not domestic activists, but rather ‘key interested parties at an elite level, in particular domestic politicians’ (Davies, 2013, p. 397). Given ASEAN’s inter-governmental nature this reveals that rather than empowering domestic activists to bring about a change in member states’ attitude towards human rights, the change has to be couched in language that fits with the prevailing view of ASEAN members and presented by norm entrepreneurs that have the elites’ respect. Hence the importance of “independently-minded” AICHR representatives as detailed below.

While for Indonesia the adoption of the VAP is part of a reconstitution of its identity as a post-authoritarian state, for other ASEAN members it can be seen as a tactical concession since some were, and remained, sceptical of the virtues of a human rights body (see Ryu and Ortuoste, 2014, pp. 368-370). This tactical concessions phase continues through to the ASEAN Charter in which a commitment to a human rights body is endorsed. It remains a tactical concession though as Jörn Dosch explains:

in July 2007...Jakarta and Manila managed to achieve approval for the clause on the establishment of a regional human rights body in a compromise that avoided the introduction of a majority voting mechanism. The Vietnamese, Laotian and Burmese governments saw changes to consensus-based decision-making in ASEAN as the greater evil (2008, p. 537).

It is the adoption of the ASEAN Human Rights Declaration (AHRD) in November 2012 and the twin goals of promoting and protecting human rights enshrined in AICHR's Terms of Reference (ToR) that denotes the current prescriptive status.

What this narrative describes is not just an evolution of ASEAN engagement with human rights but it also reveals that ASEAN is not an institution that cajoles, persuades or pressures its member states. The drivers for change were regional CSOs and Indonesia; for details of this see Collins (2013) and Dosch (2008). ASEAN reflects its members' stance on issues and therefore ASEAN's stance on human rights is not separate from its member states. Thus when human rights were increasingly prominent in ASEAN discourse in 2007, ASEAN felt compelled to comment, critically, on Myanmar's suppression of monks during the Saffron Revolution. In response to the violence Singapore's foreign minister, George Yeo, speaking on behalf of the ASEAN foreign ministers, responded by expressing their "revulsion" to the Burmese foreign minister and being "appalled" by the government's use of automatic weapon fire (Roberts, 2010, pp. 155-6). Ten years later the ASEAN response to the use of automatic weapon fire by the Burmese military against the Rohingya drew a very different response. Reflecting the regression of human rights across Southeast Asia, ASEAN's condemnation of the use of force conflated the violence used by the government forces with that from the

Arakan Rohingya Salvation Army (ARSA), and rather than an assessment of the conflict ASEAN focused on the humanitarian disaster that unfolded on the Myanmar-Bangladeshi border. If ASEAN is simply a reflection of its member states, what prospect is there that AICHR might represent something independent and engage in activities that reaffirm a commitment to human rights? Before answering this, we firstly need to note the human rights crisis that represents the region's regression.

Repression and Denial: An ASEAN human rights regression

When a state engages in repression or denial it moves from its previous phase instantly. In the Philippines, the steady progress in promoting and protecting human rights since the fall of Ferdinand Marcos is being stripped away by the Duterte administration. This can be seen in his opposition to two significant human rights achievements that followed the People Power revolution that ousted the Marcos dictatorship; the abolition of the death penalty and the enshrining in the 1987 Constitution of a Philippine National Human Rights Institution (NHRI). The Philippines' NHRI is the oldest in Southeast Asia and Duterte has sought to undermine it and reinstate the death penalty. His presidency has unambiguously treated criticisms of his approach to human rights as fallacious and no more than convenient tools for foreign interference. Tom Smith writes,

Duterte has succeeded to a significant degree in making human rights a dirty word, lacing it with his anti-Western and anti-imperialist rhetoric. According to him, the concept of human rights is to blame for protecting the drug lords and causing the country's other problems (Smith, 2017).

We can therefore interpret Duterte's encouraging of extra-judicial killings as repression because he explains it as a necessary part of his war on drugs (The Guardian, 2016).

Myanmar's counter-narrative that the violence against the "Bengalis" is an act of national security because of the terrorist threat from ARSA, can be interpreted as a form of denial. Here the government is seeking to deny the narrative of "ethnic cleansing" and "genocide" from the international community. Denial is thus evident in the refusal to recognise the name Rohingya for the targeted community, thus denying them an identity, and the government's narrative that the cause of the violence lies with ARSA. Denial can also be witnessed in Thailand where the deaths of 98 people (and more than 2000 injuries) caused in 2010 during the confrontations between the Abhisit government and the United Front for Democracy against Dictatorship, popularly known as the "Red Shirts", will not result in criminal proceedings against those responsible (Human Rights Watch, 2017). More broadly, repression and denial is also evidenced by the numerous cases of disappearances throughout the region.²

It is not surprising given the importance of regime type as a scoping condition that this regression in human rights has coincided with an authoritarian turn in Southeast Asia (APHR, 2017). While some ASEAN members have not changed regime type and remain authoritarian or "soft" authoritarian, it is the turn to authoritarianism in those more liberal states who were at the forefront of driving ASEAN's human rights progression that is pertinent. While this is most marked with the military coup in Thailand and its 20th Constitution granting extra powers to the military, it can be seen in the Philippines where Duterte's admiration for Beijing reflects his conviction that China's authoritarianism has produced economic results

that the Philippines' unwieldy democratic system has not delivered (Bello, 2017). It can also be witnessed in Indonesia where Duterte's "solution" to the Philippines drug problem has inspired President Joko "Jokowi" Widodo to encourage his law enforcement agencies to kill; 'I have told you, just be firm, especially with foreign drug dealers who enter the country and resist [upon arrest]. Gun them down. Give no mercy' (The Jakarta Post, 2017). More broadly there has been concern expressed at the restriction in religious freedom in Indonesia and the rights of marginal groups, such as the LGBT community.

What does this shift to repression mean for ASEAN? It was noted earlier that the ASEAN Chairman's Statement in response to the violence in Rakhine can be interpreted as a shield to deflect external criticism directed at the Myanmar government. This protection of Myanmar was replicated at the 31st ASEAN Summit held in November 2017. What though of AICHR? Its silence in the face of this regression could be interpreted as evidence of support for ASEAN members. Hence the accusation from Philippine human rights group, *Karapatan*, that, 'AICHR should act decisively to address the urgent concerns of peoples in South East Asia now, lest it fully exposes itself as another inter-governmental body that deodorizes governments such as the Philippines' (Interaksyon, 2017). The perceived failure of AICHR to respond to the regression of human rights in Southeast Asia has led to it being dismissed by civil society advocates as a meaningful human rights body. Phelim Kine, the Human Rights Watch deputy director for Asia, states, 'it serves no substantive function', its primary purpose is, 'to deflect international criticism about ASEAN's human rights record', and is 'purely eyewash' (Gavilan, 2017). This certainly gives the impression that by failing to act AICHR is complicit in the regression and thus party to the repression and denial of human rights abuses occurring in Southeast Asia. Therefore, what evidence is there that AICHR represents phase 4 and far from backtracking is, through its promote and protect mandate, consolidating an

ASEAN commitment to human rights and preparing the ground necessary to achieve compliance?

3. Prescriptive status: AICHR's promotion (and protection)

The argument that AICHR is on a separate trajectory to the ASEAN membership is counter-intuitive. AICHR is inter-governmental, its representatives are appointed by governments and answerable to them, it operates according to consensus decision making, it has no investigative powers and has no enforcement mechanism. Although in the case of the latter, while this did attract criticism when AICHR was created, the lack of coercive capacity to punish non-compliance was essential to achieve the consensus necessary to create AICHR. The Solidarity for Asian People's Advocacy Task Force on ASEAN has produced annual documentation revealing the limitations of AICHR and these reveal not only specific limits in its mandate - it is promote not protect - but also the constraints the ASEAN Way imposes on how AICHR operates (see Forum Asia, 2016). Essentially a modus operandi that requires consensus, prevents interference and prioritises non-legalistic mechanisms for resolving disputes is ill equipped to safeguard human rights. Consequently, it is not going to entertain formal debate about human rights abuses - although informally AICHR representatives do discuss them - but this does not mean it is silent on promoting human rights amongst the ASEAN membership. The purpose of this article is not therefore to suggest AICHR can reverse the trajectory of ASEAN member states' human rights regression. Rather, to reveal how AICHR's trajectory is at odds with the member states' trajectory, and how AICHR is preparing the groundwork for turning a human rights commitment into compliance by establishing regional action plans. Central to this are "independent" AICHR representatives.

Although AICHR representatives are appointed by their government, this does not mean that they have to be government officials. While most AICHR representatives have been selected from ASEAN members' foreign ministries or other government departments and continue to hold their government positions concurrently with their AICHR role, some have been chosen from outside of government. Out the first ten AICHR representatives, two were non-governmental appointees; Rafendi Djamin (Indonesia), who is a human rights activist, and Dr Sriprapha Petcharamesree (Thailand), who is a leading human rights' academic. AICHR representatives serve a maximum of two, three-year terms in office. Currently three AICHR representatives are not government appointees; two of them have a legal background – Dr Seree Nonthasoot (Thailand) and Edmund Bon Tai Soon (Malaysia) – and one is an academic (Dr Dinna Wisnu representing Indonesia). AICHR representatives can be replaced at any time by their government without the need for an explanation; this happened to the human rights' activist Loretta Pargas-Rosales (Philippines) in 2016 who was replaced by Leo Herrera-Lim from the Department of Foreign Affairs. The significance of their backgrounds informs their understanding of how “independent” they are of their government. Those from outside the government do see themselves as independent, and in their role as promoters and protectors of human rights they are the more active AICHR representatives and have initiated project-based Task Forces; such as the one on the rights of the disabled. They are also more willing to broadly interpret the topics for discussion under AICHR's thematic studies and other programmes and activities.³ Independent does not therefore mean to be critical of their government's position, but rather a free hand to initiate Task Forces and to interpret AICHR's programmes and activities. In this regard, we can interpret AICHR as similar to Kelly Gerard's “participatory spaces”. Gerard uses this phrase to describe the forums ASEAN establishes to engage with civil society, but also to control that engagement. They

encourage ‘problem solving and building consensus’, but not, ‘contestation or independent representation’ (Gerard, 2014, p. 81). AICHR is similar in that problem solving and consensus building is the aim but this, as noted below, arises from a process of subtle contestation by “independent” government appointees over AICHR’s modus operandi. It is within this freedom of being a participatory space that AICHR can propose and discuss human rights and, if consensus is reached, promote such rights within the Association. For example, work on the Right to Life thematic study addresses the death penalty on the initiative of the Thai AICHR representative, and through a process of negotiation with another AICHR representative, this is focused on the treatment of convicted individuals awaiting their sentence.

Utilising the Spiral Model’s scoping conditions and mechanisms it is possible to evaluate the challenges AICHR will encounter in the direction of travel from commitment to compliance when the context is far from propitious. Scoping conditions in this instance apply to AICHR itself and concerns the body’s mandate and its modus operandi. That is, what it does and how it does it. The mechanisms are the tools available to the “independent-minded” representatives and we are interested in how they use them to promote and protect human rights within AICHR.

Scoping Conditions

Scoping conditions in PPOHR are applied to states and thus applying them to AICHR is unorthodox. Ordinarily in the Spiral Model AICHR would be the body utilising mechanisms to cajole and persuade member states to commit to, and comply with, the AHRD. However,

because a number of AICHR representatives hold, or held, government positions they are not independent of member states and they interpret their role as spokespersons for their government. Thus, AICHR itself becomes the participatory space in which those AICHR representatives that see their role as independent engage with those that do not as they seek to turn commitment to compliance.

PPoHR's most important scoping condition is regime type; when a regime is in transition to democracy it is more likely to be supportive of human rights. While AICHR cannot have a regime-type applied to it, its modus operandi, specifically its ToR and more broadly the ASEAN Way, can be utilised for this purpose since this does explain AICHR's governance mechanism. Essentially, how decisions are reached and how they are implemented. This is a real bone of contention for the critics and underscores much of their criticism. While AICHR's ToR (ASEAN, 2009) codifies that it has both a promote and protect mandate the three fundamental elements to protect are missing: it has no process or procedure for receiving complaints; it cannot investigate; it cannot provide a remedy. It has a promote mandate with the potential, because the ToR can be revised, to protect at some indeterminate time in the future.⁴ This limitation in what it can do is further exacerbated, according to the critics, by its consensus decision making and the need to avoid interfering in member states internal affairs. It is indeed difficult to see what a human rights body can do if it cannot comment on internal affairs, since this is where abuses of human rights occur, and requires the agreement of the recalcitrant member state that is the subject of criticism for its human rights' record. Conceived in these terms AICHR's ToR makes it a challenging arena for the independently minded representatives to cajole the more reticent representatives to firm up their human rights commitments and strengthen compliance. This is though an interpretation of the ASEAN Way that equates consensus with unanimity and non-interference with

indifference. This is contentious, and an interpretation at odds with the meaning attributed to the ASEAN Way by ASEAN's founders.

The ASEAN Way was not designed to hinder independent states from cooperating. It reflected the reality that states, which for the most part had not long freed themselves from colonial rule, were not going to establish a supranational institution that would impinge on their independence. It encourages independent sovereign states to work cooperatively together in a familiar, non-threatening, environment that rejects the adversarial posturing, majority voting and legalistic governance structures prevalent in the West. Non-interference did not mean indifference to neighbours but rather a mechanism by which member states could support one another. Initially this meant deflecting criticism aimed at the elite but it has evolved through initiatives such as flexible engagement to mean assisting one another to manage transboundary problems that require regional solutions.⁵ Consensus is designed to ensure no one state can impose its views on others and this includes the notion that one state can veto a decision; it is designed to ensure equality among the members. Consensus does not therefore mean unanimity. Consensus reflects the need to make all members comfortable, to a greater or lesser degree, with the subjects discussed and decisions reached. If one member does not wish to participate then through a process of consultation, it would be reassured that its concerns would be respected and in return it would not prevent others from proceeding; this is known as the ASEAN minus-X principle. Being opposed did not mean becoming estranged and consensus via consultation ensured ASEAN was united in how it managed the wishes of all members. Conceived in this way the notion of non-interference and consensus is not a hindrance to achieving commitment and compliance with human rights, but rather the modus operandi that AICHR representatives need to reinterpret, mould and manipulate when they deploy the mechanisms at their disposal. That is, by problematizing consensus as

unanimity and non-interference as indifference this reinterpretation of AICHR's governance structure – its “regime type” – is tantamount to instigating a regime transition, thus enabling a renewed commitment to human rights and laying the groundwork for compliance with international human rights. However, before examining how this is done – which entails the notion of best practice – we need to reflect on the other scoping conditions.

The second and third scoping conditions concern the degree of control the state has over its territory, with lesser control making it more difficult to achieve compliance. In this instance we can interpret this to mean AICHR's position within ASEAN's structure. According to its ToR AICHR is designated as the overarching human rights institution in ASEAN with overall responsibility for human rights. This, coupled to it being the human rights body created in the Charter, would appear to give it a preeminent position within ASEAN and above both the ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee to Implement the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). The working relationship between these three is though ambiguous and while ASEAN has used the language of alignment to reinforce a sense of hierarchy with AICHR above the ACWC and ACMW, the notion of AICHR being “overarching” and having “overall responsibility” has been resisted. Consequently, a coherent and concerted promotion of human rights becomes hindered when the activities of ASEAN's human rights bodies are not aligned.

This delineation of where the remit of AICHR extends is particularly noticeable in its interactions with the coordinating bodies of ASEAN's community pillars. It is not evident, according to an AICHR representative interviewed, that AICHR is recognised as ASEAN's overarching human rights body with its remit covering all three pillars.⁶ There was instead a

sense from one pillar that AICHR was meddling in areas that were not in its purview. This type of “turf war” is commonplace within organisations so perhaps not surprising but it indicates that even with the agreement of all AICHR representatives the embedding of appropriate human rights practice in ASEAN activities is not straightforward. Thus AICHR’s promotion of human rights can be constrained by bureaucratic politics within the association. While this is different in format to those constraints caused by the devolution of power captured in the second and third scoping conditions it is similar in style. That is, incoherence caused by a lack of clarity over where authority lies to promote and protect human rights resulting in either resistance or disjointed implementation.

The final two scoping conditions concern the state’s vulnerability to material and social considerations. The more vulnerable the target because of limited resources (material) or their sense of self-worth is wanting (social) the more susceptible they are to pressure. With regard to material vulnerability, there is inadequate funding for AICHR activities from ASEAN.⁷ This has resulted in AICHR representatives procuring funding from external agencies via funding schemes such as: the ASEAN-China Cooperation Fund, the ASEAN-ROK Cooperation Fund and the Regional EU-ASEAN Dialogue Instrument Human Rights Facility. The danger is that recommendations resulting from external funded activities, as noted previously by Nuñez-Mietz and Garcia Iommi, can be rejected because they are portrayed as representing foreign interests and fail to reflect the particularities of Southeast Asia. While this is a potential problem AICHR representatives have largely avoided this accusation, thus indicating awareness that funding from external sources is a double-edged sword. Social vulnerability however does expose AICHR. Here the question of self-worth refers to how AICHR is perceived internationally and this does matter because AICHR is the embodiment of ASEAN’s external facing commitment to human rights; it has to appear

credible.⁸ While it is true that AICHR's mandate has led to much criticism of its credibility – it is often described by CSOs as toothless – ASEAN is at pains to stress that one of AICHR's purposes is to, 'uphold international human rights standards as 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' (ASEAN, 2009). This is not only stated in AICHR's ToR, it is stated in the AHRD and reiterated in the Phnom Penh Statement that accompanied the release of the AHRD (see ASEAN, 2012a; ASEAN, 2012b). This reveals that AICHR is socially vulnerable to accusations it is not fit for purpose as a human rights body because such accusations undercut its ability to show ASEAN members take their commitment and compliance with international standards of human rights seriously.

The scoping conditions reveal three findings. First, problematizing consensus as unanimity and non-interference as indifference is necessary in order to approximate regime transition. In essence, denying recalcitrant representatives the resort to consensus or non-interference to block initiatives. Second, AICHR's ability to promote human rights within the ASEAN bureaucracy, and thereby establish regional action plans for member states to implement, is hindered by an ambiguous alignment with the other ASEAN human rights bodies and Sectoral Bodies. Third, buttressing the AHRD as meeting international standards is important because this gives ASEAN's commitment to human rights credibility. ASEAN is thus socially vulnerable to any attempt to utilise the AHRD to defend an abuse of human rights. In essence, any attempt to vindicate an abuse of human rights by recourse to the AHRD can be resisted on the grounds that doing so damages ASEAN's human rights credentials. These scoping conditions are opportunities for "independently minded" AICHR representatives to

exploit, but what are the tools that they can use? To know this requires the application of PPOHR's mechanisms.

Mechanisms

The first two mechanisms presume that a degree of coercion is possible to induce change. This change is achieved either through direct threats of punishment or rewards for compliance. In light of the ASEAN Way, the first (coercion) is unlikely and the second (changing incentives) is only likely to be invoked as part of the third mechanism, which is persuasion. Persuasion is the use of argumentative discourse to establish and reinforce the manifestation of a prescriptive status and the embedding of rule-consistent behaviour through institutionalisation and habitualisation. ASEAN's emphasis on consultation and consensus makes persuasion the most important mechanism for AICHR representatives. Using argumentative discourse they can seek to cajole and encourage their AICHR colleagues to agree to the recommendations that arise from the activities they undertake and from the task forces they establish. We can discern three effects from these activities that indicate AICHR representatives are utilising persuasion effectively.

First, it can establish a position on a subject considered non-contentious from which further discussion can evolve to subjects that are more contentious. Second, it can encourage other AICHR representatives to initiate activities on the same subject area. Third, these initiatives can inspire activities in different subject areas. A good example of all three effects concerns AICHR's activities on the rights of the disabled initiated by the Thai representative, Seree Nonthasoot. This has the potential to highlight the principle of discrimination, and by doing

so, reveal that human rights' abuses stem from discrimination. In essence, if discrimination is rejected on grounds of disability then the door is open to examining discrimination on other, more contentious, issues.

The second effect is that it has encouraged other AICHR representatives to initiate activities on the same subject area. For example, the Vietnamese representative has utilized the rights of disabled to examine disabled children's access to primary education in Vietnam. Without the AICHR task force on the rights of the disabled it is unlikely that this would have happened.⁹ The significance of this is that government officials rarely initiate task forces, although they do take responsibility for executing thematic studies.¹⁰ The embracing of the topic by other representatives is also important for gaining consensus and this bodes well for the action plan currently being developed gaining approval.

The third effect of AICHR representative activity is that it can spill over into other areas. Regional consultations in 2017 were held on human rights, environment and climate change, the right to safe drinking water and sanitation, and the right to education. One area in particular that has significant potential for promotion and protection concerns legal aid, and it is not a coincidence that the notion of "access to justice for all" that is prominent in the rights for the disabled is the tagline for legal aid. In October 2017, AICHR conducted a regional consultation on legal aid led by Seree Nonthasoot. Legal aid is significant for protecting human rights because without the means to seek redress through the courts, those that have suffered injustice cannot be recompensed. A consultation is the first step in garnering views from a variety of stakeholders and can be considered a baselining activity. In this instance, the meeting gathered information about legal aid for specific groups, such as women, children, victims of trafficking and migrant workers, and more contentious, cases related to

natural resources as well as criminal cases. The former is contentious because of state implication in land grabbing from indigenous communities (see Cherry, 2013; Neef, 2016).

This activity is encouraging and indicates that while not headlining grabbing, AICHR activities are showing a commitment to promoting human rights. However, evidence of member states' commitment to human rights, and the means by which member states' compliance can be ascertained, requires an ASEAN regional action plan to be agreed that establishes internationally recognised standards that member states' national action plans should substantiate. The purpose of this article is to determine if AICHR is reaffirming commitment and laying the ground for member state compliance so here evidence is the adoption of a regional action plan.

A good example is the Task Force on Mainstreaming the Rights of Persons with Disabilities in the ASEAN Community. This had met four times by the end of 2017 and there had been three meetings of AICHR's Regional Dialogue on the Mainstreaming of the Rights of Persons with Disabilities. The task force formulates the draft versions of the action plan that the regional dialogue debates. The latter is therefore the arena in which the mechanism persuasion will determine success or failure to gain consensus needed. There are reasons to be optimistic. There is clear evidence that ASEAN is at phase 4 since it has already committed itself to promoting the human rights of the disabled through existing documents; namely the Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community and the Mobilisation Framework of the ASEAN Decade of Persons with Disabilities 2011-2020 (ASEAN, 2013). In addition, in 2016 all ASEAN member states had ratified the UN Convention on the Rights of Persons with Disabilities. The topic of the Task Force is thus not contentious and the discussion is framed

around existing ASEAN and international commitments. Evidence of persuasion can be seen from the extension of these rights. Initially, the focus was on health, education and employment affecting persons with disabilities and the remit has now increased to examining issues pertaining to access to justice, persons with disabilities as entrepreneurs and disability perspective in disaster risk management. As noted above, Vietnam has taken an interest in education, as have others that have significant numbers of amputees.¹¹ The topic therefore has support amongst a wide breadth of AICHR representatives.

One of the discursive moves made during the debates around the rights of the disabled was to link progress in this area with achieving the UN Sustainable Development Goals (SDGs). This is a tactical move in persuasion. Showing ASEAN members that by meeting international standards with regard to the rights of the disabled they are also achieving SDGs, makes agreeing to the rights of the disabled more likely. Argumentative discourse entails framing the discussion so that actors become entrapped by their previous commitments. Just as with the rights of the disabled, Seree Nonthasoot has framed legal aid around existing ASEAN commitments. He has said:

The study of legal aid is an important initiative to implement the ASEAN Vision 2025, especially the blueprints of the three ASEAN Community pillars. Without ensuring access to justice to ASEAN citizens, we cannot aspire to be a rule-based, inclusive and resilient community. Nor can we be a people-centred and people-oriented Community if we leave those who are entitled to effective legal assistance behind (ASEAN, 2017a).

It is too soon to know whether this will gain traction but it is significant development given its importance to protection as well as promotion of human rights.

The final PPOHR mechanism is capacity-building and this is where a shift from commitment to compliance is hindered because of lack of capacity rather than will. A good example of where AICHR is using this scoping condition is Corporate Social Responsibility (CSR) based on internationally accepted business and human rights principles. CSR was the first thematic study undertaken by AICHR and a baselining report was produced in June 2014. AICHR has utilised the expertise of a number of stakeholders from states, businesses and CSOs in regional dialogues and has adopted the 2011 United Nations Guiding Principles (UNGP) on Business and Human Rights as the standard-bearer of what needs to be institutionalised in national action plans and habitualised in business practice. In order to accomplish this compliance with the UNGP, AICHR is seeking to adopt a regional strategy on CSR and human rights and it has begun training activities to prepare member states and businesses to recognise their UNGP obligations. While at an early stage, utilising the UNGP will help to move CSR provision in ASEAN members from the current promote attitude of it being voluntary and philanthropic, towards internationally accepted protect provisions including ‘appropriate and effective remedies’ (ASEAN, 2017b). In light of the significance of the economic pillar in ASEAN’s community building programme, and the subsequent acceleration of its implementation, the embedding of human rights compliance is likely to be evident sooner here than in the other community pillars; the use of capacity-building via training programmes is the evidence that there is will to make progress in this area.

These activities are indeed encouraging. They indicate significant activity from “independent” AICHR representatives that are framing discussion within pre-existing ASEAN commitments and linking these commitments to international standards. The choice of non-contentious topics is enabling a breadth of support amongst AICHR representatives

that concurrently hold government positions, which is essential to achieve a regional action plan. The topics are also enabling argumentative discourse to emerge around the protection of human rights, and while tentative and at an early stage, this is emerging because (a) the source of this persuasion is highly respected AICHR representatives, (b) the debate is framed around pre-existing commitments, and (c) the approach is to highlight how compliance is beneficial (changing incentives).

However, the criticism directed at AICHR is less the topics that its programmes and activities investigate, but rather its modus operandi and the inadequate benchmark established by the AHRD. That is, for all the progress made through effective persuasion it counts for little if the scoping conditions that AICHR operates within can nullify progress. It is therefore equally significant that argumentative discourse is concurrently being utilised to reinforce, firstly, what the AHRD commits its members to, and thus avoid backsliding, and secondly, reinterpreting what consensus means. That is, using the mechanism persuasion to exploit a social vulnerability, and reframing AICHR representatives' understanding of AICHR's governance mechanism (the ASEAN Way) thus approximating a process akin to regime transition.

The first concerns Malaysia's AICHR representative, Edmund Bon Tai Soon's, interpretation of the AHRD (see Soon, 2016). The AHRD was roundly criticised by international and regional actors for diluting international human rights standards when published in November 2012. Three articles in particular draw criticism: that rights must be balanced with duties (Article 6); the realisation of rights is dependent upon national contexts and thus not universal (Article 7); that all the human rights safeguarded in the AHRD are subject to many limitations, including on grounds of public morality (Article 8). A statement from Human

Rights Watch, which was endorsed by regional CSOs, decried it as undermining rather than affirming international human rights laws (Human Rights Watch, 2012). Dismissing the AHRD in this manner undermines ASEAN's human rights credentials and far from signifying evidence of phase 4, it implies the AHRD is at best a tactical concession and at worst a tool to be used to deny human rights. While this may reflect the position of some ASEAN members it does not do so for others and, as previously noted, ensuring the AHRD, and by implication AICHR, are regarded internationally as corresponding to international standards is important. Edmund Soon's interpretation is less a rebuttal to the critics of the AHRD, as a reinforcement of the AHRD's credentials as a human rights declaration in accordance with international standards.

He begins by noting that because the AHRD specifically reaffirms ASEAN members' commitment to the Universal Declaration of Human Rights (UDHR) and other international human rights commitments there is 'no inconsistency or conflict between [them]...in relation to the minimum applicable standards of human rights' (2016, paragraph 7). This positioning of the AHRD in accordance with international standards underpins his rejection that Articles 6-8 can be used by ASEAN members to dilute ASEAN's commitment to human rights. On Article 6 he writes that this,

merely calls for a "balance" in the performance of "corresponding duties". The enjoyment of one's right does not rely on his or her due performance of duties because ultimately the primary responsibility still rests with ASEAN Member States to promote and protect all the rights of the right-holders (2016, paragraph 9.2).

He also notes that duties appear in other human rights declarations and in the case of the 1981 African Charter on Human and Peoples' Rights these duties are more extensive. With regard to Article 7, he dismisses as 'misguided' the argument that regional particularities erode the universality of human rights (2016, paragraph 10.2). He argues that different contexts 'serve to enrich the discourse on human rights' (2016, paragraph 10.2) and that so long as minimum standards are met the need to consider regional and national contexts simply reflects different ways in which states fulfil their obligations (2016, paragraph 10.3). He is quite clear that Article 7 'is not a specific "limitation" clause that permits restrictions to the realisation of rights' (2016, paragraph 10.4). Finally, on the various limitations to human rights found in Article 8, Edmund Soon is emphatic that

Article 8 provides for permissible restrictions couched in a general way without meaning to potentially apply to all human rights under the AHRD. The intention could not have been to apply to all rights considering by the time the AHRD was adopted, certain rights had been well-entrenched as being non-derogable (2016, paragraph 11.3).

He notes that the UDHR has a similar provision and that 'it is well-established that any interpretation of human rights must be towards the promotion, and not the destruction of, the same rights' (2016, paragraph 12). The point is less that Edmund Soon is right, but rather his interpretation of the AHRD is an example of argumentative discourse to reinforce AICHR's commitment to international standards of human rights and ward against backtracking. If a member state, or in AICHR discussion a representative, defends their limiting of human rights by making recourse to the AHRD, this can be disputed on that grounds that such a move undermines ASEAN's human rights' credentials. By arguing the AHRD meets the minimum standards of international human rights law, and because ASEAN members are

socially vulnerable to the accusation AICHR does not meet this standard, and the interpretation has come from an AICHR representative, it sets ASEAN's human rights prescriptive status as meeting the minimum standards of international human rights law.

The attempt to change AICHR's modality, which here I am conflating with governance structure and regime type, is less documented but nevertheless underpins the persuasion that the Indonesian AICHR representative, Dinna Wisnu, has used to progress the promotion of human rights. Recognising that equating consensus with unanimity and non-interference with indifference is a hindrance, Dinna Wisnu has focused on the notion of best practice. Her argument is that the promotion of human rights can be achieved when action plans are pursued by some member states and establish best practice that others can follow if they so wish. This, as noted earlier, is the essence of the ASEAN Way; a familiar, non-threatening environment based on mutual respect that engenders trust and confidence that members are not pursuing actions at the expense of one another. Through establishing best practice reticent members can, firstly, opt out thus not preventing others from acting, and secondly, opt in later. Consensus is achieved and non-interference is respected while establishing best practice to follow at some future point. The idea that some members can act and others can follow if they want has resonance more widely in ASEAN. There is increasing concern that a two-tier ASEAN has formed and this is impeding the realisation of its community building ambitions. The notion of best practice therefore reflects a wider impetus to ensure ASEAN is active and not procrastinating. Given the sensitivities surrounding human rights, specific adjustments to AICHR's ToR might be unlikely to gain support, but evidence that consensus has created a degree of comfort with discussing human rights can be discerned by the increasing activity of AICHR representatives that concurrently hold government positions. In essence, "best practice" interprets consensus and non-interference as enablers rather than constrainters of

activity, and thus by contesting the meaning of consensus and non-interference the modus operandi of AICHR is becoming propitious for laying the groundwork that turns a commitment to human rights into compliance with human rights.

Conclusion

With ASEAN citizens' human rights routinely denied and repression widespread from Myanmar in the West to the Philippines in the East, the notion that AICHR, an intergovernmental body, is at phase 4 of the Spiral Model and preparing the ground for phase 5 appears absurd. However, utilising PPOHR's mechanisms and scoping conditions it is possible to show that this is indeed the case. The most important scoping condition is regime type and the degree to which it is in transition. The stronger the regime the more it is able to resist human rights advocates through counter-narratives, either by rejecting the rights (immunization) or reframing them (defiance). By positing AICHR as a "participatory space" it is necessary to determine the robustness of its regime-type. The argument made is that the more independently minded AICHR representatives have problematized the modus operandi of AICHR by using the notion of best practice. This reinterprets the ASEAN Way and is equivalent to regime transition. Another important scoping condition is social vulnerability and here AICHR and its implementation of the AHRD leave it vulnerable to the accusation it falls short of international standards. The reinforcement that the AHRD does meet the international standards of human rights establishes the benchmark that ASEAN commitments and compliance can be measured against and ensures that any backtracking can be exposed. ASEAN is socially vulnerable to this because AICHR represents ASEAN's international credibility on human rights.

With these two scoping conditions (regime type and social vulnerability) propitious for change, AICHR representatives have been able to utilise the mechanism persuasion to initiate a variety of activities to promote and ultimately protect human rights. By utilising existing ASEAN and international human rights commitments, progress on principles of discrimination and access to justice for all can be discerned. In the first instance these are on relatively non-contentious areas, such as rights for the disabled, but areas of more contention, such as land rights, have been discussed. It is also pertinent to note that AICHR representatives that concurrently hold government positions have become more active and thus the prospects of achieving action plans that establish best practice have increased. This will be the evidence of a commitment becoming compliance and the prospects of action plans being agreeable to member states are enhanced because the recommendations are coming from their own officials.

Of course the trajectory can change; movement through the Spiral Model is not unidirectional and contestation is perpetual. The scoping conditions relating to how much control the state has over compliance reveals that although AICHR is the overarching human rights body, its alignment with the ACWC and its relationship with other ASEAN bodies is ambiguous. Ultimately, decisions reached by AICHR require other ASEAN bodies, as well as national governments, to do the implementing. “Immunization” and “defiance” can arise at any stage leading to rhetorical adaptations that stymie the progress from commitment to compliance with international human rights standards. Charting ASEAN members’ progression and regression through the phases is evidence that movement through the Spiral Model is not unidirectional. This is no less true of AICHR. The argument that can be heard in ASEAN that AICHR’s mandate is not promote and then protect but rather promote is protect – because if

you get promotion right then you automatically protect – is evidence that AICHR’s trajectory is far from unidirectional. Contestation is a constant companion throughout the phases; it is the persistent battle for, not power of, human rights.

¹ Interviews conducted with Dinna Wisnu, current Indonesian AICHR representative, 17 March 2016. Rafendi Djamin, Indonesian AICHR representative 2009-2015, 18 March 2016. Sriprapha Petcharamesree, Thailand AICHR representative 2009-2012, 16 March 2016. Seree Nonthasoot, current Thailand AICHR representative, 14 March 2016 and 23 October 2017. Barry Desker, current Singapore AICHR representative, 12 October 2017. For matters of confidentiality, I have not attributed the interviewees to points made in this article.

² In their press release the ASEAN Civil Society Conference / ASEAN Peoples Forum 2017 stated: ‘Poor and innocent people and leaders of groups challenging government policies become targets of extra judicial killings and forced disappearances in most countries in Southeast Asia. The cases of Jonas Burgos, Sherlyn Cadapan, Karen Empeno, and Gloria Capitan from the Philippines, Sombath Somphone from Laos, Thailand’s Somchai Neelaphaijit and Porlajee “Billy” Rakchongchaoren, Malaysia’s Raymond Koh, and Myanmar’s U Ko Ni among hundreds of other cases of enforced disappearances and extra-judicial killings in Southeast Asia remain unresolved showing how impunity still prevails in the region’ (ASEAN Civil Society Conference, 2017).

³ AICHR is currently pursuing eleven thematic studies. Thematic studies, regional workshops, thematic workshops, seminars, study visits, training programmes, road shows are all types of activities and programmes that AICHR representatives can initiate in order to achieve, through Task Forces, the goals established by AICHR’s Work Plan. AICHR is currently pursuing the second of its Five-Year Work Plans (2016-2020).

⁴ The ToR contains the provision that it must be reviewed after its initial five years by ASEAN Foreign Ministers and then can be reviewed at subsequent times by the foreign ministers on AICHR's recommendation.

⁵ Although officially flexible engagement was rejected by ASEAN – the official nomenclature is enhanced interaction – many of its features subsequently informed ASEAN behaviour (see Acharya, 2014, pp. 151-2).

⁶ The specifics governing the engagement between AICHR and Sectoral Bodies are contained in section 10 of the Guidelines on the Operations of the ASEAN Intergovernmental Commission on Human Rights (AICHR). The language does not authorise AICHR to require conformity by Sectoral Bodies, instead the working relationship is couched in phrases such as “recommend”, “request”, and AICHR can only attend sectoral bodies meetings by invitation. The line of authority between AICHR and ASEAN's Sectoral Bodies is ambiguous hence paragraph 10.3: ‘The format and level of participation of such engagement will be determined through consultations by AICHR and relevant sectoral bodies’ (ASEAN, 2012c).

⁷ Funds for AICHR's Work Plan can come directly from member states or via an Endowment Fund, but they can also be sourced from Dialogue Partners, donor countries, international agencies, the private sector, and nongovernmental organisations. Although the caveat is added that any funding from, ‘non-ASEAN Member States shall be solely for human rights promotion, capacity building and education’, and not, therefore presumably, protection (ASEAN, 2012c, paragraph 13.1.2).

⁸ On the importance of external legitimacy in the creation of AICHR see Poole (2015).

⁹ On the 13-14 December 2017 in Da Nang, Vietnam, Nguyen Thi Nha, the Vietnamese AICHR Representative, held an AICHR Regional Workshop on Enhanced Access to Education for Children with Disabilities. This was held back-to-back with the 4th meeting of

the Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community.

¹⁰ The lack of initiatives from those AICHR representatives that concurrently hold government positions can be explained by (a) their concern that doing so will create tensions between ministries/departments within their own government as they are seen to impinge on someone else's area of concern (b) a bureaucratic structure that requires multiple approvals before it can be initiated thus removing incentives for doing so, or (c) the representatives general lack of interest in human rights.

¹¹ Vietnam, Laos and Cambodia continue to suffer from the munitions dropped during the Vietnam War and landmines were used extensively in Myanmar's civil war.

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