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Chapter 2

The Regional Institutional Development of Human Rights in Southeast Asia



Stanati Netipatalachoochote, Aurelia Colombi Ciacchi,
and Ronald L. Holzacker

Abstract The deliberation on a Southeast Asian human rights regime dates back to the 1993 World Conference on Human Rights in Vienna. From then, the emergence of an idea on regional institutional human rights development arose to address the absence of human rights mechanisms in the region. This chapter offers a critical analysis on the human rights institutional development in ASEAN. The initial focus of the chapter is on illustrating the step by step progress toward the establishment of an ASEAN human rights institution. This progress will lead to the understanding of how the demand for a human rights institution has been made by ASEAN. The arguments here are supported by the analysis of the Joint Communiqués of the ASEAN Ministerial Meetings (AMM) from 1993 to 2010 and the Workshop statements of the Working Group for an ASEAN Human Rights Mechanism (Working Group) which documents ASEAN elite's official speeches and opinions. The analysis on this point demonstrates ASEAN's attempt to build regional agents in terms of human rights. The principal-agent theory is applied to offer understanding on the logical relationship between member states (principal) and regional human rights institutions (agent). Institutional theory is applied with respect to the second point of this analysis, which is to scrutinize the creation of a human rights institution known as the ASEAN Intergovernmental Commission on Human Rights (AICHR). The functions of the AICHR are illustrated through an investigation of its mandates, work plans and statements of meetings since the year of establishment to clarify why regional human rights institutions have been vital and particularly how the

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AICHR has expanded its role and power over time to increasingly improve human rights in ASEAN.

Keywords Human rights · Regional institutional development · ASEAN Intergovernmental Commission on Human Rights (AICHR) · Principal-agent theory

2.1 Introduction

The advent of the Association of Southeast Asian Nations (ASEAN) in 1967 signifies a great step forward in regional integration in Southeast Asia. Under this regional collaborative effort, ASEAN's performance on human rights has been limited and gradual, and the emergence of a truly effective mechanism to protect human rights has been conspicuously absent. Triggered by the World Conference on Human Rights held in Vienna, Austria, ASEAN's first consideration for a regional human rights regime was formally instituted that very same year at the 26th ASEAN Ministerial Meeting (hereafter, "AMM") (ASEAN, 1993). In view of this, Southeast Asian elites organizationally pushed forward the idea of a human rights body in article 14 of the ASEAN Charter (ASEAN, 2007) which seemed to be a vast leap forward given the past ambivalence of ASEAN member states governments. In 2009, a first human rights institution was eventually established which is called the ASEAN Intergovernmental Commission on Human Rights, also known as the AICHR (ASEAN, n.d.).

Many scholars have commented on AICHR's weakness, its lack of a powerful judicial system and the general regressiveness of ASEAN human rights (Bui, 2016; Thio, 1999). Yet, the argument advanced in this chapter is that the AICHR represents an effort to help institutionalize human rights in the region. Since the AICHR has been established, this intergovernmental organization has realized some achievements in the human rights field. For instance, the AICHR is the key performer in enacting the ASEAN Human Rights Declaration (AHRD) which provided motivation for ASEAN member states to amend their domestic laws and regulations. The AICHR was also a vital component in driving the creation of the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP) in 2015.

This chapter provides a critical and comprehensive analysis of the human rights institutional developments in ASEAN. The challenge of governance here in the context of ASEAN is the lack of an effective human rights institution. In this light, the chapter supports goal 16 of the United Nations Sustainable Development Goals which aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. The content is divided into two parts.

First, the chapter outlines the gradual development of the AICHR over time. It shows how ASEAN has expressed demands for the creation of this institution, and delegated to it certain roles for the promotion of human rights in the region and within the ASEAN member states. The purpose of this demonstration is to argue that the development of a regional human rights institution was highly imperative. In this regard, the principal-agent theory will be illustrated to show the linkage of state members and regional human rights institutions. The empirical evidence analyzed here involves the statement of the Working Group for an ASEAN Human Rights Mechanism (Working Group), as well as AMM statements from 1993 to 2009, which is the period when AICHR was being established.

Next, the chapter analyses the role and achievements of the AICHR as a regional human rights institution as to what it has conducted after having been established for a decade. In particular, it looks at why the AICHR is important and how has this institution as a delegate of human rights of ASEAN expanded its role and power over time beyond the strict principle-agent model in order to improve human rights issues. In this part, the AICHR's mandate, work plans and statements of meetings will be investigated to answer the research questions below.

2.2 Research Question

The research questions are divided into two points.

The first one is “How did ASEAN demand the creation of a regional human rights institution as an agent to deal with human rights issues?”

In continuation, the second question asks “How has the AICHR expanded their role over time to significantly contribute to the improvement of human rights in Southeast Asia?”

2.3 Scientific and Social Significance of the Research

This research is socially significant, because the research will be of use to a wide range of groups, individuals, and institutions engaged in human rights. Members of the ASEAN public can benefit from the information provided in the chapter. For policy makers of ASEAN member states, the findings of the research may help them be aware of the competency of the existing mechanism and how it may be further developed. Moreover, it will be useful for them to realize the next step of building a regional human rights institution. ASEAN had put a lot of effort in its endeavor to create AICHR in the past decade. These developments are an important idea to draw upon as the region proceeds to further discuss creating regional human rights institutions in the future.

Academically, throughout the period of this research into the evolution of human rights in ASEAN, much criticism has been found particularly about how AICHR is

not a fully-fledged regional commission that promotes and protects human rights as maintained by a global standard (Clarke, 2012). Exemplifying a different position of the AICHR, this chapter focuses on its development and contributions, its role and importance. In doing so, this chapter makes suggestions as to how AICHR's achievements can be channeled to overcome present challenges to how human rights can be developed in the future.

2.4 Methodology

This research is primarily based on the theoretical context of “the principal-agent theory” which has been useful in matters of regional political and legal integration and should be the initial notion to consider when dealing with matters of institutional development. This research uses the principal-agent theory by mapping out the relationship between a state or region and the institution which it has built to help it overcome their regional concerns. Next, the theory of institutionalism is scrutinized to offer a clear understanding why institutional development is highly significant and pertinent particularly for human rights issues in ASEAN.

Secondly, the study espouses a legal analysis approach by laying out the foremost institutionalist arguments regarding the important role of regional human rights institutions. It uses both primary and secondary sources of reference to describe the role of the AICHR to ascertain why it is significant. It analyzes the AICHR's performances, work plans and mandates, statements of AMM which are known as joint communiqués and Workshop statements of the Working Group to ascertain whether and to what extent their objectives have been realized. Empirical evidence testifies to the progress of regional institutional human rights development in this region.

2.5 Theoretical and Literature Context

2.5.1 *The Principal-Agent Theory; Member States: Intergovernmental Institutions*

It is inevitable to begin with an explanation on the theory as to why ASEAN member states came together to create a human rights institution. The relevant concept here is “the principal-agent” theory. This theory facilitates the understanding of the affiliation of the regional human rights institution, implied to be the “agent,” and the member states, implied to be the “principal.” While on this explanatory route, the chapter should firstly clarify the actual connotation of the principal-agent theory as follows.

The principal-agent theory in political science and economic context can be best described as a relation between a person or entity (agent) who agrees to work in favor of another person or entity (principal) (Jensen, 2000). Laffont and Martimort (2002) state that one party (the “agent”) is able to make decisions on behalf of, or impacts, another party: the “principal.” In the context of law, scholars describe this interaction as *“the foundational principle of agency law is that the principals, who have chosen to conduct their business through an agent, must bear the foreseeable consequences created by that choice. Conversely, as the bearer of the risks, the principal is entitled to receive the benefits created by the agency relationship”* (Dalley, 2011, p. 497).

Scholars apply the principal-agent theory in terms of the relations between member states and International Organizations (IOs) and/or International Institutions (IIs) by examining IOs/IIs in their role as agents with various responsibilities to member states (Hawkins, Lake, Nielson, & Tierney, 2006). Hawkins and Jacoby (2008) exemplify agents as actors, for example, the Security Council and European Court of Human Rights (ECtHR) act as an agent of states, which provide states valuable information and may influence state human rights policies and preferences.

The IOs/IIs as actors are very important in implementing policy decisions and pursue member states’ interests strategically (ibid.). Mearsheimer (1994) states that IOs/IIs are “sets of rules that stipulate the ways in which states should cooperate and compete with each other” in collective decision-making. States may also delegate powers to IOs/IIs when they hold problems of collective decision-making or socially intransitive preferences (Pollack, 2003). Thus, if states as a group cannot reach a constant agreement on a policy, they can delegate their powers to an agenda-setting agent to induce an equilibrium when one might not otherwise exist (ibid.). This shows a typical solution to the collective choice problem in domestic politics (ibid.).

The reason why member states create IOs/IIs and how they operate are examined by some scholars. Important new research has begun to advance a political approach in which strategic, modern states purposely adopt and design IOs/IIs as agents in pursuit of their goals (Goldstein, Kahler, Keohane, & Slaughter, 2000; Koremenos, Lipson, & Snidal, 2001). Member states have tasked some IOs/IIs to act independently, even empowering them to sanction member states in order to help dispute resolution or reinforce treaty commitments (ibid.). Additionally, the principal-agent theory is defined in the sense of delegation. Williamson (1985) states that delegation is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former. Agents receive conditional grants of authority from a principal, but this defining characteristic does not imply that agents always do what principals want (ibid.). Because agents have autonomy, which is defined as “the range of potential independent action available to an agent,” it is possible that they act in a way which is undesired by the principal (Hawkins et al., 2006, p. 8). This undesirable action can occur in the form of shirking, where “an agent minimizes the effort it exerts on its principal’s behalf” (ibid.).

On the other hand, there are scholars which suggest occurrences which are the opposite of shirking, that IOs/IIs have expanded their mandate over time. Betts (2012) demonstrates this phenomenon with the expanding role and mandate of the

Office of the United Nations High Commissioner for Refugees (UNHCR) which is prescribed by its Statute, to one which has undergone formal and informal adaptations overtime. The mandate expansion relates to two areas, namely, the scope of population under UNHCR's protection, and the scope of the required activities to protect those populations. Namely, the UNHCR originally protected refugees, gave legal advice, and conducted work in Europe, its protection has now expanded to include, inter alia, internally displaced people and victims of natural disasters (ibid.).

In addition to legal advice to states, the UNCHR also now offers humanitarian emergency response and material assistance and operates on a global scale (ibid.). Betts posits that this expansion is largely a self-directed (in other words IO-led, as opposed to state-led) change (ibid.). Monnet's research corroborates the phenomenon of mandate expansion. She argues that IO's "mission creep"¹ in unexpected issue domains is made possible through the strategic mobilization of internal and external expertise (Monnet, 2017). She demonstrates this argument in the context of bioethics where entrepreneurial bureaucrats within UNESCO, an organization which has no direct mandate on bioethics, mobilized external experts in bioethics for the purposes of creating mission creep in the field (ibid.).

2.5.2 Institutional Theory: Definition, Character, and Significance

One important concept related to human rights development is institutional involvement. Hence, the institutional theory is presented here to pave the way in understanding why institutions are very important, and how their conduct fulfills the community's demand. Moreover, this theory further examines what are the characters of an institution that will allow it to overcome the envisaged collective social request, help improve political and human rights issues and influence states' actions.

North (1991, p. 97) notes that "*institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights).*" The basics of the institutional theory is that something identified at a higher level is used to explain processes and outcomes at a lower level of analysis (Clemens & Cook, 1999). Institutions comprise, for example, protection of rights, contract enforcement, government bureaucracies, and the rule of law, and also include behaviors and beliefs, norms, and social units (Amenta, 2005). March and Olsen (2006) describe an institution as a relatively enduring collection of organized practices and rules, surrounded in

¹ Monnet understands "mission creep" as a phenomenon that takes place when international secretariats engage in a significant amount of activities into new policy areas (such as standard-setting activities, support programs, and dissemination activities). Mission creep does not necessarily involve a formal change in mandate.

structures of meaning and resources that are relatively invariant in terms of turnover of individuals and relatively resilient to the characteristic preferences and expectations of individuals and changing peripheral circumstances.

The components of order and commonness are created by institutions, political actors are also fashioned and limited by them as institutions act within a logic of suitable action (Béland, 2005). Institutions are carriers of identities and roles and they are markers of a polity's character, history and visions and also provide bonds that connect people together (Amenta & Ramsey, 2010). Argument about the causal role of institutions point out that institutions particularly in the political field were also posited to have key impacts on the political identities, interests, preferences, and strategies of groups (*ibid.*).

Greif (2000) views institutions as a “system of social factors” that guide, enable, and constrain the actions of individuals. Mearsheimer (1994) defines institutions as a set of rules that stipulate the ways in which states should cooperate and compete with each other. Immergut (1998) adds that an institution is regarded as a well-ordered structure systematized by rule-based procedures. Dai (2007) explains institutions in the sense of international institutions. She argues that international institutions can resolve collective action problems among states by monitoring states' compliance with treaties. Monitoring is done by providing compliance information, as a result facilitating reciprocity, inducing compliance (*ibid.*).

While definitional dissimilarities remain, the arguments of institutionalists have been shared here: international institutions can have an independent effect on state behavior (Jepperson, 1991). International institutions not only constrain state behavior by applying sanctions to enforce international law, they also help internalize new norms into states—including human rights norms (Hafner-Burton, 2005).

Around the world today, institutions play a vital role in several fields in terms of being people's and governments' or member states' representatives (Greif, 2000, p. 284). With regard to human rights, virtually every state has ratified at least one of the United Nations (UN) core international human rights instruments, reflecting that the UN is an international institution that influences countries around the world to agree upon the same objective (Phan, 2012, pp. 28–30). Globally, the UN has a number of human rights sectoral bodies such as the Office of the UN High Commissioner for Human Rights (OHCHR) and the United Nations Human Rights Council (UNHRC). Regionally, the European Court of Human Rights (ECtHR), the Inter-American Commission and Court on Human Rights (IACHR & IACtHR), and the African Court on Human and Peoples' Rights (the Court) demonstrate that human rights institutions are exceptionally important (*Ibid.*, pp. 38–39).

The impact of the above-mentioned institutions on governments and state involvement can be explained in many ways. One vital method by which international and regional human rights institutions can be beneficial in changing state behavior in terms of human rights is to ease international human rights law promotion and codification (Cortell & Davis, 1996). International and regional human rights institutions help to create and advance human rights norms (Phan, 2012, p. 36). They can lobby national governments and mobilize public support for the creation and adoption of certain human rights norms (*ibid.*). They can form special

committees or assign their experts and organs to draft human rights agreements and submit these documents for state consideration, deliberation, and approval (ibid.). At the same time States can also negotiate international human rights agreements, debate and deliberate the pros and cons of distinctions in wordings, and reach a compromise on the final version of texts through those institutions' communicative platform (Hawkins, 2004).

International and regional human rights institutions can also help to address human rights violations (Petersen, 2011). The role of international institutions as monitoring mechanisms for human rights treaty commitments is very important (Hathaway, 2002). They have increasingly proven capable in providing tools for reporting and enabling the information exchange on human rights violations (ibid.). They globally and regionally disseminate information as a way to respond to human rights violations and put pressure on targeted states (Hafner-Burton, 2005). Additionally, international human rights institutions can support endogenous enforcement by putting norm violating states on the international agenda, and empowering and legitimating human rights norms (Risse, 1999).

2.6 Analysis

2.6.1 *The Principal-Agent Theory and the Need for the AICHR: Evidences from ASEAN Official Statements and ASEAN Elites' Speeches*

The idea advanced in this part pertains to human rights institutional developments viewed through the principal-agent theory, whereby a human rights institution is the agent and member states are the principals. It can simply be seen that the AICHR, the institution being exemplified here, is interpreted as the delegation of ASEAN in playing the role on promoting and protecting human rights because member states were not able to deal with human rights issues in their own territories. An example of such inability is when states are violators of human rights themselves. Thus, regional power is needed to deal with those challenges. This seems to be why the principal-agent theory can be assumed to be used in ASEAN's (the principal) creation of an agent to work on regional human rights issues.

This part offers collective empirical information from the AMM joint communiqué and the Working Group's performance from 1993 until 2009. This range of years was selected because 1993 is the year human rights gained momentum in ASEAN due to the influences of the conference related to the Universal Declaration of Human Rights in Vienna and 2009 was the year the AICHR was established. This information shows how ASEAN designed and built their regional human rights institution and what form did they want the institution to take place.

The idea of human rights institutional development firstly emerged in the 26th ASEAN Ministerial Meeting in Singapore in 1993, which broached the possibility

of establishing an (intergovernmental) mechanism on human rights evidence from the following joint communiqué statement (ASEAN, 1993): “(The Foreign Ministers) in support of the Vienna Declaration and Programme of Action (of the World Conference on Human Rights) agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.”

This arrival confirms the beginning of ASEAN’s endeavor to start the demand of a human rights institution to work as an agent in human rights issues. It was reaffirmed by the creation and accreditation on the Working Group for an ASEAN Human Rights Mechanism (hereinafter: Working Group)² which was first explicitly confirmed in the 31st Joint Communiqué 1998 (ASEAN, 1998). Consequently, ASEAN has continued reaffirming the official idea of establishing a regional human rights institution in AMM joint communiqués from the 32nd session in 1999 through to the 42nd session held in 2009. Over a period of ten years, ASEAN worked in cooperation with the Working Group which had regularly been invited to meet with the Foreign Ministers of ASEAN to engage with the governments on the possibility of establishing a human rights institution (Muntarhorn, 2013, pp. 108–110).

As for empirical evidence in the form of speeches, one of the Working Group’s chairperson, Vitit Muntarhorn remarked that the reason why ASEAN needs an agent to deal with human rights issues is because there exists major human rights violations yet the remedies available at the national level may be inadequate or unavailable to render justice, thus necessitating a check and balance at the higher level to allow access to justice (Ibid, p. 105). There may also be regional considerations which require a regional response rather than a purely national response, such as cross-border issues (Ibid, p. 106).

The Working Group annually organized workshops on the ASEAN Regional Mechanism on Human Rights, which were attended by participants from ASEAN governments, policy makers, and civil society organizations (Working Group *a*, n.d.). One of the Working Group’s progressive outsets is the Agreement on the Establishment of the ASEAN Human Rights Commission adopted by the First and Second Workshops which finally was confirmed and agreed in article 32 of the 35th Joint Communiqué by the AMM (Working Group *b*, n.d.). In the Draft Agreement, article 11 identified the power of the proposed commission as an agent to address human rights issues in particular to, on its own initiative, investigate (alleged) violations of human rights by a Contracting State or States which have ratified this Agreement in accordance with the established rules of procedure (ibid.).

In 2003, the third Workshop affirmed the prominent demand of ASEAN for a regional human rights agent. In the keynote speech delivered by Dr. Sorajak Kasemsuwan, Vice Minister of Foreign Affairs of Thailand, he declared that

²The Working Group for an ASEAN Human Rights Mechanism (Working Group) is created by the Human Rights Committee of LAWASIA in 1995. Its primary goal is to establish an intergovernmental human rights commission for ASEAN. It is a coalition of national working groups from ASEAN states which are composed of representatives of government institutions, parliamentary human rights committees, the academe, and NGOs. Available at <http://www.aseanhrmech.org/aboutus.html>

member states all agree in principle that there should be a regional mechanism for human rights in the region (Working Group *c*, n.d.). Dr. Carolina Hernandez of the ASEAN-Institute of Strategic and International Studies (ASEAN-ISIS) points out that the diversity within ASEAN has made it difficult to endorse the proposal for the ASEAN Human Rights Commission, but that ASEAN is willing to continue collaborative efforts with the Working Group (ibid.). Dr. Hafid Abbas of the Ministry of Justice and Human Rights of Indonesia stated that having regional human rights centers is very important (ibid.). Subsequently, the Working Group submitted the “Roadmap for an ASEAN Human Rights Mechanism” to the 36th AMM, and the Foreign ministers reaffirmed ASEAN’s commitment to establish regional human rights commission in article 36 of the Joint Communiqué 2003 (ASEAN, 2003).

In the Fourth Workshop, Mr. Enny Soeprapto of the National Human Rights Commission of Indonesia noted with regret the absence of a human rights mechanism and stressed the need to build on existing institutions to protect human rights in the ASEAN region (Working Group *d*, n.d.). Hassan Wirajuda, Minister of Foreign Affairs (Indonesia) stressed that respect for human rights should be an important element of the ASEAN Security Community (ibid.). Tan Sri Abu Talib Othman, Chairperson of the Human Rights Commission of Malaysia (SUHAKAM) remarked: “A regional human rights institution would be an important milestone in the work of promoting and protecting human rights in the region. The four National Human Rights Institutions (NHRIs) in ASEAN have increased joint efforts on issues of common concern and will act as a catalyst for the establishment of the regional intergovernmental human rights mechanism” (Working Group *e*, n.d.).

Mr. Duong Chi Dung of Ministry of Foreign Affairs of Vietnam stressed the need to create a human rights mechanism both in general and in a specific field such as women, and children’s rights in the regional level (ibid.). Ms. Pittara Damrithamanij of the Ministry of Foreign Affairs of Thailand addressed the need to establish an institution or mechanism in terms of specific rights such as to protect migrant workers required transnational solutions (Working Group *f*, n.d.). Dato’ S. Thanarajasingam, Acting Secretary-General of the Ministry of Foreign Affairs of Malaysia emphasized the importance of a partnership among governments, NHRIs, civil society groups and ASEAN peoples in shaping the regional mechanism (ibid.).

The keynote address of the Philippine Secretary of Foreign Affairs, the Honorable Dr. Alberto G. Romulo, was delivered by the Honorable Franklin M. Ebdalin, Acting Secretary of Foreign Affairs and Undersecretary for Administration of the Department of Foreign Affairs. He stressed that “the establishment of a regional human rights mechanism is an important component in the course of building an ASEAN Community” (Working Group *g*, n.d.). He cited the report of the Eminent Persons Group (EPG) on the ASEAN Charter which recommended that ASEAN should, as a matter of principle, commit “to develop democracy, promote good governance and uphold human rights and the rule of law, and to establish appropriate mechanisms for these purposes” (ibid.). Regional human rights institutions also aid national governments to address cross-national borders human rights violations and abuses which might derive from organized crime such as human trafficking,

terrorism, sexual exploitation of migrant workers, women and children better (Working Group *h*, n.d.).

As a result, the demand for a regional human rights institution came into fruition. The signing of the ASEAN Charter in 2007 confirmed the possibility to establish a human rights institution, evident in article 14 (ASEAN, 2007). Later, at the 41st AMM in 2008, the decision was made to commission the High Level Panel (HLP) to establish an ASEAN Human Rights Body (HRB) (ASEAN, 2008). The final decision toward establishing a regional human rights institution was given at the 42nd AMM in 2009 whereby ASEAN officially signed HLP recommendations and created an HRB with ToR (ASEAN, 2009). With the ToR complete and present in the Joint Communiqué of the 43rd AMM, the ASEAN Intergovernmental Commission on Human Rights (AICHR) came into being and was commissioned as an overarching umbrella institution which would coordinate sectoral and thematic human rights issues and organizations within ASEAN (Jones, 2015).

ASEAN statements and elites' speeches cited above are clear manifestations of the demand of and attempt to create a regional human rights institution. ASEAN member states need an agent to mobilize human rights issues, a need which has been noted in AMM statements since 1993. The discussion on goals to establish a regional human rights institution, together with the progress made to realize that goal, is continuously mentioned almost annually during the AMM and in Working Group statements up until the time the AICHR was established. All of the endeavors on creating a human rights institution attest to ASEAN's willingness to have an agent on human rights, otherwise they would not have tried to establish it.

Nevertheless, the intergovernmental nature of institutions in ASEAN means they are designed to be dependent, as their representatives have to work under their government control. But, as will be demonstrated in more detail below, ASEAN human rights institutions have occasionally tried to expand their power to deal with the urgent human rights issues occurring in the region beyond a strict principal-agent model. It is thus our submission that ASEAN's need of a human rights institution as an agent should be coupled with ASEAN's grant of independence to the agent so that it will not be subject to power of the principal and can be free to expand its mandate to help solve human rights violations, so as to be a truly effective human rights institution like those that exist in other regions, such as the European Court of Human Rights.

2.6.2 Institutional Theory with the AICHR's Functions: Significances and Expansion of Power to Improve Human Rights

In order to illustrate why an institution is important in helping improve human rights issues in ASEAN, it is necessary to explain the functions and achievements of the existing human rights institution; the AICHR, in parallel with analyzing how they

have expanded their power over time to deal with human rights issues. This part shows the features of the AICHR. Firstly, how the AICHR has contributed to the human rights arena regionally and domestically under its mandates and work plans. It will then analyze how, since its establishment, the AICHR has expanded its role and power to work beyond their scopes in order to respond to urgent human rights issues which occur in Southeast Asian countries.

Pursuant to the Terms of Reference (ToR) for the AICHR which were negotiated and drafted by an intergovernmental panel known as the High Level Panel (HLP) and finally adopted at the 42nd AMM, Articles 1 and 3 of the ToR state that the AICHR acts as the consultative intergovernmental body; (1) to promote and protect human rights and fundamental freedoms of the peoples within the regional context, (2) to enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights, and (3) to uphold international human rights standards (AICHR *a*, n.d.).

Likewise, AICHR's performance can be found in the Five-Year Work Plan, which is grounded on the 14 mandates outlined in the ToR. Year by year, the AICHR postulates its high priority functions and activities for the year under the work plan and in response to emerging exigencies on human rights in the region. Since its establishment, the AICHR has had two Five-Year Work Plans which are the 2010–2015 and 2016–2020 plans. The activities and functions of the AICHR can be summarized into the following tasks.

The AICHR's Functions and Mandate (AICHR, 2010–2015, 2016–2020) include:

- Complete a stocktaking of existing human rights instruments acceded and ratified by ASEAN Member States.
- Conduct workshops and studies on various thematic themes related to human rights.
- Identify current and potential human rights matters of interest to ASEAN.
- Conduct trainings on human rights for specific target groups, such as government officials, law enforcement officers, journalists, etc.
- Develop regional plan of actions, recommendations, or ASEAN policy framework on specific human rights issues.
- Disseminate information of the work of the AICHR and share best practices of effective implementation of international human rights treaty obligations including publications in both English and national languages of the ASEAN Member States.
- Coordinate and consult with relevant ASEAN Sectoral Bodies to ensure the effective implementation of ASEAN instruments related to human rights.
- Engage in dialogues with regional stakeholders on emerging human rights issues of interest to ASEAN pertaining to the promotion and protection of human rights in accordance with the AHRD.

The first Work Plan for 2010–2015 is not so detailed and generally outlines conduct on main concerns based on the 14 mandates. A significantly prominent plan was the development of an ASEAN Human Rights Declaration (AHRD). It is an ASEAN landmark document, which sets the framework for further promotion and

protection of human rights and fundamental freedoms in the region (Davies, 2014). The AHRD represents the aspirations and determination of ASEAN Member States and their populaces for a people-oriented ASEAN Community (Bui, 2016).

The second Work Plan of 2016–2020 is more detailed in comparison with its predecessor because it designates clearly the years that AICHR should complete each work stipulated in the plan. An interesting and creative point in this work plan concerns the idea to ‘engage in dialogue and consultation with civil society and other stakeholders’ as provided for in mandate 4.8—an idea never formally realized by the AICHR before as previous AICHR-CSO engagements were obviously informal and noninclusive (Gomez & Ramcharan, 2013). The feature of this work plan signals the possibility for an increasingly formal relation between the AICHR and CSOs starting in 2015. The AICHR looked forward for more meaningful and constructive engagement and interaction with civil society organizations (CSOs) through the adoption of Guidelines on the AICHR’s Relations with Civil Society Organizations (AICHR *b*, n.d.).

A few months later, the AICHR launched the application form for Civil Society Organizations (CSOs) to apply for Consultative Relationship with the AICHR. As of June 2019, there are 30 CSOs (and more are pending) that have been accredited by the AICHR to consultatively attend in all of the AICHR’s conferences and dialogues.³ This development shows that the AICHR seems to have embarked on a strategy to involve CSOs more closely in its work. This may also be viewed as a way to expand its powers. The institution can say it is simply responding to information and pressure from citizens and CSOs when it moves into new areas of engagement.

In this sense, it is clear that the AICHR’s mandates were geared more toward a promoting, rather than a protecting approach. Its ToR does not include the powers of investigation, monitoring or enforcement, or protection of rights. Additionally, we found that both five-year work plans of the AICHR do not provide for the power to protect against human rights violations, nor is there an official discussion on this point at the AICHR’s workshops or meetings. These matters cause displeasure for the Working Group for an ASEAN Human Rights Mechanism which pushed for the ASEAN human rights mechanism (Petersen, 2011). Meanwhile, ASEAN member states seem to be acquiescing to this nonexistence. This is because member states are afraid that if the AICHR’s power can be expanded on these terms, in the future it might affect now states act constitute in violation of human rights. As a result, despite having the legal power to support AICHR’s expansion, member states have withheld their decision to do so, insisting instead that the AICHR only has a human right promotion role but not a protection role.

As mentioned above, we argue that the AICHR as a regional institution should function similarly to human rights institutions in other regions, especially as regards judicial power and independence. For instance, the AICHR should have much more possibility to creatively construe its own mandate, and go beyond areas not explicitly listed, namely investigating, reporting and arbitrating individual complaints of

³ See <http://aichr.org/>. Archives: February, May and November 2016; January and August 2017.

human rights abuse. Although, some ASEAN elites, such as the Thai Prime Minister (2008–2011) Abhisit Vejjajiva, remarked that this human rights institution needs to first begin to increase its role in the issue of promotion. Once that is in place, there will be more teeth in terms of protection (The Straits Times, 2009). Dr. Surin Pitsuwan, the 12th Secretary-General of ASEAN highlighted the importance of AICHR's achievement, in particular the ASEAN Human Rights Declaration, which is a roadmap for the regional human rights development (AICHR *c*, n.d.). Nevertheless, the argument here in this chapter is expected to move forward beyond only promotion-oriented role of the AICHR. That means the AICHR should seek opportunities to adapt its powers to reach the standard of other regional human rights institutions and be in line with international human rights norms especially in terms of protection.

Even though the AICHR is not independent of the governments which have established it as an intergovernmental organization, we found that the AICHR itself and other groups and individuals, support the idea of AICHR's expansion of power. On this point, the opinions of AICHR representatives who have consistently attended CSOs' platform meetings seem to be interesting evidence to guarantee that they are trying to step out beyond their power. Mr. Edmund Bon, Malaysian representative to the AICHR, responding publicly to a question concerning the establishment of a judicial human rights mechanism, said that it is possible to create AICHR powers beyond its mandate to build a new arena of human rights protection such as establishing the ASEAN Human Rights Court in the future, but not soon. ASEAN should first actively adapt the already existing human rights institution, the AICHR, to have more competence to play a significant role in protecting human rights violations (SEAHRN, 2016). This position seems to be an argument for an institutional strengthening and expansion of the AICHR's role and power.

Thus, alongside the expansion of protection powers, it is not astonishing to find that the AICHR often tries to make a new way to overcome the lack of power. The AICHR itself has occasionally tried to expand its power beyond a strict principal-agent model to deal with the urgent human rights issues occurring in the region, without having regard to its mandate and work plan and to become somewhat freer and more interpretive of their own powers.

More evidence of this assertion is the first-ever Judicial Colloquium on the Sharing of Good Practices regarding International Human Rights Law held on 13 to 15 March 2017 organized by AICHR (AICHR *d*, n.d.). The objectives of the Colloquium were to strengthen judicial cooperation and enhance the legal ability of the AICHR (*ibid.*).

The Judicial Colloquium initially demonstrates a tendency toward increasing legal capacity to respond to human rights issues. Despite there being no mention of increasing investigative or adjudicatory powers in relation to human rights violations by states, the colloquium marks a legal initiative where participants, member of the high offices of the judiciary from their respective countries, are able to consult each other on legal matters. Participants like representatives of the Public Prosecution and Attorney General Offices, ASEAN Law Ministers Meeting (ALAWMM), ASEAN Senior Law Officials Meeting (ASLOM) are also among the

most important instruments that can contribute toward legal powers to address human rights violations in the future.

This evidence highlights the beginning of ideas about the judiciary functioning of regional human rights institutions, as regarded by the AICHR. This also ignites the need to establish an inter-sectoral expert or working group on human rights to provide technical knowledge and assistance to policy makers and AICHR representatives to strengthen judiciary functions. We support that this is of importance to the ASEAN human rights situation especially in terms of cases of violations. Creating and strengthening the judicial function can fulfill the absence of a protection role. Even though the idea is in its early stages, the knowledge and experiences of judges and lawyers can contribute and motivate the AICHR to actively consider this issue by perhaps enhancing the ASEAN Human Rights Declaration (AHRD) or enacting a new ASEAN human rights agreement or convention which will provide for and support judicial functions necessary to address regional human rights violations.

Another significant expansion of the AICHR's protection power is the attempt to combat issues of trafficking-in-persons (TIP). Both AICHR work plans; 2010–2015 and 2016–2020, in mandates 4.1 to 4.14 do not specifically mention that AICHR needs to adopt a human trafficking convention. In the second work plan, for example, mandate 4.2 only mentions about establishing “*framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights*” (AICHR *a. n.d.*). TIP also appears merely as one of the issues the AICHR is mandated to initiate thematic studies upon in mandate 4.12 (*ibid.*). However, the AICHR went beyond that mandate by being a significant actor in drafting and enacting the ASEAN Convention against Trafficking in Persons, Especially Women and Children, known as “ACTIP,” which is an important step to encourage ASEAN states to amend their domestic law. Finally, the convention was signed by the member states' leaders at the 27th ASEAN Summit, which marks a fruitful expansion of the role of the AICHR (ASEAN, 2015).

There is a reason to this accelerated work. The US TIP Report which is the predominant universal barometer on anti-TIP initiatives in 2015 placed Singapore, Malaysia, Myanmar, Laos, and Cambodia on its Tier 2 watch list, and placed Thailand on its Tier 3 list (Kumar, 2016). About 200,000 women and children, or about one-third of the global trafficking trade, are trafficked annually from Southeast Asian countries (*ibid.*). Thailand is the primary source of women and children trafficked for commercial sex work in several urban cities (*ibid.*). As for Indonesia, thirty-four provinces in the country are source and destination points for TIP particularly in the Batam district of the Riau Islands and West Papua provinces where children are victims of sex trafficking (US Department of State, 2015).

Vietnamese women who are internationally brokered for marriages and go live abroad, mostly to China and increasingly to Malaysia, are finally later forced into domestic labor or the sex trade (Kumar, 2016). Furthermore, the International Labour Office has reported of trafficking of migrant fishermen from Laos, Cambodia, and Myanmar into the Thai fishing industry (*ibid.*). This is strong evidence that TIP remains a vital problem in Southeast Asia which the AICHR is determined to combat and accordingly expanded their role to work with stakeholders to respond to this

urgent regional issue. In this regard, the AICHR representatives try to explain that this work is a step forward in its development of a protection system. For example, the former Representative of Indonesia to the AICHR; 2013–2015, Mr. Rafendi Djamin, underscored that no ASEAN Member State (AMS) is free from the issue of trafficking, and the crosscutting nature of trafficking could be a start for better cooperation and/or coordination among relevant organs/bodies/sectoral bodies of ASEAN (AICHR *e*, n.d.).

In the AICHR-SOMTC Consultation 2016, Dr. Dinna Wisnu, Indonesian representative to AICHR supports the attempt of stepping beyond the work plan as follows (AICHR *f*, n.d.): *“In combating trafficking in persons, cross-border cooperation at the regional and international levels are necessary and inevitable, ASEAN has received the appreciation and acknowledgement of the international community. We have achieved much progress even before the ratification of ACTIP by all countries. There is even an agreement that the enforcement of laws and immigration rules needs to provide justice for victims and deliver more comprehensive preventive measures.”*

From this event, the AICHR launched the Summary of Activity Report on how countries in Europe and the United States develop their procedures to interview victims and to investigate crimes at their root, a procedure which should be applied for ASEAN situations (*ibid.*). AICHR Representatives also highlighted the importance of preventing these crimes to cut down criminal cases given that investigations take some time and a mechanism for human-rights-based approach in prosecution and victim rehabilitation is still undergoing (*ibid.*). Mr. Edmund Bon was a key speaker at the third SEA/ASEAN Research Network and Forum held at VU Amsterdam on 12th May 2017. He confirmed that the adoption of the ACTIP was an upright example guaranteeing that the AICHR has not only been working on human right promotion matters but also protection matters. It was suggested that the ACTIP really creates the opportunity for the AICHR to have a greater right of intervention (Personal Interview, n.d.).

It is thus understandable that the AICHR has been trying to work outside of its work plans. Perceptions and opinions of the AICHR representatives can also guarantee that they have had progressive thoughts to work beyond their role and have tried to expand their power over time to deal with urgent human rights issues in the region, despite not being independent from member states' control. Nevertheless, some human rights violations in this region still remain unaddressed by the AICHR. An obvious example is the mass atrocities perpetrated against the Rohingyas in Myanmar. Such violations were allegedly caused by the state government. It is noted that the AICHR seems to be quiet when it comes to violations of this kind because intervention will likely affect the relation between them and state governments. The AICHR is not able to expand their power to deal with state-perpetrated human rights abuses. In relation to this sensitive political issue, it seems that the AICHR still relies on a consensus from all member states before any action can be taken. This discrepancy between self-led role expansion in some cases and reliance on consensus in others is a point which needs to be further discussed and resolved.

2.7 Conclusion

The purpose of this chapter is to argue that regional human rights institutions are very important and highly needed, especially in Southeast Asia, where human rights awareness just recently emerged to become a significant issue under its regional integration. To conclude and to answer the first question of whether ASEAN really demanded a regional human rights institution, the mentioned empirical evidence from AMM Joint Communiqués, Working Group' statements and ASEAN elites' speeches can confirm that this region needed an agent to deal with human rights issues. ASEAN member states themselves were not able to manage human rights situations which occurred in each respective state.

All of the endeavors on creating a human rights institution attest to ASEAN's willingness to have an agent on human rights, otherwise they would not have tried to establish it. Having a human rights institution as agents of ASEAN is beneficial because some state members lack technical expertise, credibility, legitimacy, or other resources to deal with human rights issues on their own. Agents like the AICHR can help to manage regional policies on human rights issues, facilitating collective decision-making, resolving human rights problems and enhance human rights credibility. A human rights institution as an agent is also important in helping ASEAN to have a stronger mechanism to determine which human rights problems shall be dealt with and how to equip ASEAN with the capacity to be a sustainable region in terms of good governance and human rights protection.

As a final point, to answer the second question, the above analysis shows that after the AICHR was established, it has been active in improving human rights. AICHR performance show that it has been mobilizing human rights issues in several ways, such as organizing many campaigns, dialogues, and events, proving that this institution is not totally useless as it has been criticized by some. The regional institutional development on human rights has been increasingly changed in a positive way since its formation, and has contributed a number of successful works. The AICHR often tries to work outside its mandates and work plans to overcome urgent human rights issues which occur and become a major concern in the region. An achievement from expanding its human rights protection power and role has been with respect to the enactment of a legal instrument; the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP).

What does all this mean for the future of human rights in Southeast Asia? It means that with independence and an expanded scope of power, the AICHR would be able to make a meaningful contribution toward addressing human rights violations, especially those that are severe and urgent. Realizing such benefits of an expansion of power, ASEAN should support existing human rights institutions with independence and work together with them with a view that such expansion of scope of power would result in a future strong and effective human rights institution. Also, the AICHR can be one of the major actors to establish new regional human rights institutions which will be more powerful and independent to deal with human rights violations in the future such as a regional human rights court.

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