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Abstract:

The ASEAN Intergovernmental Commission on Human Rights (AICHR) is often regarded unfavourably, depicted at best as irrelevant in the battle to promote and protect human rights in Southeast Asia, and at worst, complicit in the abuse of human rights by its silence in the face of the region's human rights' tragedies. While AICHR has many limitations, we regard it as a work-in-progress, evolving as it was always meant to. To understand this evolution, we conceive of AICHR as a participatory space in which contestation of what AICHR can, and cannot, do is being undertaken by its Representatives. This contestation includes exposing its secretive face of power by revealing: the space human rights can be discussed in; who can participate and who is excluded in this discussion; and how malleable the norms that operate within this space are to change. The latter aspect of contestation engages with the thorny "problem" of consensus. We argue that the presence of Representatives from outside of government has introduced a desire in AICHR for change; a dynamism that makes it a participatory space witnessing contestation that has the potential to enable AICHR to evolve. A space, therefore, that for all its shortcomings is worth watching.

Keywords: ASEAN, human rights, AICHR, participatory space, contestation

Introduction

The Association of Southeast Asian Nations (ASEAN) established a human rights body in 2009 called the ASEAN Intergovernmental Commission on Human Rights (AICHR). It was not well-received at the time by human rights activists that regarded it as falling significantly short of international standards for a human rights body, captured in the image of ASEAN's stalks of padi inverted into a mouth with the tagline that it lacked bite. These criticisms had not been assuaged after its first decade of activity, with the accusation moving from it being toothless to AICHR's very existence deflecting international attention from member states' abuse of their citizens; its primary purpose is 'purely eyewash' (Gavilan 2017). At the core of these criticisms is the accusation that the principles and procedures that determine how an ASEAN body can operate – the ASEAN Way – is incompatible with promoting and protecting human rights. Hence the criticism from regional NGOs at the outset of AICHR's creation that the principles of consensus decision making and non-interference were not consonant with protecting human rights (see Collins 2013, 96-7), and that these principles, which underpin AICHR's Terms of Reference, will ultimately, if not changed, make AICHR irrelevant (Cumaraswamy 2021, 27); a view endorsed by Celine Martin who argues AICHR has to go beyond its current terms of reference otherwise it will continue to be largely ignored by the UN's Universal Periodic Review of human rights (2018).

The continuing questioning of AICHR's ability to address human rights abuses in Southeast Asia is neatly captured in Alison Duxbury and Tan Hsien-Li's recent addition to the literature – *Can ASEAN Take Human Rights Seriously?* This too recognises that an affirmative answer 'necessitates an ideological reconstruction of the ASEAN Way' (Duxbury and Hsien-Li 2019, 347). They tentatively suggest that this is possible, and that it could happen because the ASEAN Way is subject to changing interpretation. This builds on a Constructivist inspired literature that began with Amitav Acharya (2001) and has blossomed to encompass alternative approaches that directly address the potential for ASEAN normative change (Ba 2009; Glas 2017; Nair 2019), including specifically about human rights (Collins 2019; Davies 2013, 2014; Katsumata 2009). We concur that understandings of the ASEAN Way are not fixed, and, utilising the notion of participatory spaces, we show how some AICHR Representatives are taking human rights seriously.

We contend that as an ASEAN body AICHR must operate within ASEAN's modus operandi – the ASEAN Way – so AICHR's evolution is less about going beyond the constraints of ASEAN's procedures, but rather contesting them and interpreting them so that they enable AICHR to promote and protect. We posit that in order to understand what contestation is possible we need to understand how AICHR operates. James Gomez and Robin Ramcharan explicitly note the secretive nature of AICHR and that research on its workings is needed (2018, 2). We concur, and this article represents a contribution to that end. The article draws significantly on the experience of ex-AICHR Representatives, specifically those of the co-author, thus providing critical insights into human rights contestation within ASEAN.

In this article, we are therefore interested in revealing the limitations ASEAN's modus operandi creates for AICHR's Representatives, but also how those limitations are subject to contestation

by its Representatives. Utilising the concept of participatory spaces, we argue, firstly, that this contestation exposes how AICHR's participatory space operates, and thus reveals the hidden, or secretive, power of its practices. Secondly, we argue that, because the space is open to contestation, AICHR is a body that can evolve, and indeed, has. For all the criticism levelled at it, AICHR is thus a body worth watching.

We begin by explaining what type of participatory space AICHR is, and that this space extends beyond AICHR to encompass other ASEAN Sectoral Bodies. The purpose is to reveal the parameters within which human rights contestation occurs. Parameters here are understood to mean AICHR's governing structure, which are primarily detailed in AICHR's Terms of Reference (ToR), and includes other documents providing guidance on AICHR's operations and engaging with civil society organisations (CSOs), and the ASEAN Human Rights Declaration (AHRD). We interpret these parameters as establishing what is feasible and permissible within the participatory space.

The article then proceeds to reveal how AICHR's modus operandi constitutes what Steven Lukes coined the second face, or dimension, of power and is also referred to as the secretive face of power (1974). In essence, how contestation is circumscribed and thus reveals where the power to pursue, hinder, achieve a commitment to, and comply with, human rights lies. Finally, the article addresses the challenges of adjusting AICHR's participatory space to make promoting human rights more systematic, and, amenable to protecting human rights.

The empirical research contains primary material from AICHR Representatives and data from the ASEAN Secretariat. When the material and its source is already in the public domain we have identified the Representative, otherwise, given that the data is drawn from behind-closed-door meetings, the sources are not identified to safeguard their anonymity.

AICHR as a Participatory Space

The meaning of political participation is itself contentious with many criteria used in its definition (see Fox 2014), and debates in the literature are concerned with whether there is a decline in political participation by the citizenry (Whiteley 2012). For our purposes, we acknowledge that while participation initially referred to empowering the citizenry as a challenge to the governing elite, since the 1990s what constitutes participation, and indeed the space in which it occurs, has undergone significant change. Now, it is utilised by governments and international organisations to co-opt communities into being participants in state and international action (Loh Kah Seng 2016). This co-option has led to criticism of participation being insidious; it purports to empower the citizenry, but it exploits them by putting the onus on communities to carry the burden of responding to problems while lessening the state's responsibility. Ilan Kapoor (2005, 1203–4 and 1215) calls participatory development, for example, a “Trojan horse” for “neo-imperial and inegalitarian” forces. This is a warning to be mindful of as we examine, not participation per se but rather the spaces in which this participation occurs; political power will be just as present within this space as it is everywhere else. Thus, while a participatory space enables non-state actors to participate in decision making, whether this empowers them or not is questionable. Writing with specific reference to ASEAN and its engagement with CSOs, Kelly Gerard adopts the concept of participatory

spaces to examine the utilisation of CSO expertise by ASEAN in its community building projects, and specifically its desire for this to be people-oriented (2014). Gerard's findings that ASEAN's modes of participation promote representation at the expense of contestation, reaffirms the scepticism that participation empowers.

We can therefore understand a participatory space to exist where the state reaches out to additional actors within its citizenry to cope with a range of contemporary social problems, including beyond its borders. It is the combination of state and non-state actor that, by drawing upon a wealth of knowledge and experience, can create a more effective governance framework to respond to multifaceted problems (Fischer 2006). Therefore, a participatory space is where that governance framework is established, (re)interpreted, contested, and evolves. However, thinking of a participatory space as an interaction between state and non-state actors reveals the importance of power to determine acceptable practices within that space. Gerard's tagline that ASEAN's engagement of civil society amounts to "regulating dissent" (2014) is based on the findings that ASEAN's institutional practices nullify Southeast Asian CSO's ability to contest ASEAN policy making. We are specifically interested in the claim that this arises because of 'the relationship between the *structure* of participatory channels and the interests they further' (emphasis added) (2014, 43). While Gerard is examining the relationship between state actors (ASEAN) and non-state actors (CSOs), we utilise these findings to examine the operation of an ASEAN body, and how members of this body interact not only with CSOs but other ASEAN Bodies and indeed within AICHR itself.

We contend that Gerard's identification of the relationship between "structure" and "interests" speaks directly to Peter Bachrach and Morton Baratz's (1962) idea that power is exercised within a complex system and comes in the form of agenda-setting. It is what Steven Lukes classified as the second dimension of power (1974), widely classified as the "secretive face" of power. In essence, power is controlling the parameters of a discussion. It is possible to manipulate actors' behaviour by establishing norms determining what is, and is not, permissible. This empowers some persons or groups and hinders others by confining the scope of decision-making. It is precisely because this exercise of power is normalised within the space that it becomes imperceptible. This helps explain why this dimension, or face of power, is often linked to the notion of decisions being made "behind closed doors" and in the "corridors of power". These phrases capture the second dimension's hidden nature, and why it has been coined secretive. We are specifically interested in AICHR's modus operandi as an example of this secretive face, determining what its Representatives can and cannot do.

Participatory spaces are also marked by who is included and who is excluded. Kanishka Juyasuriya and Garry Rodan write: 'A mode of participation...refers to the institutional structures and ideologies that shape the inclusion and exclusion of individuals and groups in the political process' (2007, 773-4). The "institutional structure" and "ideologies" that shape inclusion and exclusion, are, in this article, the ToR, the *Guidelines on the Operations of the ASEAN Intergovernmental Commission on Human Rights* (ASEAN 2012a), hereafter known as the *Guidelines*, and more broadly the ASEAN Way of consensus.

Who can participate?

The inclusion of actors from outside of government enables new ideas and approaches to infuse decision making within the participatory space. According to Frank Fischer, ‘a new breed of public servant, the civil society professional, has emerged to offer assistance. Often schooled in NGOs, such professionals—as government officials or independent consultants to parallel institutions—have often played an essential role in the development and spread of participatory approaches to governance’ (2006, 20). We contend that with some member states choosing their AICHR Representatives from outside of government, AICHR contains such professionals. In particular, those from the law profession with expertise in human rights law, civil society human rights activists, and academics. The Representatives that have such expertise have continuously represented Indonesia, Thailand, and Malaysia. The Representatives of the other member states are routinely government officials, thus making AICHR a body that contains a mixture of government officials and those drawn from outside of government; the latter, examples of Fischer’s “new breed of public servant”.

Who can participate excludes and includes, and for AICHR there are formal limitations on whom it can engage. Thus according to its ToR it cannot receive complaints about human rights abuses, so there is no space for the victims of human rights abuse, and it can only open its space to dialogue with civil society organisations (CSO) that are recognised entities. The types of CSOs that can participate and the procedures governing this participation are detailed in the *Guidelines on the AICHR’s Relations with Civil Society Organisations* (ASEAN 2015). They amount to CSOs that respect and not act contrary to the principles and purposes of the ASEAN Charter, the AHRD and the ToR. It creates space for CSOs with expertise in specific rights, expertise that can be utilised in promoting human rights through, for example, attending working groups or task forces (see *Guidelines* Article 8.2). While it does not explicitly exclude formal engagement with activist, human rights NGOs that seek to hold member states accountable for their human rights record, they are unlikely to secure a place in this participatory space because they are critical of, rather than supportive of, member states. This does not, of course, preclude individual AICHR Representatives from receiving information from such NGOs and utilising that information in AICHR fora, but this is proxy participation, with limitations ranging from the presence of amenable representatives to the representatives’ (mis)interpretation of the NGOs’ message. Finally, the *Guidelines* provide provision for anyone to attend AICHR on a case-by-case basis, although their participation requires the consensus of the Representatives (Article 1.4).

AICHR is thus a space that includes civil society professionals as formal Representatives, albeit three out of ten, and it has formal limitations on who can participate in its activities, namely no victim of human rights abuses or CSOs championing their cause. As we note below, contesting who can participate is a means of challenging what is permissible and exposing this second dimension of power. A dimension of power that also determines what constitutes the space, and what participation in this space is permitted.

What is the space?

The participatory space is detailed in the ToR (ASEAN 2009a). It includes AICHR’s meetings, which includes mandatory meetings – a minimum of two such meetings have to be held each

year (Article 6.2) – and events arranged by individual AICHR Representatives in pursuit of their thematic studies (Article 4.12). It also includes AICHR’s engagement with other entities that support the principles and purposes of ASEAN, such as; civil society and think tanks, for example, the Working Group for ASEAN Human Rights Mechanism (Article 4.8); national, regional and international institutions concerned with human rights (Article 4.9); and ASEAN Sectoral Bodies (Article 4.7), such as its engagement with Senior Official Meetings (SOMs).

These spaces appear to be quite diverse, ranging from formal meetings of the AICHR Representatives to meetings with invited participants from outside ASEAN, to ad hoc meetings with SOMs within ASEAN. However, we contend that what makes these participatory spaces analogous is that they share common assumptions of how members should act in these spaces. That is, what is permissible to do and feasible to achieve. We thus concur with Fischer, that: “Political space, from this perspective, is not just filled up with competing interests but rather is understood as something that is created, opened, and shaped by social understandings” (2006, 25). Of course, the variety of these spaces provides the opportunity to contest these assumptions, or “social understandings”. These assumptions thus constitute the structures of the space and help to reveal the secretive face of power. To expose this dimension of power we need to reveal AICHR’s *modus operandi*, and thereby expose how this agenda-setting power operates.

AICHR’s modus operandi

Fischer reveals the importance of practices and habits that operate within participatory spaces when he writes: “Never socially neutral, space enables some actions—including the possibility of new actions—and blocks or constrains others. This perspective thus calls attention to the importance of analyzing the underlying and implicit assumptions about social and political relations that organize and constitute spaces for participation” (2006, 25). We understand these “assumptions” to be the practices and habits of AICHR’s *modus operandi*, specifically its interpretation of its ToR, the AHRD, and more broadly the ASEAN Way’s principles of consensus, non-interference and proclivity for informal resolutions.

AICHR’s ToR (ASEAN 2009a) establishes that it is ‘the overarching human rights institution in ASEAN’ (Article 6.8), and its purpose is to promote and protect the human rights and the fundamental freedoms of the peoples of ASEAN (Article 1.1), and to uphold their right to live in peace, dignity and prosperity (Article 1.2). It is though recognised that it lacks the necessary toolkit to protect: it has no process or procedure for receiving complaints; it cannot investigate; it cannot provide a remedy. Instead, it is a promotional body with the potential, because its ToR is subject to review (Article 9.6), to protect at some indeterminate time in the future. It is essential to note that in the accompanying Cha-am Hua Hin Declaration to the ToR’s release, ASEAN Member States recognised that AICHR’s mechanisms to promote and protect human rights could be further developed (ASEAN 2009b). The terms of reference for this participatory space are therefore subject to change, and that this change will be manifest in interpretations and reinterpretations of its ToR.

The ToR reaffirms the core principles of the ASEAN Way as contained in the ASEAN Charter, notably consultation and consensus (Article 6.1), non-interference (Article 2.1b), and that this

promotion of human rights and fundamental freedoms is subject to ‘national and regional particularities’, reflecting the need for ‘mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities’ (Article 1.4). While this notion of particularities is often interpreted as a limitation clause restricting universal understandings of human rights, in the context of AICHR it should be read in congruence with consensus. If consensus means unanimous agreement, achieving this while respecting different national particularities, can be interpreted differently. If it means that all ten member states need to have the same understanding of what the implications are of implementing an agreement – that is, their commitment and compliance can be objectively assessed against an external measurement – then each AICHR Representative holds a veto. Debates, discussions, and deliberations can occur, but if one Representative can simply say no and stymie any outcome, then the participatory space is a talk shop. While this is an interpretation of consensus that has some traction among ASEAN members, as was vividly revealed in October 2021 when ASEAN took the unprecedented step of disinviting the Myanmar head of state from their 38th and 39th ASEAN Summits there are evidently circumstances where vetoes do not pertain. Myanmar’s dissent was noted but it did not amount to a veto. We contend that equating consensus with veto power is a contentious interpretation, out-of-step with it being traditionally understood as a mechanism to ensure that all member states were treated equally, not that one could prevent others from acting by wielding a veto. Long before the ASEAN Charter enshrined it in the ASEAN Economic Community pillar, ASEAN Minus-X was for all ASEAN deliberations (Acharya 1997, 331-2). Achieving consensus can therefore be interpreted to mean that any ASEAN agreement is likely to be ambiguous in its requirements, leading to member states having significant leeway in their implementation. For a participatory space, this allows for the contestation of meanings, with member states able to interpret and reinterpret their implementation. While for promoting human rights it can lead to activities that are appropriate for national particularities, for protection it can lead some member states to inaction, or action that is at best lip-service and at worst injurious. We return to this below when looking at the AHRD; for now, we note that the ToR, imbued with consensus, does not negate contestation.

When conceiving of AICHR as a decision-making participatory space, the primary responsibility for promoting and protecting human rights lies with the member states (Article 2.3). AICHR is a consultative body (Article 3) with its mandate and functions (Article 4) revealing the breadth of its participatory space as noted above, namely that it is within and beyond ASEAN. There is a tension within the ToR over AICHR’s engagement within ASEAN, where despite being the overarching human rights body tasked with aligning sectoral bodies’ modalities to ensure synergies and coherence in ASEAN’s promotion and protection of human rights (Article 6.9), this consultation, coordination and collaboration is subject to sectoral bodies’ ‘request’ (Article 4.7). The tension between having the responsibility to collaborate but not having the authority to require sectoral bodies to work with AICHR, reveals the workings of the secretive face of power. It is a constraint on the functioning of AICHR’s participatory space. AICHR can be simply ignored. The subsequent *Guidelines* (ASEAN 2012a) provide greater detail on what aligning modalities between AICHR and sectoral bodies entails - convening joint consultations, reviewing sectoral bodies’ terms of reference, conducting joint activities etc. – but AICHR cannot require these sectoral bodies to engage (see *Guidelines* Article 10).

The ToR tasked AICHR to write the ASEAN Human Rights Declaration (AHRD), which ASEAN duly adopted in November 2012 (ASEAN 2012b). It was not well-received by human rights activists, who lambasted it for diluting international human rights standards and consequently undermining rather than affirming international human rights laws (Human Rights Watch 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). In terms of establishing what is possible within AICHR's participatory space for the promotion of human rights, what is significant is whether the AHRD does, as its critics contend, permit member states to curtail human rights. Is the AHRD so permissive that human rights violators can use it to defend their actions? For the AHRD to establish acceptable behaviour for promoting human rights, such an interpretation would need to be contested. This has happened, with Edmund Bon Tai Soon, the then Malaysian AICHR Representative, interpreting the AHRD as consistent with international standards (Bon 2016). It was certainly reaffirmed in the accompanying Phnom Penh statement to the AHRD, which stated that that AHRD is to 'advance' human rights (ASEAN 2012c). Thus, we contend that any attempt by an AICHR Representative, or Member State, to utilise the AHRD to justify human rights violations can be contested by recourse to the AHRD and contested within the participatory space.

AICHR's modus operandi reveals the known understandings that act as the parameters that define what is acceptable within the participatory space. Namely, that decision making is based on consensus, that AICHR is invited to embed human rights promotion within the workings of sectoral bodies, and the AHRD can be interpreted as upholding minimum international standards of human rights law. What is not fixed about these parameters is what Representatives and member states understand them to mean at any specific time. What consensus means is subject to change via contestation, as indeed is how AICHR and sectoral bodies engage, as indeed is the interpretation of the AHRD. We now turn to the evidence of contestation within AICHR's participatory space.

Contestation within AICHR's participatory space

We have noted above, and detailed elsewhere (Collins 2019), the contestation of the AHRD. This section shows the constraints the secretive face of power creates for AICHR Representatives engaging in contestation. We divide this section into three. First, we examine how the who can participate is contested. Second, we look at the contestation over what constitutes the participatory space, which includes AICHR's convening power, and the tensions between being "invited" to promote human rights and having the responsibility to embed and mainstream human rights into ASEAN sectoral bodies' activities. Third, the contestation over consensus and how this can stymie discussion by silencing discussion.

Who can participate?

It was previously noted that AICHR cannot receive complaints about human rights abuses. This does not mean written submissions have not been sent; they have, and whether they are considered or not, reveal the Chairperson's power. From 2010 to October 2019, 55 letters had been sent to AICHR. The complaints and cases highlighted a wide range of violations that alleged breaches of the AHRD. These had not been examined systematically. Whether they were ignored or considered depended on the AICHR Chair. While the Chairperson is only supposed to regulate the affairs and meetings of AICHR and to stay neutral during the discussions, he or she wields a great deal of unseen power. Each Chairperson has adopted different practices. Because the conduct of AICHR as a group differed from year to year depending on who chaired the Commission, some complaints and cases would be shared with all the Representatives, while some would not be. If they were not shared, the Representatives would not know about them. Some letters would receive a response, while others would not. This absence of consistency in the way the letters were treated resulted in complaints that AICHR was unresponsive. It reveals that determining who can participate, or at least whose cases can be considered by AICHR, is at the whim of the Chair.

There are means to contest this secretive power, not least by asking CSOs to continue sending their letters of complaint and cases of human rights violations to AICHR, but also copy in all of the individual Representatives to ensure that they come to their attention. While this at least ensures the cases are known in the first instance, it does not create a formalised mechanism for AICHR to receive and respond to the letters. Creating such a mechanism would ensure that AICHR's participatory space would receive cases of alleged human rights violation; which seems quintessential for a human rights body.

Creating a mechanism by establishing guidelines to institutionalise AICHR's practice of handling the letters it received has been tried. As of 28 July 2017, AICHR had received no less than 34 letters of complaints. In the same year, Bon, after consultations with the Malaysian Ministry of Foreign Affairs and NGOs, and on behalf of Malaysia, presented AICHR with a proposed set of 'Guidelines on Correspondence' (GOC). The draft went through some seven revisions. It proposed that the GOC handle three types of letters: (a) requests to meet, (b) proposals to cooperate or collaborate on joint activities, and (c) complaints and cases of human rights violations. On the modality regarding letters of complaints and cases, the GOC provided that all letters must be shared to everyone. Individual Representatives may follow up on the matters raised at his or her discretion. Should there be any action taken, he or she may report it to AICHR for a response to be sent to the complainant to inform them of the progress regarding the complaint or case. While not the best for a human rights commission, this procedure was to be a starting point for the practice to gradually evolve. It would also institutionalise a consistent practice that would not differ from one Chairperson to another. The GOC was then discussed at retreats and in several meetings. It was encouraging that some of the Representatives supported the GOC while some expressed caution. One Representative was of the view that letters that pertained to the situation of a country should be sent only to the country's Representative and to no one else, for otherwise it would be an interference in the domestic affairs of the member state. Another Representative said that AICHR had no power to receive complaints and cases of human rights violations. The argument was that only once the ASEAN Secretary-General raises with AICHR such complaints and cases can the AICHR

then consider them. One Representative attempted to water down the GOC further to gain consensus.

The draft was revised again and discussions ensued till the end of 2018. Still, AICHR could not find a consensus. This failure was partly due to several other unrelated factors such as the attempt to place a budgetary cap on AICHR's funding sources and limit the number of AICHR activities. Because some Representatives could not agree to the cap and limitation proposal, other Representatives vetoed the GOC on a quid pro quo basis. In 2020, another attempt was made to pass a similar proposal as the GOC. No guidelines were eventually adopted. However, there is now an "understanding" that complaints regarding human rights violations committed by members states can be sent to the ASEAN Secretariat. They would then be forwarded to the individual Representative of the country concerned. Unfortunately, this procedure is not publicly known and does not appear on AICHR's website, indicating once again the Commission's insularity and prevalence of the secretive face power both in terms of how to implement the procedure and who gets to know a letter has been filed.

We return to the "problem" of consensus below, but for now, it is pertinent to note that contestation occurs over modalities and that formalising (and publicising) procedures is critical in exposing the secretive face of power because it creates recognised routines. This is seen in the following example, which is directly concerned with broadening AICHR's participatory space.

Since the adoption of the ToR there have been concerted efforts to broaden the participatory space for CSOs. The number of CSOs that had consultative status with AICHR following their applications under the 2015 CSO Guidelines (ASEAN 2015) increased. The Representatives of Malaysia, Singapore and Indonesia formed AICHR's Screening Panel, which would vet the applications and make recommendations to AICHR. There were six CSOs in 2016. At the end of 2018, the number of CSOs with consultative status increased five-fold. As a result of the increasing number of CSOs, AICHR was physically and practically unable to accommodate requests for meetings with each of them. In 2017, the Representatives of Malaysia, Indonesia, and the Philippines then decided to initiate an annual interface and dialogue with the accredited CSOs. On 28 November 2017, AICHR held a 'Roundtable Discussion on the ASEAN Human Rights Declaration' in Bohol, Philippines, inviting the accredited CSOs. A second interface occurred at Thailand's 'AICHR CSO Symposium' held from 13 to 15 October 2018 in Chiang Rai, Thailand. A third interface was named the 2019 Jakarta-AICHR Human Rights Dialogue held 13 November 2019, which extended the dialogue beyond accredited CSOs (ASEAN 2019).

These are groundbreaking in that they allowed CSOs to put across their concerns, but more importantly, it acted to allow an in-person, face-to-face, public airing of human rights cases before the Representatives. Whether these activities become institutionalised and thus routinely part of AICHR's participatory space remains unknown. While they are reliant on AICHR Representatives initiating them they are not institutionalised. However, routines become embedded once they are established and repeated. With the ToR subject to review, institutionalising a process for screening CSO applications for consultative status, and institutionalising an annual interface and dialogue, becomes possible within a revised ToR

because it is codifying existing practice. It also provides a level of comfort for Representatives who would otherwise not be inclined to the practices. The fate of the Screening Panel and the annual interfaces are thus important markers for assessing the evolution of AICHR's participatory space.

What is the space?

The participatory space not only includes engagement with bodies outside of ASEAN, it also includes those within. In this section we add to the literature on participatory spaces by assigning the role of Fischer's new breed of public servant to AICHR Representatives chosen from outside of government. This enables us to reveal how, by contesting with other ASEAN bodies, AICHR Representatives can create a space for CSOs that would not have otherwise existed, and how AICHR Representatives by contesting the meanings attributed to AICHR's modus operandi are adjusting the modalities that constitute the secretive face of power.

Of particular importance for AICHR's engagement within ASEAN are the SOMs, which are populated by senior officials from the member states responsible for the SOMs' area of expertise, and they advise the governments directly. To embed the promotion of human rights into ASEAN activity requires a working relationship with the SOM responsible. What this working relationship entails is, though, ambiguous, and, as the following example reveals, it is one where what constitutes the power to set the agenda is contentious.

Creating the space

ASEAN's architecture is complex and bureaucratic. Access by non-state actors to ASEAN bodies and resources is difficult, and engagement with civil society and marginalised communities have not been made simpler by the ASEAN Charter. ASEAN meetings are primarily dominated by senior government officials conducted at a high level. Nevertheless, AICHR does have the capacity to create space for non-state actors and allow them to engage government officials through its programmes. This convening power enables AICHR Representatives to create a participatory space that includes outside expertise and internal ASEAN decision-makers. Perhaps more significantly, the modality of how AICHR programmes evolve is a work-in-progress. It is subject to contention and thus malleable. The example we draw upon concerns the deliberations that resulted in the 'ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities' (EM2025), adopted by the ASEAN Leaders at the 33rd ASEAN Summit in 2018 (ASEAN 2018).

At the end of 2015, several AICHR Representatives (led by Thailand's then Representative, Seree Nonthasoot) sought to embark on drafting a regional action plan on the rights of persons with disabilities. The idea arose after AICHR's programmes highlighted the need to guide governments in implementing their human rights commitments in the Convention on the Rights of Persons with Disabilities (CRPD). When the proposal was made at AICHR, there were attempts to derail the initiative. The reason was that the subject matter properly fell within the mandate of ASEAN's Senior Officials Meeting on Social Welfare and Development (SOMSWD). AICHR was accused of encroaching into an arena exclusively reserved for a specialist body of ASEAN. No one denied that persons with disabilities had rights, and no one

disputed the normative human rights standard expected of member states. Unspoken though was a concern of a proliferation of meetings and additional work for the Representatives. When some of the Representatives communicated the proposal to their SOMSWD officials, there was a backlash against the idea. Instead of saying that her member state objected to the proposal, one Representative referred to the ASEAN Way of centrality and consultation. The Representative shared the view of her country's SOMSWD member. She asked AICHR to formally discuss the proposal with SOMSWD, but some of the AICHR's Representatives did not feel the need to as the regional action plan was to be owned by AICHR.

AICHR proceeded to establish a Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community (Task Force), which had its first meeting on 5 to 6 December 2016. Through backchannel discussions, word returned that the SOMSWD was opposed to the Task Force. No official meeting was called to placate the SOMSWD. The situation came to a head at an AICHR programme on the rights of persons with disabilities. On 26 January 2017 at the sidelines of the programme, an informal discussion was held between several members of AICHR and SOMSWD. Notes were taken but only as a Note-to-File. A Note-to-File contains key points of the discussion at the meeting and is kept by the ASEAN Secretariat as an internal document only. It is a formal document but will not be officially circulated. It is a quintessential example of the second face of power; the confidential recording of a "behind closed door meeting" that ensures discussions remain opaque. The AICHR and SOMSWD meeting was heated and saw a frank exchange of views. The SOMSWD felt it was being sidelined and secondly, that there was no need for the plan if it replicated earlier documents. The former garnered more traction among SOMSWD officials than the latter. Strong reactions from the SOMSWD were evident. Negotiations ensued. It felt that so long as AICHR managed to operationalise a modality that included the SOMSWD, there would be a consensus. Finally, the deadlock was broken. It was agreed that the Task Force was to be co-chaired by AICHR and SOMSWD. The latter also requested that all ten of its members be included in the Task Force. There would be two representatives from the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The Task Force met on numerous occasions, and it included representatives from disabled persons' organisations (DPOs), such as the General Election Network for Disability Access (AGENDA) and the ASEAN Disability Forum (ADF). They made various proposals; for example, that an office of a regional commissioner for the rights of persons with disabilities be established to receive communications on violations, mediate complaints and monitor ASEAN's implementation of the CRPD. Regional DPOs were active in their engagement with the Task Force, and it could be said that behind the scenes, they had a heavy hand in holding the pen to draft the action plan. Thus, the participatory space was broad enough to contain progressive actors that provided "out of the box" thinking to what would usually be straitjacketed ASEAN high-level official meetings. Task forces thus manifest Fischer's point noted earlier that participatory spaces allow for a non-state actor's expertise to inform decision making.

Several points stand out to note. First, AICHR has significant convening power, and thus it is an important participatory space. Regional initiatives provide opportunities for advocates to reach out to their government officials, especially when they are blocked in their home countries, and ASEAN is one such platform. Second, the "sub-contracting" to draft the EM2025 by the AICHR and the SOMSWD to a joint task force is significant. It allowed experts

who were human rights advocates from DPOs to be part of an intergovernmental process. It provided much room for the crafting and grafting of human rights values; practices that would not have been the case had the Task Force only comprised government officials. Third, cooperation with ASEAN's sectoral bodies is not only seen as ideal but as necessary. Without such cooperation, progress can be stymied, not by objecting on principles or substance but rather process. For example, the Task Force's creation allayed concerns of additional work for the AICHR's Representatives because they could appoint others from their respective countries to attend the meetings and draft the document. It is also worth recalling that member states implement measures, not AICHR. AICHR relies heavily on the relevant national line agencies to support its work. Today, the local agencies in charge of persons with disabilities bear the responsibility to implement the EM2025. SOMSWD's engagement was thus necessary. Fourth, and we elaborate on this below, the rule on consensus was met without requiring active agreement. There were times that the Task Force did not operate at full strength, meaning meetings proceeded in the absence of one or two members. One AICHR Representative did not nominate a Task Force member and left the drafting and negotiating process to the country's SOMSWD representative. The absence of some members did not affect consensus.

AICHR may well be the overarching human rights institution in ASEAN, but its participatory space to promote human rights extends beyond its ten representatives to include the expertise contained in CSOs, and implementing authority contained within SOMs. The example of the Task Force reveals that as AICHR pursues its mandate to mainstream human rights in ASEAN activities, and creates space for CSO to assist in this endeavour, its interaction with other ASEAN bodies is bound within existing ASEAN's structures and ideologies. These are not though fixed in their meaning, but open to reinterpretation. SOMSWD's pivotal role can be recognised by co-chairing the Task Force. AICHR Representatives that cannot devote time to an AICHR Task Force can nominate an alternate, or not attend at all. As the EM2025 experience reveals, it is a nascent participatory space in which contestation over its guiding principles can be seen. The most important of these, as it is for many ASEAN decision-making bodies, concerns consensus.

Contesting social understandings: The "problem" of consensus

Consensus is often regarded as a problem because it is presumed to mean that all ten member states must agree for a consensus to exist. Getting ten member states all to agree is problematic on most issues, let alone a sensitive subject such as human rights. However, as noted in the Task Force experience above, where some members were absent, consensus need not mean that all explicitly agree. Rather, that no member disagrees, or if they disagree, they do not object to others proceeding. This is the *raison d'être* of the ASEAN Minus-X principle; that since all member states are equal, no one member should wield a veto as if it held the power of a permanent member of the UN Security Council preventing the other nine from acting. Of course, in practice, ASEAN likes to present a united front, and so in those instances where some members are uncomfortable, declarations, communiqués, and agreements will contain ambiguity to enable variable interpretations. In some instances, these will be accompanied by statements to reaffirm particular interpretations, as occurred with the Cha-am Hua Hin Declaration to accompany the ToR's release, and the Phnom Penh statement to the AHRD. The critical point about consensus is not that it stops the activity, but that it ensures all members are

treated equally; none can impose their views and pursue their ambitions without reflecting on how others will react. Thus, while some members may be less enamoured by an activity than others, their concerns are not ignored but rather, they are encouraged to adopt what can be conceived as best practice at a time when they are comfortable doing so.

Thus, what becomes interesting with consensus is not to dismiss it as a problem but rather to witness how AICHR Representatives interpret what they can do and how consensus, along with that other ASEAN principle that is interpreted as negating ASEAN activity, non-interference, is interpreted. It reveals significant contestation of what AICHR Representatives can do. We begin by appreciating that while appointed by governments, AICHR Representatives interpret their role very differently. This helps to explain why some engage in self-censorship and what this means for monitoring the implementation of human rights agreements.

Governments appoint AICHR Representatives, but while some are drawn from member states' foreign ministries or are retired government officials, some are from academia, the legal profession, or are human rights activists. Those from outside of government distinguish between representing their country and their government. They can, for example, interpret their role as representing Malaysia or Indonesia without being a representative of the *Barisan Nasional* or Joko Widodo's administration. With reference to Article 5.7 of the ToR, that Representatives discharge their duties 'impartially', these Representatives can be seen to be "independently-minded" (Collins 2019) and they constitute for the purposes of this article examples of Fischer's new breed of public servant. Before examining what this means in practice, and its implications for consensus, it is important to note how interpretations of consensus by some of the Representatives can stymie activity. Here we draw on the example of Malaysia's pursuit of an AICHR position on safe drinking water and sanitation.

After Malaysia hosted AICHR's Regional Consultation on the Right to Safe Drinking Water and Sanitation (with an emphasis on rural communities) held from 25 to 27 October 2017 in Kota Kinabalu, Malaysia (ASEAN 2017), a team of experts¹ worked with Bon to draft a general comment-like document. This became known as a 'Consultation Position Paper Regarding Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD)' [CPPA28(e)] (Bon 2018). It was to elaborate on the meaning of the right and show how far ASEAN had progressed in securing the right to safe drinking water and sanitation for the peoples of the region.

The intention was for it to express AICHR's position on a particular human rights issue, which would represent the first instance of AICHR articulating an interpretation of the AHRD. The CPPA28(e) was presented for discussion at AICHR's 26th Meeting held from 24 to 26 January 2018 in Singapore. One Representative said that it is only for governments to decide on how the AHRD is to be interpreted, not for AICHR, and another Representative said that AICHR was not ready to adopt such a document. It was telling that no one objected to the language, tone or interpretation of Article 28(e) of the AHRD as contained in the CPPA28(e). Bon asked that if there were any objections to the content, amendments to the text should be proposed and revisions can then be considered. Time was given, but no comments were ever received. Perhaps it would have been rather difficult for any Representative to state in writing that safe drinking water and sanitation should not be available, adequate, accessible, acceptable and be

of a certain quality. Silence prevailed. This is how consensus can be interpreted. Not to engage in substantive discussion of the topic, but rather to state procedural constraints – who interprets the AHRD? – and to nullify the process by not engaging with it. A clear manifestation of the secretive face of power. This tactic arises because there is a high degree of cautiousness among some of the Representatives, which is to be expected as some of them perceive themselves as acting on behalf of their governments. AICHR had to censor itself even though it appeared that there were no objections to the text or content of the document. There are also instances where Representatives would reveal that they had to take a particular position on sidelines of meetings even though they did not personally agree with it.

How then are the more independently-minded Representatives to reinterpret consensus to make it an enabler of action? The answer lies in contesting what Representatives can publicly say, and in doing so, establish what is permissible. Here we draw on an example of a response to the refugee and human rights crises occurring in Myanmar's Rakhine State. The then Indonesian Representative, Dinna Wisnu, and Malaysian Representative, Bon, issued a joint media statement on 23 April 2018 (Wisnu and Bon 2018). They used language from the AHRD and the ASEAN instruments to recommend developing a 'whole-of-ASEAN' approach in cooperation with Myanmar to meet its challenges. They released the carefully worded statement after consulting with some of the Representatives and inviting them to sign on. As a courtesy, they provided an advance copy of the statement to the then Myanmar Representative, Hla Myint. They had been engaging him on the matter. They had also both been raising the issue at the plenary sessions and sidelines of AICHR meetings regularly but no agreement could be reached. It came to a point where they had exhausted the avenues available within AICHR and the joint statement had to be issued. It would be the first time a minority of AICHR representatives issued such a statement on their own.

Subsequently, in one of the meetings, Wisnu and Bon were taken aback when one Representative said that such a public statement should not have been made because it interfered with the affairs of a member state. One Representative defended the issuance of the statement citing free speech and expression of the Representatives. Notions of consensus, or for that matter non-interference, were not, therefore, considered barriers to expression by Wisnu or Bon. The willingness to draw attention to breaches of the AHRD has continued, with the current Indonesian Representative, Yuyun Wahyuningrum, doing so about the curtailment of freedom of expression (2020a, 2020b) and the arrest of migrant workers (2020c) during COVID-19, as well as, the death of Indonesian migrant fishermen on a Chinese trawler (2020d).

We are witnessing in AICHR's participatory space an emerging practice; if consensus is not achievable through discussion, then AICHR Representatives can issue public statements condemning violations of the AHRD. Following the lead of the media statement on Rakhine State in 2018, four AICHR Representatives from Myanmar, Malaysia, Singapore and Indonesia released a public statement on the need to combat transboundary haze pollution (Malaysiakini 2019, The Straits Times 2019). These are, of course, minority and not AICHR statements, but they are crucial because not only do they provide public interpretations of the AHRD by AICHR Representatives, they establish a convention that silence cannot stymie expression. This has been particularly evident in the aftermath of the Myanmar military coup in February

2021. On 5 February, four AICHR Representatives (from Malaysia, Singapore, Indonesia and Thailand) issued a statement urging Myanmar to uphold the principles of the ASEAN Charter, the AHRD, resolve the matter peacefully, and return to the path of democracy (Statement 2021). Since only four of them issued this it did not reflect a consensus within AICHR, but within two months, AICHR issued a press release expressing concern about the escalation of violence in Myanmar. AICHR offered its services, as assigned to it by the ASEAN Foreign Ministers' Meeting, to assist in returning the country to normalcy (ASEAN 2021). It would appear that a consensus can emerge quite quickly when there is a political will to make it happen, a political will that can be encouraged through public statements.

The willingness to speak publicly about human rights has escalated during the COVID-19 pandemic, where AICHR Indonesia, under Yuyun Wahyuningrum's leadership, utilised digital platforms to engage with the general public and provide NGOs with a platform to raise their concerns. For example, AICHR Indonesia arranged meetings to give NGOs a platform to discuss the right to an effective remedy in ASEAN on 17 February 2021, including for migrants and trafficked persons on 24 February 2021. On 20 April 2021, Wahyuningrum, with Thailand's Representative, Amara Pongsapich, held an online "Conversation with AICHR Representatives" with the general public to provide an update on AICHR's developments, and listen and respond to comments, inputs and questions. Although these are not formally AICHR participatory spaces, they nevertheless provided a space to discuss human rights in the presence of AICHR's Representatives. The April online "conversation" is a continuation of the interfaces noted earlier, thus maintaining their regularity and encouraging their institutionalisation.

Our final example of why consensus is not as problematic as often thought returns to the consultative function of AICHR and that its participatory space includes engagement with other ASEAN bodies. In this instance, the engagement was initiated by Wisnu and Bon under the pretext of disaster management. They were interested to learn about the progress of ASEAN's humanitarian aid to Myanmar's Rakhine State in light of the Rohingya crisis. They sought a briefing on the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre) in the region. The briefing included aspects of AHA Centre's work in non-natural disasters such as in the Rakhine State and Marawi, the Philippines. At the end of the briefing, which took place on 31 July 2018, AICHR expressed an interest to assist the ASEAN Committee on Disaster Management (ACDM) to refine its proposal to define the term 'human induced disasters', since AICHR was informed that the ACDM was attempting to agree on such a definition.

After consulting several CSOs and on behalf of Malaysia, Bon responded by providing a proposed definition. AICHR could not agree on making the definition official. Instead, AICHR transmitted Bon's proposal written in his capacity as the Representative of Malaysia. In other words, although consensus could not be achieved, a Minus-X understanding prevailed, and AICHR transmitted the advisory. This was probably the first advisory service and technical assistance provided to a Sectoral Body pursuant to AICHR's mandate under Article 4.7 of the ToR.

Conclusion

When conceived as an embryonic participatory space, we contend that AICHR is a work in progress, where who can participate and how those in the space can participate is not fixed but rather open to contestation and thus change. What makes AICHR ripe for such contestation is the presence of independently-minded Representatives committed to advancing human rights; Fischer's new breed of public servant. We argue that for this embryonic participatory space to fulfil the ambitions of human rights activists to promote/protect human rights, within and without AICHR, then ultimately AICHR's modus operandi must institutionalise practices that accord with this objective. To accomplish this requires, in the first instance, the initiation of activities that become part of AICHR's routine. It is the customary nature of the activities, and the interpretation of AICHR's modus operandi, that can create the degree of comfort amongst AICHR Representatives that leads to their institutionalisation. It is the "practising" of what may appear mundane in the operational everyday of AICHR that institutionalises change. With the ToR subject to review, this contestation by some AICHR Representatives is timely.

In this article we have shown evidence of this contestation. We can discern it over expanding the participatory space to include entities from outside of ASEAN, specifically CSOs that bring expertise to the workings of thematic studies and task forces. By making public statements that reaffirm the AHRD and by revealing activities that are in contradiction of its articles. By recognising that while not having the authority to require sectoral bodies' engagement with AICHR in promoting human rights, initiating activities can establish a momentum that forces their engagement. That by shining a light on how AICHR operates, by revealing the secretive face of power, procedures that have come to exist can be contested, whether that is how letters of complaint are received, who has the authority to interpret the AHRD, or even what consensus means and entails. The ToR is subject to review; we contend that such a review is not just an event, but an ongoing process as Representatives interpret their role and contest the space they operate within. In so doing these "public servants" expose the secretive face of power, denude procedures that hamper progress, and enable the promotion and protection of human rights. A human rights campaigner in AICHR is thus not lost to human rights activism in Southeast Asia; it is vital for making this participatory space evolve as the architects of AICHR intended.

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