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An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia

Mathew Davies

Abstract: ASEAN's engagement with human rights culminated in the creation of the ASEAN Human Rights Declaration in 2012. The Declaration is fascinating in three ways: Its institutional origins are surprising, it was agreed upon by states with very different positions on the role of human rights domestically, and it both contains commitments far in advance of some members and is at the same time dangerously regressive. The three leading frameworks that currently interrogate the Declaration fail to provide convincing insights into all three of those dimensions. To correct these shortcomings, this article applies the notion of an "incompletely theorized agreement" to the study of the Declaration, arguing that member states understand the Declaration in very different ways and agreed to it for similarly diverse reasons. Further, I argue that the Declaration neither articulates a shared regional identity relating to respect for human rights, nor can it be understood as marking an early point towards the creation of this identity. Instead, the current diversity of regional opinions on human rights and democracy is perceived as legitimate and will endure. The article concludes by considering whether this denudes the Declaration of value, arguing that its importance will vary: The more progressive the member state, the more important the Declaration will be in the future.

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Introduction

The ASEAN Human Rights Declaration of 19 November 2012 (hereafter, the Declaration) managed to disappoint nearly everyone upon its release. The majority of civil society, notably excluded from the drafting process except for carefully managed “consultations”, decried the document as inadequate and perhaps even regressive (Human Rights Watch 2012). The United States expressed extreme concern that the Declaration was not compatible with global standards and could be used as a shield for continued rights violations (Baer 2012). Yet, despite such criticism, the Declaration stands as the first ever Southeast Asian charter of human rights and contains commitments not only to economic, cultural and social rights – the traditional focus of regional engagement with rights concerns – but also to far more contentious civil and political rights.

The Declaration is worthy of study for three reasons: First, its institutional development was unexpected; ASEAN went from an organisation widely viewed as hostile to human rights to one that crafted the Declaration in less than twenty years. Second, the Declaration was negotiated and agreed upon by ten member states that disagree considerably on the importance and value of human rights norms. Third, the Declaration is perplexing in three ways, as it possesses statements of rights far beyond the domestic positions of some member states; reawakens the “Asian values” debate; and contains a self-limiting clause that undercuts its own provisions.

Those debating the nature of ASEAN regionalism have used the Declaration to substantiate the persuasiveness of their own particular approaches. Realist scholarship suggests the Declaration reveals both the disinterest of member states in human rights concerns and the primacy of traditional state-security concerns. Constructivism takes the inverse view, and considers the Declaration not only a key step towards the socialisation of human rights across the region but also a document of great significance for the creation of a shared regional identity. Last, in an approach I refer to as “acculturalist”, scholars argue that the Declaration is nothing more than the latest product of mimetic adoption whereby ASEAN elites have copied the form of other regional institutions to gain legitimacy, which suggests the adoption of human rights standards is for strategic ends only (Davies 2013a; Katsumata 2009).

In this article, I take issue with each of the three interpretations as the sole explanatory framework for the Declaration because each assumes similar motives for the ten ASEAN members that together crafted the Declaration. I argue instead that the Declaration reveals that human rights norms are clearly important to ASEAN members, but this

importance has taken very different forms in each state, resulting in member states' diverging motives in approaching the subject. This suggests further that the Declaration actually reveals the diversity, not the incipient homogenisation, of standards that are considered legitimate by regional elites. Drawing on the idea of an "incompletely theorized agreement", I depict the Declaration as revealing the weakness of ASEAN's engagement with human rights, as there is no common approach to the importance of such rights or shared opinion of their value within the regional organisation. The Declaration represents an "agreement to disagree".

The argument unfolds over five sections: First, the article recaps the evolution of ASEAN's human rights position since the Asian Financial Crisis, detailing the perplexing nature of the various articles of the Declaration. Second, the article presents realist, constructivist and acculturalist accounts of ASEAN and how they approach understanding the Declaration, along with revealing their weaknesses. Third, the article frames the Declaration as an "agreement to disagree" using the idea of an incompletely theorised agreement, which I use to depict the nature of the Declaration and, through that, ASEAN's approach to human rights concerns. Fourth, the article explores the relevance of framing the Declaration as an incompletely theorised agreement for debates over an ASEAN identity and security community in Southeast Asia. Fifth, the article unpacks what the Declaration, even in the form this article argues it takes, means for the future of human rights promotion in the region.

The Evolution, Nature and Negotiations of the ASEAN Human Rights Declaration

In this opening section, I reveal three interrelated aspects of the Declaration that form the basis for the coming discussion. First, the institutional genesis of the Declaration was protracted. When ASEAN began a process of regional reform in 1997, there was no reason to believe this would automatically culminate in a declaration, or any commitment at all to human rights. Second, agreement to draft, and then the process of drafting, a declaration on human rights was agreed to by all ten ASEAN members despite those members displaying considerable divergence in their understanding of and commitment to human rights. Each member state, because of the unanimity at the heart of ASEAN's approach to regional diplomacy, had to agree to the Declaration. Third, the Declaration contains at least three surprising features: commitments in advance of the positions of at least some of the governments who designed it; a

statement on the issue of Asian values, previously assumed to be closed; and a self-limiting clause with the potential to undercut the entire document. Any analysis of the Declaration must account for all three of these components.

An Uncertain Journey

From its creation in 1967 through to the mid-1990s, ASEAN was an association little troubled by human rights concerns. While it is true that ASEAN has always had some sort of declaratory commitment to economic and social welfare, and since 1975 has had a sub-committee on the role of women, it has steered clear of any engagement with either the language or the substance of human rights, especially those of a civil and political nature. The reasons for this avoidance are not hard to fathom. ASEAN was created to both facilitate and reinforce national and regional resilience (Acharya 1991: 162; Solingen 1999: 46; Ba 2009). It achieved this through prioritising complementary economic development, which in turn was meant to facilitate trust-building between regional elites, defusing the political tensions that dominated the region in the early 1960s (Pollard 1970; Leifer 1973). In pursuit of these aims, ASEAN member states developed the famous “ASEAN Way”, which not only encompassed an approach towards each other that emphasised consensus and avoidance of contentious issues, but also presented a package of beliefs about what form regional institutions should take and how they should be run.

Considerable – and to ASEAN’s detractors, interminable – debate over the nature and significance of the ASEAN Way has been a hallmark of scholarship on ASEAN since at least the 1980s (see Ba 2009; Nischalke 2000; Ramcharan 2000; Stubbs 2008; Jones 2011). For our purposes, it suffices to suggest the ASEAN Way has three aspects to it: an aversion to institutionalisation, a diplomatic culture that shies away from public disagreement and a presumptive deference towards the principle of non-intervention. This last aspect is particularly important given that human rights, with their focus on the relationship between citizens and their governments, are directly related to domestic politics. Further, the normative ideal that human rights present serves in almost all cases as a critique of existing domestic political relationships (Munro 2010: 2). The ASEAN Way, while unquestionably elitist and conducive to a particular authoritarian approach to governance (Kuhonta 2006: 339–340), was successful in facilitating the peaceful relations between regional states.

Given this context, the emergence of human rights as a general concern for ASEAN, and the Declaration as the ultimate expression of

that concern, are remarkable. The Declaration stands as the culminating document to almost two decades of engagement with human rights issues. In the wake of the 1993 Vienna World Conference on Human Rights, in the 26th Joint Communiqué of the Annual Ministerial Meeting ASEAN members promised to “consider the establishment of an appropriate regional mechanism on human rights” (ASEAN 1993: Paragraph 18). The path between this promise and its ultimate realisation in 2009 with the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) was neither linear nor inexorable. The Asian Financial Crisis of 1997–98, sparked by currency volatility in the wake of premature financial liberalisation (Rüland 2000: 424), led to a loss of legitimacy of the authoritarian structures of many regional governments and of ASEAN (Kraft 2001: 36). This loss of legitimacy did not result immediately in a commitment to human rights; instead, it sparked a process of community-building and reform that was gradual and incremental.

Vision 2020, agreed upon at the height of the crisis on 15 December 1997, committed ASEAN to little more than thinking about the creation of “caring societies” (ASEAN 1997). The Eminent Persons Group (EPG) established to consider the implementation of Vision 2020 proclaimed that individual rights were important in ensuring “regional resilience” but tied that to unspecified “civic responsibilities” (ASEAN 2001). The Bali II Accords of 2003, the most important of the regional agreements between the financial crisis and the signing of the ASEAN Charter, made no mention of human rights at all, although the creation of the Socio-Cultural Community did commit the region to fostering “caring societies” (ASEAN 2003). It was only with the follow up to Bali II, the Vientiane Action Programme, that human rights came to occupy an important and, from that point on, constant role in ASEAN’s discussions about regional reform (see Davies 2013c).¹ Among other commitments made at Vientiane, ASEAN member states agreed to share information about human rights, to link any existing human rights institutions and to establish a commission to protect and promote the rights of

1 As Davies (2013c) reveals, the history of ASEAN’s engagement with human rights shows a surprising role for civil society actors, especially the Working Group for the Establishment of an ASEAN Human Rights Mechanism. The state-centric nature of the analysis in this article is not intended to contradict this or similar findings. Civil society provided not only an impetus for engaging with human rights but also crucial ideas about how to do so. The Declaration stands as one of the outcomes of this process of engagement, a particularly state-centric one given the negotiations over it were between state representatives and only behind closed doors. Civil society actors were notably excluded from debate over the Declaration.

women and children (ASEAN 2003: Annex 1.1.14). Vientiane laid the groundwork for the process leading to the ASEAN Charter (hereafter, the Charter), launched in 2005, which evolved first via an EPG and then a High-Level Task Force and ultimately morphed into the final version of the Charter that was signed in December 2007. The final text delineated some of the central purposes of ASEAN as “strengthening democracy, enhancing good governance and the rule of law, and promoting and protecting human rights and fundamental freedoms”, although once again this aim was to be tempered by “due regard to the rights and responsibilities of the member states of ASEAN” (ASEAN 2007: Art. 1/7). Beyond this commitment, Article 14 called for the creation of an ASEAN Human Rights Body, which in 2009 would result in the AICHR.

Agreement in Diversity

The second piece of the puzzle is that the ten ASEAN members, who all have highly divergent positions on human rights generally, and on the rights contained within the Declaration specifically, managed to craft any sort of shared document. ASEAN members can be broadly split into three groups in terms of their relationship with human rights, although it should be noted that each of these categories contains significant variation. The first, the progressives, comprises Indonesia and the Philippines, which to varying degrees have embraced democratic liberal norms domestically and whose political systems are defined by political pluralism. The second, termed the cautious, includes Singapore, Malaysia and Thailand which, whilst ensuring the rule of law, consistently show considerably more reluctance to embrace global standards, especially of the civil and political variety. The third, the recalcitrant, comprises the four newer members, Cambodia, Laos, Myanmar and Vietnam, along with Brunei (see Davies 2013b: 52–53 and Davies 2014a). Illustrating the tension between the Declaration and member state positions on human rights, Brunei, Malaysia, Myanmar and Singapore have not signed, let alone ratified, either the International Covenant on Economic, Cultural and Social Rights or the International Covenant on Civil and Political Rights. That the Declaration has been agreed to by states that have a long history of avoiding similar rights agreements at the global level has to be set alongside the fact that the governance structures of ASEAN members require that those states actively assent to the Declaration. The principles on unanimity and equal participation have a long history within ASEAN, resting on consultative and consensual diplomacy as the driving force for any forward movement (Acharya 1997: 328; Narine 1997: 962).

A Perplexing Nature

The Declaration, released after almost three years of high-level negotiations, consists of forty articles and outlines a list of general principles, civil and political rights, economic cultural and social rights, the right to development and the right to peace (see Renshaw 2013 for detailed discussion of the articles). While it appears to be an innocuous document similar in form, if more vague, than parallel documents created in other regional organisations, upon more careful reading perplexing features emerge that demand not only our attention, but an explanation.

Articles 21–25 outline a set of civil and political rights far beyond those recognised in many of the states that negotiated the Declaration. Articles 21 and 22 nominally protect freedom of thought and expression, respectively, and Article 25(1) outlines that

every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law (ASEAN 2012).

While not an overt commitment to multiparty democracy, it is still a surprising assertion for the more authoritarian members of ASEAN in the recalcitrant group.

Continuing the surprises, but this time on a different theme, Article 7 starts off with a traditional restatement of the universality of human rights: “All human rights are universal, indivisible, interdependent and interrelated.” However, further on in the same article comes the provision stating that

at the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

This is nothing less than the reawakening of the Asian values debate of the early 1990s (Bauer and Bell 1999). At the 1993 Bangkok Meeting of Asian States, a preparatory meeting for the Vienna Conference mentioned above, Asian states asserted that

while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds (United Nations 1993).

The marked similarity in language was a cause for much concern, and the United States expressed concern that the indivisibility of human rights was far from assured in the Declaration (Baer 2012). This apparent reawakening of the Asian Values debate is surprising given that this debate, at its height in the early 1990s, was widely seen as politically self-serving and was broadly rejected, with the final text of the Vienna Conference strongly re-emphasising the universality of human rights. The relativism that the Asian values claim represented in the 1990s had been wholly absent in the following decade, only to reappear in the final text of the Declaration.

Most surprising for a human rights document is the content of the very last article. Article 40 states: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN.” This article effectively undercuts every one of the foregoing 39 articles, as the “purposes and principles” referred to are the traditional state-centric ones that have served ASEAN since its creation in 1967. The ASEAN Charter states these clearly. Article 2.2(h) of the Charter notes that one of the principles of ASEAN is “adherence to the rule of law, good governance (and) the principles of democracy”, and Article 2.2(i) states that “respect for fundamental freedoms, the promotion and protection of human rights” are also principles of the association. However, Article 2.2(a) of the Charter calls for the “respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States”. Moreover, Article 2.2(e) of the Charter relates to “non-interference in the internal affairs” of other members, and 2.2(f) states the “respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion”. Article 40, therefore, can be understood as a self-limiting clause; the preceding 39 articles are explicitly made subordinate to the dominant understandings of non-intervention and sovereign equality upon which ASEAN rests.

Assessing the Declaration: The Constructivist, Realist and Acculturalist Alternatives

The perplexing genesis, agreement and then form of ASEAN’s commitment to human rights as represented in the Declaration, demand explanation. This section outlines the three dominant explanatory frameworks that are most used to explore ASEAN: realism, constructivism and acculturation. I suggest that none of these three frameworks can

explain ASEAN's move towards human rights, the nature of the Declaration and the context of its origins. The failure of the existing approaches to explaining ASEAN exposes the necessity for the "incompletely theorized agreement" approach that I outline in the next section. While I reject realism as having nothing to say about the Declaration, my critique of constructivist and acculturalist accounts is more nuanced. Both of these approaches seem to have some relevance to at least some ASEAN members but they fail to provide, by themselves, convincing holistic answers. This suggests the need to move beyond simple either/or explanatory frameworks by using the incompletely theorised agreement framework to underpin analytical eclecticism.

Realism

Realist theory, the assertion that states are concerned with power and security in an anarchic world, has been used longer than any other theory to analyse Southeast Asia (Peou 2002: 120; Acharya and Stubbs 2006: 127). The doyen of this approach was Michael Leifer, who examined Southeast Asia through the prism of materialism, balance of power and the role of external actors, notably the United States (Acharya 2005; Leifer 1989). Realist accounts assert that states only do what is in their material interests and will shy away from activities and commitments that either damage their position or impose considerable costs and limitations with little positive return. Despite the traditional dominance of realist accounts of ASEAN and Southeast Asian security, there is little that realism can bring to the study of human rights within ASEAN. At most, a realist focus on the motive of actors as power-maximising, security-conscious states would suggest that member states created ASEAN as a way both to mitigate the consequences of balance of power logics internally and to maximise their own security by creating a bloc against external subversion and interference. The weakness of the Declaration suggests that member states have no real interest in the subject matter and remain ultimately wedded to the view of ASEAN as a vehicle for national security and resilience. The realist account has two further weaknesses that render it unsuitable as an explanation for the Declaration: First, if the only interest in ASEAN on the part of member states is that it improves state security, then it seems strange that states would expend any effort to create a human rights declaration at all. Second, given the strong activism on the part of some member states in the human rights field – those states that I have classified as "progressives" – to claim that states are "not interested" in human rights is off the mark. Though the

parsimony of realist thought is appealing, almost all of its explanatory power is stripped away in the context of ASEAN human rights.

Constructivism

Constructivism, emerging into international relations debate in the 1990s in response to the perceived failures of the neorealist version of realism, asserts that actors, instead of being constantly preoccupied with their own material position, power and security, are actually animated by norms that shape behaviour by outlining what the right or legitimate form of behaviour is at any given time. Whereas for the realists the interests and identities of states are unchangeable, for constructivists they can change as the norms that shape them alter over time (see discussion in Davies 2013a: 215–217 and Davies 2014b: 28–30).

Human rights issues have been an area of sustained interest for constructivist research from the earliest days, and the power of human rights to change ideas about appropriate behaviour has been widely documented (Klotz 1995; Sikkink 1993). Crucial to the constructivist account of human rights, both generally and in its application to Southeast Asia, are two key constructivist concerns: socialisation and internalisation. The constructivist account of socialisation refers to the mechanism of persuasion, where actors are convinced to adopt new standards because those new standards are thought to hold superior moral weight to the ones they are replacing; they are right, not simply expedient.² Internalisation is the consequence of persuasion-driven socialisation on the identity of the actors who have “taken on” human rights standards, and it refers to the moral norm reconstituting the interest and identity of the actor to bring those attributes into alignment with the new norm (see Risse, Ropp, and Sikkink 1999 and 2013).

The constructivist account of human rights in ASEAN seems initially far more plausible than the realist approach. The financial crisis led to a crisis of confidence in traditional ASEAN norms and, through a process of norm entrepreneurship led by Track II and Track III actors (Aviel 2000; Davies 2013c), regional elites came to adopt human rights standards as new moral guidelines for their behaviour. The fatal weakness is the overwhelming evidence that the constructivist commitment to internalisation in Southeast Asian states has not come to pass. This is not related to the gap between rhetoric and implementation so often referred to in the ASEAN context (Jetschke 2009: 408; Nischalke 2002: 92), but

2 This is often referred to as a logic-of-appropriateness account of international relations, see March and Olsen 1998.

the far more damaging fact that states that clearly violate the rights outlined in the Declaration, and so cannot be said to have internalised those human rights norms, have agreed to the Declaration. Again, it is the recalcitrant states that are particularly important here, although making similar critiques of all ASEAN states is possible. If norms drive behaviour, then how can the recalcitrant states adopt human rights regionally while so clearly violating those same standards domestically, violations that are well documented in the literature on ASEAN (Thio 1999; Mohamad 2002; Davies 2014a)? Given that human rights norms cannot be held morally invalid domestically and, simultaneously, morally valid regionally (Davies 2013a: 213), we are left with the fact that states that violate human rights norms domestically have created a human rights declaration that enshrines these rights regionally. Constructivism fails because it is too optimistic about the power of norms to reconstitute and drive the behaviour of actors.

Acculturation

The acculturalist approach, the newest of the three discussed, asserts that norms are important in explaining ASEAN's reforms but disagrees with the constructivist account of norms as necessarily reshaping identities (Munro 2010: 3). Instead, reform in ASEAN has been driven by a process of "mimetic adoption" (Katsumata 2009, 2011). Drawing on sociological institutionalism, the acculturation approach says that the driving force behind change is the desire to be seen as "legitimate" in the eyes of others (Katsumata 2009: 626). The adoption of human rights has been for ultimately strategic ends (Davies 2013a: 208–209), both because it is what other regional organisations do and because in developing some sort of institutional isomorphism ASEAN states can reinforce the legitimacy of ASEAN as a regional body. The Declaration is just another in a long line of documents and institutions that ASEAN members have created because of their strategic concern over the position of ASEAN in the eyes of others.

The strengths and weaknesses of this account are almost the direct inverse of those determined for the constructivist position: Whilst acculturation explains with far more ease the role of recalcitrant states in the construction of the Declaration, it inaccurately represents the driving force for those countries that have displayed continued and costly commitments to human rights. To claim that Indonesia was doing nothing more than generating legitimacy for ASEAN seems off the mark given the massive improvement of human rights within Indonesian domestic political arrangements since the late 1990s.

Using “Incompletely Theorized Agreement” to Investigate the Declaration

The above discussion suggests that none of the leading three accounts of ASEAN offers convincing insights into the Declaration because none is able to, by itself, address the three puzzles I outlined in the introduction – namely, how the Declaration evolved, why such diverse states agreed to it and why it has taken the form it has. In this section, I argue that scholars’ failure in this regard is because all three aforementioned theories assume similar motives for creating the Declaration, a similarity not borne out by the diversity of ASEAN members’ positions on human rights concerns. In this section, I explore how using the framework offered by the “incompletely theorized agreement” provides greater explanatory insight into the Declaration; then, in the following sections, I draw on this discussion to power a broader account of ASEAN itself. Similar to Acharya’s claim in 2001 that applying the notion of a security community to ASEAN was useful not because ASEAN necessarily was a security community, but because it highlighted certain key processes and dynamics, I am not claiming that the Declaration unambiguously represents an incompletely theorised agreement. At the close of this section, I will highlight the shortcomings of this approach. Instead I am argue that the lens of the incompletely theorised agreement offers new ways to understand the declaration and to eclectically integrate the constructivist and acculturalist frameworks to provide greater explanatory insight than either can on its own.

Cass R. Sunstein first discussed the idea of an incompletely theorised agreement in the context of domestic law in the United States, and argued that a well-functioning legal system tends to “adopt a special strategy for producing agreement amidst pluralism” (Sunstein 1995: 1735). Sunstein explains this as the tendency to agree on results and “relatively narrow or low-level explanations for that agreement, but not on the fundamental principles that any one actor thinks underpins that agreement” (Sunstein 1995: 1736). The application of the lens of incompletely theorised agreements to both the question of human rights, generally, and their role in Southeast Asia, specifically, is not new. In *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Anthony J. Langlois applied the idea of an incompletely theorised agreement to the political underpinnings of human rights (Langlois 2001). Langlois wrote that the “great virtue of an incompletely theorized model of human rights theory is that it allows for any given ethical position [...] to be indigenously justified” (Langlois 2001: 8).

Applying this notion to the Declaration reveals important truths – namely, that each of the ten members of ASEAN values the Declaration for different reasons. Recalcitrant states, concerned more with the efficacy of ASEAN and its ability to shelter them from both globalisation and uncomfortably prying outside eyes, have approached the Declaration as a necessary burden. Unable to avoid the Declaration entirely, given the interest displayed by their more proactive members, and concerned with the legitimacy of ASEAN in the eyes of others, recalcitrant states have engaged with the Declaration as a necessary evil. The proactive states, powered by their own domestic political systems exerting pressure both directly on governments and indirectly via civil society, bestow upon the Declaration far greater moral weight, seeing it as the logical extension of their own domestic political values into the regional governance framework.

This assertion allows us to understand the process of ASEAN’s engagement with human rights as the product of the interaction of competing motives within the governance structures of consensus and unanimity that ASEAN requires. Given that no state could “overpower” any other as each has in effect a veto, the Declaration and all that came before it had to be agreed upon by, and be agreeable to, all member states. This suggests the process of drafting the text was characterised by considerable jockeying for position between the delegates of members as those states more comfortable with human rights standards negotiated with those states who were, and are, not. Surprisingly strong commitments to civil and political rights, distasteful to the recalcitrant members but of great importance to the progressives, are balanced by commitments to Asian values and forceful restatements of the “ASEAN Way” as the guiding approach to (non-)implementation. Conversely, strong commitments to the right to develop, the right to live in peace and to economic, cultural and social rights that recalcitrant members have greater engagement with were inserted alongside, but not as substitutes, for civil and political concerns and the assertion that rights are universal and indivisible. All the rights enunciated in the Declaration are packaged within the traditional ASEAN norms of non-intervention and sovereign equality. The Declaration is completely silent on any mechanisms to protect the rights it describes, and the AICHR itself, the institutional home of the Declaration, focuses only on future promotion, not on actively protecting individuals whose rights have been violated or on addressing past wrongs. This synthesis between, on the one hand, commitments to rights and, on the other, the framing of these rights within traditional ASEAN norms accommodates the progressive, cautious and

recalcitrant states, each getting at least some of what they want (Davies 2013b).

Applying the notion of an incompletely theorised agreement to the ASEAN Human Rights Declaration thus restores the agency of the ten individual members rather than assuming that aggregate and individual motives were the same, as do realist, constructivist and acculturalist approaches. This application of the incompletely theorised agreement also suggests that an eclectic framework that draws on both constructivist and acculturalist accounts has more explanatory power than using just one of those frameworks by itself. The more confident democratic states pushed for the Declaration because many of the rights enunciated in it were held to be moral goods. The more cautious states use the Declaration to both cement their position within ASEAN and enhance the legitimacy of the region in the eyes of others.

The Absence of Shared Identity

Understanding the Declaration as representing an incompletely theorised agreement provides the basis for a line of argument about the role of human rights within ASEAN, and as such, the nature of ASEAN and the presence, absence and content of any shared or emerging regional identity.

The lead up and form of the Declaration suggests that, while there is agreement about the need for a human rights component within ASEAN, and further agreement that this should not be limited to “just” economic, cultural and social rights, there is no shared commitment to the significance of that inclusion. ASEAN member states value the Declaration for completely different reasons. This divergence is of great importance for arguments about the presence of an ASEAN identity. Michael E. Jones thought that the creation of a regional identity was ambitious and would require a substantial change in, and between, ASEAN member states (Jones 2004: 152) and the question as to whether ASEAN member states share an identity has been much debated (Emmerson 2005: 165; Busse 1999). Framing the Declaration as an incompletely theorised agreement indicates that human rights, where the agreement to disagree dominates, play no role in any shared regional identity that may currently exist. There is no agreement upon which that shared identity could rest. Any common identity that includes human rights would, by definition, have to demonstrate a convergence between member state positions on the matter and an adherence to the established regional standards, neither of which are present. The presence of a

written document cannot be used as evidence for a regional identity simply because it has ten signatures attached to it, because the reasons for signing can diverge significantly.

Furthermore, given the enduring contact between ASEAN political elites, and in particular the negotiations that surrounded the creation of the Declaration, we can only conclude that the incompletely theorised agreement between ASEAN members is generally known and accepted by those political elites. ASEAN states are well aware of their diverging opinions on matters; indeed the diplomatic code which emphasises avoiding public disagreement only works if those areas of disagreement are already clearly known. If ASEAN members are well aware of divergent opinions, then the Declaration cannot be seen as a step towards converging normative affiliations in either the short or medium term. Instead, the Declaration represents – counterintuitively unless one understands its genesis – the parameters of legitimate divergent opinion within the grouping. The Declaration defends the pluralism of opinion by including a variety of perspectives as outlined above, wrapped in a strongly non-interventionist package. The Declaration is designed to allow agreement between divergent members, and it reflects their different beliefs about the nature and role of rights in their respective domestic political contexts.

This line of reasoning does not automatically contradict claims that ASEAN represents some sort of security community, but it does render that community incredibly elitist and narrow if it does exist, and uncomfortably far from the original definition of that term by Karl Deutsch. The debate over the presence of a security community in Southeast Asia has been protracted. Of course, Amitav Acharya undertook much of the conceptual work in a series of works in the late 1990s and early years of the 2000s. In 1991 Acharya noted that the relations between states in Southeast Asia were now qualitatively different to their status in the 1960s (Acharya 1991: 172), and even went so far as to claim that a community existed in the sense that armed conflict between them seemed unthinkable (Acharya 1991: 172). Acharya stepped back from this assertion in 2001 when claiming that the concept of a security community was a fruitful way to analyse ASEAN, even though ASEAN did not fully meet the requirements of such a community (Acharya 2001). Serious criticism of the application of a security community to ASEAN has been levelled (Jones and Smith 2002; Khoo 2004; Narine 2009).

An important point of contestation in this debate is that Deutsch's definition of a security community did not just rest on "stable expectations of peace among their participating units or groups, whether or not

there has been a merger of their political institutions” (Deutsch 1961: 98 and Deutsch 1954: 33), but also on processes of “integration” defined as the creation of “unifying habits and institutions” (Deutsch 1978: 194) in driving peace. In his 2012 book *ASEAN Regionalism*, Christopher Roberts focused on this far more closely than Acharya had previously: Roberts elaborates the significance of high levels of political, social and cultural integration as the necessary prerequisites for any security community in Southeast Asia (Roberts 2012: 12–13). For both Deutsch and Roberts, integration included the integration of people, not just elites, into shared understandings that serve as the basis of any common identity. In this light, understanding the Declaration as an incompletely theorised agreement strongly suggests that, at least in the realm of human rights, this integration has not occurred. There is no shared understanding between people and no integration of political systems around shared understandings and standards.

The Future of Rights within ASEAN

For those interested in not only the academic significance of ongoing regional order-building in Southeast Asia, but also the well-being of citizens in the region, there seems to be little to take comfort from in the above discussion. If it is indeed the case that the Declaration reveals both the diversity of beliefs around human rights and the engrained and legitimate nature of that diversity within ASEAN, this bodes poorly for ASEAN’s ability to promote human rights across the region, let alone protect individuals from further abuses.

The official architecture of ASEAN’s approach to human rights, its Commission and Declaration, seem to support this view. The AICHR is tasked with promoting the Declaration, yet its terms of reference are explicitly tied to non-intervention and sovereign equality as outlined in the ASEAN Charter (ASEAN 2009, 2010). Thus, it seems unlikely to the point of impossibility to expect any rapid overhaul of ASEAN’s engagement with human rights. The worries of Yuval Ginbar, who, prior to the finalisation of the Declaration, wrote that “the only thing worse than having no regional human rights instrument at all is having one riddled with restrictions, caveats, provisos and balancing acts” (Ginbar 2010: 517–518), seem to have come to pass.

However, if we look beyond the formal powers of the Declaration, despite all that has been said to this point, and consider how it may be used in practice, a different argument can be made. First, for member states with a greater comfort with the full range of rights norms the Dec-

laration enunciates, its presence provides a missing link between domestic and regional civil society actors, government bodies and other notable actors, most prominent the national human rights institutions that now exist in Indonesia, Malaysia, the Philippines and Thailand.³ While it is too early to judge how the Declaration will impact these actors, its presence as the first regional declaration in Southeast Asia is a step towards a more robust system of human rights promotion.

The more interesting possibility, however, is how the Declaration may impact even the most recalcitrant states in ASEAN over the long term. While wide academic consensus exists around the assertion that signing, even ratifying, human rights treaties does not automatically, result in compliance with those standards (Hathaway 2002; Neumayer 2005), the Declaration does expose states such as Cambodia, Laos, Myanmar and Vietnam to new pressures. Regional and domestic civil society actors now have another issue to factor into the increasingly populated human rights space that covers Southeast Asia. The Declaration may have little or no formal power, but it may well be used in ways that not even the states most comfortable with human rights intended when negotiating the Declaration by civil society to promote human rights. The network of civil society actors is unevenly spread across Southeast Asia, more complex in democratic members of ASEAN and sparser in the authoritarian member states. Civil society offers new opportunities to “sidestep” the formal weakness of the Declaration, and indeed ASEAN’s commitment to human rights, by moving the conversation away from questions of state-level compliance and towards on-the-ground rights promotion efforts, whether through publicising the rights of people, creating education programmes, working with domestic legal and advocacy systems or linking up with other actors from different states to promote particular issues to governments. In this view, the Declaration offers powerful, though informal, opportunities to be mobilised by actors to pressure governments “from below” (see Keck and Sikkink 1998).

Lending conceptual heft to this assertion is the argument about the diffusion of human rights norms crafted by Risse, Ropp and Sikkink in their 1999 book, *The Power of Human Rights*. The authors distinguished between five different stages in the journey from human rights repression to human rights compliance (Risse, Ropp, and Sikkink 1999). Of particular interest is their argument about Stages 2 and 3 of the “spiral model”. Stage 2 they term “denial”, where repressive states deny the

3 Whilst Myanmar possesses a national human rights institution, it is not yet thought to be compatible with the Paris Principles that define fully independent institutions (see Asia Pacific Forum n.d.).

validity of human rights norms (Risse, Ropp, and Sikkink 1999: 23). Stage 3 they label “tactical concession”, where a state undertakes “cosmetic changes to pacify international criticism” (Risse, Ropp, and Sikkink 1999: 25). There are strong parallels, although at this moment they are nothing more than parallels, between the agreement of recalcitrant states within ASEAN to the Charter, the arguments of Katsumata and Jetschke about acculturation and the claims by Risse, Ropp, and Sikkink that this is an important step towards compliance. Making tactical concessions such as the drafting of charters does not automatically mean that it is “just a matter of time” before compliance is realised, but there is potential for this to happen. Transnational networks, continuing pressure from activist regional governments and external sources have worked in the past to move states from making tactical concessions to complying with norms. While the challenges in Southeast Asia today are considerable, they are no more daunting than those faced by South Africa before the end of Apartheid or Indonesia before its democratic transition, both of which did move from tactical concessions forwards towards a fuller embrace of human rights.

Conclusions

The ASEAN Human Rights Declaration is a fascinating document. The very fact that it exists is remarkable given the lack of concern ASEAN member states displayed in the human rights field just twenty years ago. The regional financial crisis, and its impact on key ASEAN states, drove political elites into uncharted territory where over the course of a decade or more, generalised commitments to caring communities crystallised into the assertion that ASEAN should “do something” in the realm of human rights, or at least be seen as doing something, as the case may well be.

Due to its protracted and counterintuitive genesis, the Declaration defies easy classification and simple explanation. It pushes beyond what some states appear comfortable with domestically, it contains what appear to be atavistic commitments to relativism alongside commitments to global human rights treaties, and it even has a self-limiting article that if read in a certain way strips all other articles of any significance. The reason for these attributes is to be found in the interplay between the divergence of member states’ positions on human rights and the governance structures through which those differences were mediated during the creation of the Declaration. These two issues expose the inadequacy of realist, constructivist and acculturalist accounts of ASEAN as sole

explanatory frameworks for the Declaration. I have argued in this article that the lens of an incompletely theorised agreement offers new insight, revealing that the ten member states value the Declaration for different reasons, enabling a far more precise application of existing theoretical frameworks. The notion of an incompletely theorised agreement suggests that the diversity of regional opinion on human rights is considerable and, at least within the ASEAN framework, viewed as legitimate, which problematises the assertion that any sustained integration of ASEAN members exists in the human rights space.

The importance of the Declaration remains to be seen. While in itself it is a weak and flawed document, its utility to other actors in the human rights space across Southeast Asia may be far more wide-reaching than the framers of the document intended. As the most developed human rights document that certain members have ever signed, it provides the possibility of mobilising transnational pressure upon states and exploiting their cosmetic commitment to rights. As such, the Declaration is a quintessential ASEAN document, which was created gradually and which has left the door open for multiple futures.

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