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### From aversion to acceptance: Evolution of the Asean human rights agenda

Siraj Aziz SHAIK

*Singapore Management University*, [siraj.sa.2010@law.smu.edu.sg](mailto:siraj.sa.2010@law.smu.edu.sg)

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# **FROM AVERSION TO ACCEPTANCE : EVOLUTION OF THE ASEAN HUMAN RIGHTS AGENDA**

**By: Siraj Shaik Aziz**

## **ABSTRACT**

*This paper examines the evolution of ASEAN's attitude towards human rights from one of aversion on the premise of cultural relativism to the acceptance of its universality as demonstrated by the adoption of the ASEAN Human Rights Declaration. In doing so, it also examines the veracity of cultural relativist objection to universality of human rights. The paper then examines the obstacles that militate against ensuring institutionalisation on the ground via the rule of law.*

## **A. INTRODUCTION**

ASEAN sits at the crossroads as it ushers in a landmark moment in its history by making a formal commitment to protecting and promoting human rights in the form of the ASEAN Human Rights Declaration. This, despite major misgivings from some quarters, is a major step forward for a region more diverse socially, economically and politically than any other regional bloc and for one whose historical relationship with human rights has been marked more by aversion than amenability. That no ASEAN country has ratified all twenty-six international instruments of human rights, while only two ASEAN countries (Cambodia and the Philippines) have ratified all six major human rights conventions is testament to this reality.

At this point, as one projects whether ASEAN will live up to delivering on safeguarding universal standards of human rights or succumb to its politico-cultural peculiarities and sink back into the cultural relativist dogma of the 1990s, one needs to heed the warning of the Statement *on Human Rights* by the American Anthropological Association (AAA) about the need to be

cognizant of the fact of cultural pluralism.<sup>1</sup> The question that ought to be asked then is the following; does the fact of cultural pluralism completely frustrate the very objective of international human rights law to establish rights that operate *erga omnes partes* despite the disparate cultural and political contingencies that characterize different nation-states? This article seeks to examine the various concerns, emanating from cultural relativism, raised against acceptance of universality of human rights and conclude if they pass muster. It then proceeds to chronicle the softening of this aversion in the past decade and flag out challenges ahead for ASEAN in holding true to its own AHRD and this will decide whether commitment to the universal notion can overcome the obstacle of relative application of the rule of law in ASEAN states.

## **B. SOURCES OF ASEAN STATES' AVERSION TO UNIVERSALITY OF HUMAN RIGHTS**

In the 1990s, the ASEAN states made clear their reservations to accepting the universality of human rights via the Bangkok Declaration in 1993. This beckons the question; why were the ASEAN governments more forceful with their dissent against human rights in the 1990s, even though many had been the original endorsers of the UDHR Rights in 1948? A few pertinent roots of discontent are explored and opportunities at mitigating these difficulties are flagged out; if they are indeed legitimate.

### **I. Pre-eminence of Western Liberal ideology in Human Rights**

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<sup>1</sup> American Anthropological Association, *Statement on Human Rights*, 49 Am. Anthropologist 539 (1947).

The first factor that accounted for ASEAN's aversion to human rights is the impression of western moral imperialism engendered by the fact of the pre-eminence of Western liberal ideology in the crafting of human rights. The Bangkok Human Rights Declaration of 1993 explicitly stated the concerns of ASEAN in viewing human rights as a tool of Western neo-imperialist agenda.<sup>2</sup>

When the Universal Declaration of Human Rights (UDHR) draft was put to vote, the overwhelming support was derived from the international community's resolve to protect humankind from a repeat of the Second World War, despite the diversity of creeds, races and political ideologies.<sup>3</sup> Thus, the international body of human rights we possess today were a result of political will rather than a consensus on values as commonly believed. Due to a concentration of power in certain states, namely the Allied Powers, the eventual outcome was that the cornerstone of the international institution of human rights. Specifically, the ideal that the state should never violate the inalienable rights of man was more of a construct of Western liberal thought, drawing from the theories of Hobbes, Rousseau, Locke, Kant and their contemporaries, which was received favourably by Grotius, the Father of international law and encapsulated in the American and French Declarations which in turn served as inspiration for the genesis of international human rights.<sup>4</sup> This liberal orientation of the human rights discourse fosters the notion that despite its rhetoric of universal appeal, the global world order and the international human rights regime possess a tendency towards Western-centricity.

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<sup>2</sup> Vitit Muntarbhorn, "Towards an ASEAN Human Rights Mechanism?" in *Towards an ASEAN Human Rights Mechanism: Proposals, Declarations and Related Documents* (Manila: Working Group for an ASEAN Human Rights Mechanism, 1999), p. 14.

<sup>3</sup> Louis Henkin, *the Age of Rights* (New York, Oxford: Columbia University Press, 1990), at 6.

<sup>4</sup> Richard Tuck, *the Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999).

However, caution must be taken not to reach any simple conclusion of synonymy between the human rights movement and Western liberalism. First, international human rights did not develop as an identifiable movement until after World War II; whereas liberalism, in its diverse manifestations, claims a much longer history. Second, although human rights evolved from values and philosophical presumptions closely associated with the Western liberal tradition, the modern international human rights movement can embrace certain other substantive cultural values to the extent that they promote human dignity. Finally, no necessary connection exists between being a political liberal and respecting all international human rights.<sup>5</sup> Some liberals, including self-identified human rights advocates, reject economic, social, and cultural rights; half of the so-called “Universal Bill of Human Rights,” as genuine rights.<sup>6</sup> Other liberals, such as those of the Benthamite utilitarian tradition, might regard international human rights as “nonsense on stilts” though they might be inclined to concede the usefulness of this nonsense.<sup>7</sup> Still others might express support for international human rights while maintaining a deep commitment to Marxist political theory.

Also, one should not attempt to extricate and dichotomise completely western liberalism and the ASEAN way as liberal theory does permeate aspects of its governance for instance as a Framework for ASEAN consensus. Liberal theorists such as John Rawls and Martha Nussbaum propounded that respect for the individual affirms that person’s dignity and equality .As it is with individual persons in liberal democratic theory, states, too, treat one another with the same respect and equal standing in liberal international relations. In this sense, the notion of respect and equality in liberal democratic politics is analogous to the notion of 'state sovereignty', which is the normative element of the ASEAN Way. One way that the respect that ASEAN states

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<sup>5</sup> Jack Donnelly, *Universal Human Rights in Theory & Practice*, 28-34 (1989)

<sup>6</sup> E.g., Robert Nozick, *Anarchy, State & Utopia* (1971).

<sup>7</sup> Jeremy Bentham, *Anarchical Fallacies* 489, 501 (1824).

accord one another is manifested is through their deferential regard for each member-state as an equal. Respect, and ultimately equality, is salient features of ASEAN diplomatic practices. That ASEAN states are impressed with the same liberal notion of parity is apparent in the constitutive documents of ASEAN, the Bangkok Declaration, the Treaty of Amity and Cooperation and finally in the ASEAN Charter, wherein the theme of 'equality' resonates. The Declaration refers to “the spirit of equality and partnership”<sup>8</sup>, the Treaty of Amity and Cooperation calls for “mutual respect for the ... equality... of all nations”<sup>9</sup> and the Charter emphasizes “the fundamental importance of equality...”<sup>10</sup> Indeed, ASEAN diplomacy is predicated on the equal standing of all member states, and ultimately, consensus is predicated upon the equality of member-states participating in negotiations.

Regardless of how the human rights regime had started out, a supposed under-inclusiveness of other political theories can be remedied by a sincere attempt at engaging in the exercise of formulating a philosophical justification that is more inclusive of political traditions apart from Western liberalism. This may seem to be in the lofty province of philosophers but in fact as Henkin commented, ‘International human rights are not the work of philosophers but of politicians and citizens.’<sup>11</sup> Such an attempt is necessary for it will be counter-productive to expect non-Western states to assume that universal human rights is self-evident because even by tracing the developments of liberal theory and its impact on human rights nowhere can we find explicit explanation for the existence of human rights. While the exercise will be difficult because of the

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<sup>8</sup> The ASEAN Declaration (Bangkok Declaration), Bangkok, Thailand, signed on 8 August 1967 by the founding nations of ASEAN, preamble.

<sup>9</sup> Treaty of Amity and Cooperation (TAC), signed on 24 February 1976 in Bali, Indonesia, Art. 2(a) and 5.

<sup>10</sup> *Declaration of ASEAN Concord II (Bali Concord II)*, Indonesia, 7 October 2003.

<sup>11</sup> Henkin, *supra* note 2, at 6.

value-laden nature of the term and the wide plethora of competing ideologies, such difficulty should not preclude an attempt at such an exercise.

## **II. Preference for Civil and political rights over Socio-Economic and Developmental Rights**

Another complaint that Southeast Asian states have is the general preference for civil and political rights over the socio-economic and developmental ones despite the fact that such a dichotomy is false. The fact that this dichotomy is illusory becomes apparent when one examines the early development of international human rights. Roosevelt's wartime exhortation for the 'four freedoms' included the 'freedom from want', clearly encompassing the socio-economic aim of ensuring the provisions of basic necessities. In the early days of the UN, the General Assembly has also called upon the UN specialized agencies to give effect to socio-economic priorities for acceptable standards of living to be met thus maintaining consistency with the UDHR which provides for social, economic and cultural rights alongside the civil-political ones.

However, the above complaint is generated by the fact that Western states have eschewed this indivisibility of human rights and placed greater emphasis on the former over the latter set of rights. This trend found its origin in Cold War politics, with the Capitalist West and the Communist East taking sides and championing civil-political and socio-economic rights respectively. A 'generational' theory of human rights arose with the civil-political claiming the standard of being the 'first generation' of rights while the socio-economic and cultural and developmental rights were relegated to 'second' and 'third' place respectively. This trend continues till this day with bias for the former set of rights apparent in the Inter-American and

European Conventions and the European Social Charter among other documents. This invariably leads the Asian states among others to feel that socio-economic and developmental rights they have consistently valued are somehow inferior to the ones that Western developed nations have traditionally preferred. A corollary concern in this complaint that Asian states have is the operation of this preference against their favour, especially the curious phenomenon of how democracy has become ubiquitously twinned with human rights. This did not sit comfortably with the post-colonial regimes in Southeast Asia; their respective leaderships being variations of soft authoritarianism more keen on nation-building than discussion on civil-political liberties.<sup>12</sup>

However, there is hope that human rights will soon revert to its original indivisibility status as the stigma attached to socio-economic and developmental rights is being chiselled away. The ongoing Millennium Development project undertaken by the UN to eradicate poverty, raise living and educational standards and abolish gender discrimination will aid in ensuring substantive indivisibility in human rights.<sup>13</sup> This is due to the fact that not only developing countries are taking measures to achieve this goals; even developed countries facilitate the socio-economic development of the developing world by increasing aid contribution and abolishing unfair trade practices. Successful mutual cooperation will help to ease tensions over democratic promotion in the cause of establishing human rights and it could generate a higher regard for socio-economic and developmental exigencies of the developing world and enable the rightful standing of such rights alongside the civil-political ones.<sup>14</sup>

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<sup>12</sup> Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Boulder, Colorado: Lynne Rienner Publishers, 2002), at 39-66.

<sup>13</sup> Samantha Power and Graham Allison (Eds), *Realising Human Rights: Moving from Inspiration to Impact* (New York: St Martin's Press, 2000), at 249-64.

<sup>14</sup> Hsien-Li, Tan. *The ASEAN Intergovernmental Commission on Human Rights*. Cambridge University Press, 2011. Cambridge Books Online. <http://dx.doi.org/10.1017/CBO9780511790386.005> at pp 69.



While the West could arguably be seen to impinge on the indivisibility of human rights in favour of civil-political rights, the same charge was initially applicable to ASEAN; this time the preference leaning in the other extreme. When ASEAN members signed the Bali Concord II in 2003 to forge a stronger ASEAN community by 2020 through the three pillars of ASEAN, Security Community, Economic Community and Socio-cultural Community, no reference is made to a theme of human rights.<sup>15</sup> As the communities were tasked to operate unilaterally, it was certain that either one of the 3 pillars would take precedence over human rights or thus it was of low priority. To ASEAN's credit however, low expectations for ASEAN human rights dissipated when the Vientiane Action Programme (VAP) pronounced that human rights was to be squarely placed within the political development segment of the ASEAN Security Community.<sup>16</sup>

There is also an opportunity for ASEAN to take a lead in embracing indivisibility of human rights. This arises if ASEAN can make a genuine attempt to truly define 'the right to development', a term bandied around often by members of the Bloc, namely what it really consists of and how it is to play a role in the international human rights discourse. Exploring this human rights-development nexus will in itself be a discipline paving the way for greater acceptance of socio-economic rights. Encouragement of state practice in allowing human rights to take root by non-governmental organisations (NGOs) and aid from AICHR in helping to define the right to development as experienced in the ASEAN context of human rights and

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<sup>15</sup> *Declaration of ASEAN Concord II (Bali Concord II)*, Indonesia, 7 October 2003.

<sup>16</sup> *Vientiane Action Programme (VAP)*, Laos, 29 November 2004.

development will help shape the requisite *opinio juris* that could serve as a basis for making the right to development a substantive universal right in the future and not a culturally peculiar one. The ongoing Millennium Development Goals project already provides a ripe opportunity for such an attempt.

### **III. ‘Asian Values’ Debate**

During the economic ascendancy of the 5 Asian Economic Tigers and partly as a reaction to Western triumphalism at the end of the Cold War , the articulation of distinct ‘Asian values’ came into vogue. This was particularly advanced by ‘strongman’ soft authoritarian leaders such as Mahathir Mohamed of Malaysia and Lee Kuan Yew of Singapore. It posits that Asian societies valued communitarian values over individual rights i.e. the obligations of Asian individuals to their communities and nations were more important than their personal rights. This stands in stark contrast to the individual-centric western liberal ideology that permeated the human rights movement at the onset. Such a worldview would permit the curtailment of civil-political rights in favour of public goods such as peace and stability that facilitated their emphasis on socio-economic development. Other Asian nations, including other members of ASEAN and even China soon adopted this lexicon as well. Even though the ‘Asian Values’ debate has died down with the departure of the leadership in various ASEAN countries that led that debate, it is still appropriate to examine serious criticisms to such a notion of ‘Asian Values’ lest remnants of this argument get resonance down the road.

Firstly, the politically charged nature of this debate directly lead to the adoption of a position in the debate that ran afoul of the warning from the AAA in 1947 to recognize cultural pluralism. Some proponents of Asian Values went a step further and start advocating the superiority of one model of another. This led to mutual accusations of hubris which did little to answer the question posed in the introduction of this article. The way the debate had been framed also presupposed a zero-sum game between communitarian and individual objectives; a trade-off that is potentially illusory if one refers back to the indivisibility of human rights described earlier.

Secondly, the claim of a monolithic set of Asian values across the most diverse region in the world has been subject to much scrutiny. As An-Na'im notes, within a single culture, multiple perceptions and interpretations of its constitutive shared values subsist.<sup>17</sup> As such, cultural pluralism does not simply refer to disputes *between* cultures such as between "Islam **and** the West"<sup>18</sup> but also *within* cultures; for instance, cultures internal disagreements among Islamic cultural groups and nation-states. Similarly, in the context of the "Asian values" debate, Yash Ghai points out that "neither Asian culture nor Asian realities are homogenous throughout the continent."<sup>19</sup> Thus, for example, some "Asian values" theorists claim that Confucian cultural traditions in East and Southeast Asia create greater popular desire for the social order and efficient governance allegedly enabled by authoritarian regimes than for democracy.<sup>20</sup> But the Dalai Lama, a prominent exemplar of the diverse Buddhist traditions of Asia, expresses the view that "not only are Buddhism and democracy compatible, they are rooted in a common

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<sup>17</sup> Human Rights in Cross-Cultural Perspective: A Quest for Consensus 81, 91 (Abdullahi A. An-Na'im ed., 1991) at 20.

<sup>18</sup> Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order 35 (1996) at 209-18.

<sup>19</sup> Yash Ghai, Human Rights and Governance: The Asia Debate, 15 Austl. Y.B. Int'l L. 1, 6 (1994);

<sup>20</sup> Bilahari Kausikan, Asia's Different Standard, 92 Foreign Policy 26 (1993), at 226,230.

understanding of the equality and potential of every individual.”<sup>21</sup> The point here is not that one view or the other is correct, but rather that we have no reason to assume that the State-, to whom universal human rights law principally applies-, speaks with a monolithic cultural voice. In the era of the nation-state, rarely, if ever, do territorial boundaries embrace a single cultural tradition?<sup>22</sup>

It has also been questioned whether a State’s exposition of a preference for ‘Asian Values’ can be said to represent a true societal consensus on that point. Human rights activists and academics alike observe that frequently it is not cultural values that inhibit societies from realizing a legal order that respects universal human rights; it is the self-serving manipulation of these values by elites.<sup>23</sup> Kofi Annan sums up this proposition aptly during a speech at the Aspen Institute. Specifically, he said ‘one does not’ need to explain the meaning of human rights to an Asian mother or an African father whose son or daughter has been tortured or killed. They understand it--tragically--far better than we ever will.”<sup>24</sup> Such a disconnect between the leadership and the ground is also apparent in civil societies’ criticism of the AHRD through the *Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration*, including the lack of transparency and failure to consult them. More crucially, many of the groups championed by civil society were excluded from the AHRD. Clearly, the civil societies in ASEAN countries had very different aspiration for human rights discourse and were not content with accepting the ‘Asian values’ as a justificatory theory.

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<sup>21</sup> His Holiness the Dalai Lama, Buddhism, Asian Values, and Democracy, 10 J. Democracy 3, 4 (1999).

<sup>22</sup> Controversies and Culture, A Survey of Human-Rights Law, Economist, Dec. 5, 1998, at 10.

<sup>23</sup> Jack Donnelly, Universal Human Rights in Theory & Practice 28-34 (1989) at 119-20.

<sup>24</sup> Press Release, ‘Ignorance, not Knowledge ... Makes Enemies of Man,’ Secretary-General Tells Communications Conference at Aspen Institute (Oct. 20, 1997),

### **C. Softening of the ASEAN stance on Human Rights**

#### **I. A brief Genealogy of an ASEAN human rights mechanism**

Notwithstanding the various factors that have influenced ASEAN's slow reception to the universality of human rights, it is important to acknowledge that ASEAN has made significant progress towards just such an acceptance. Amidst the 'Asian Values' debate and the defiant posturing during the Bangkok Declaration in the 1990s, ASEAN member states had already begun to take tentative steps towards the idea of instituting human rights regionally in line with universal ideals embodied by UN norms while at the same time respecting cultural subjectivities. As early as 1993, during the 26<sup>th</sup> ASEAN Ministerial Meeting, the ASEAN foreign ministers declared that the regional grouping should 'consider the establishment of an appropriate regional mechanism on human rights' to support the Vienna World Declaration on Human Rights concluded that same year.<sup>25</sup> In ASEAN's blueprint for the future, ASEAN Vision 2020, announced in 1997, socio-economic initiatives related to human rights could be inferred from the commitment to make ASEAN 'a community of caring societies' and to 'address issues of unequal economic development, poverty and socio-economic disparities' by 2020.<sup>26</sup> While this was not couched in human rights language, it displayed a cognizance of such rights specifically the concern for human welfare and the resolve to rectify unjust situations. The following year, 1998, was a milestone for human right consciousness in ASEAN as the term 'human rights' entered the official lexicon in ASEAN diplomacy in the context of a reaffirmation by the ASEAN foreign ministers of the pledge made in 1993 towards creating a human rights mechanism. Thereafter, ASEAN's collective human rights-related undertakings grew

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<sup>25</sup> *Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, para.16.

<sup>26</sup> *ASEAN Vision 2020*, Kuala Lumpur, Malaysia, 15 December 1997.

concurrently with human rights consciousness, a trend epitomized by the ratification of a slew of conventions and declarations such as the Convention on the Elimination of Discrimination against Women (CEDAW) and Convention for the Rights of the Child (CRC).

The turning point for the human rights in ASEAN was spelt out in the Vientiane Action Programme in 2004 which expressly provided for action on human rights by 2010.<sup>27</sup> This would culminate in the inauguration in 2009 of the ASEAN Intergovernmental Commission on Human Rights (AICHR) created to promote and protect human rights in the region the ASEAN way in conformity with the principles in the ASEAN Charter; principles such as sovereignty and non-interference. A formal declaration of ASEAN member states' commitment to promoting and upholding human rights, the ASEAN Human Rights Declaration (AHRD) was adopted in November 2012.

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<sup>27</sup> *Vientiane Action Programme (VAP)*, Laos, 29 November 2004, para. 1.1(iii).

## **II. ASEAN Human Rights Declaration :Rhetorical commitment to universal human rights**

At first blush, it may seem that the circumscription of the AICHR by principle of non-interference via the Terms of Reference (TOR) would support an inference that ASEAN has not shifted from predicating its commitment to human rights on cultural peculiarities and thus maintaining its aversion of the universality of human rights in the 1990s. However, in response to UN rights Chief Navi Pillay's criticism that restrictions in the name of "regional and national particularities" would serve as loopholes in adherence to international standards among other critical comments, ASEAN chief Surin Pitsuwan announced that the bloc's foreign ministers made an amendment to the text which affirmed that ASEAN nations would "implement the declaration in accordance to the international human rights declarations and standards". As such, it can be argued that this gesture, coupled with the softening of ASEAN's aversion to human rights displayed over the past two decades, signifies at the very least a formal acceptance of the universality of human rights.

### **D. CHALLENGES IN BEING FILIAL TO THE AHRD PLEDGE: RELATIVE RECEPTION OF UNIVERSAL OBLIGATIONS ON THE GROUND : WILL FORMAL DECLARATION TRANSLATE TO ENSURING RULE OF LAW ON THE GROUND?**

While a formal commitment to universal human rights is made by the AHRD, steadfastness to such a committed will be predicated on ASEAN's ability to deal with relativism in enforcement of a universal obligation. Such relative protection of human rights by the rule of law stems from

a few factors which are flagged out herein namely the relative reception of these universal obligations on the ground.

### **I. Need to ensure implementation on the ground at the State level: Creating and respecting National Human Rights Institutions (NHRIs)**

It is vital that human rights norms be institutionalized at the State level if commitment to human rights is to go beyond a public relations stunt. Two questions must be posed to two classes of ASEAN states. For the states without NHRIs, how can they be convinced or muster enough political will to establish human rights commissions? The main impetus must be domestically driven before external expertise can be rendered, for no international actor can compel the state to do so against its will. At this juncture, it is encouraging to note that Cambodia, though no fixed timeline is given, is preparing to establish its national commission<sup>28</sup> and Vietnam too has vowed that it will not be the last ASEAN member to establish an NHRI.<sup>29</sup> The second question pertains to ASEAN states once they establish or if they already have NHRIs; how would they maintain the independence necessary for real effectiveness. Here, it must be noted that NHRIs are stuck between a rock and a hard place in having to straddle the contentious position between civil society and the state. As can be observed, the four NHRIs in Indonesia, Malaysia, Thailand and the Philippines are frequently hampered due to these competing obligations. For instance, the ousted Thai Premier Thaksin Shinawatra condemned Thailand's NHRI for its scathing report of the 'War on Drugs' in Southern Thailand.<sup>30</sup> Conversely, in Indonesia, while acknowledging

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<sup>28</sup> 'Cambodian Joint Working Group Commits to Undertake Serious Work for an Independent NHRI', *ASEAN NHRI Forum News Release*, 26 May 2010.

<sup>29</sup> 'First Deputy Minister of Foreign Affairs Le Cong Phung: Vietnam Won't Be Last In ASEAN to Set Up a National Human Rights Commission', 29 June, 2007.

<sup>30</sup> 'Thailand's National Human Rights Commission', *Human Rights Features*, 8 May, 2003.



the shortcomings of the NHRI, the South Asia Human Rights Documentation Centre (SAHRDC) has faulted NGOs for not recognizing the merits achieved by Komnas HAM.<sup>31</sup> On top of this balancing exercise, NHRIs have to strive to be impartial and be neither written off as a state apologist nor overly supportive of NGOs and face resistance from the state. To help mitigate these already significant difficulties, the ASEAN states must understand and respect the requisite powers and autonomies of these bodies.

## **II. The need to grapple with subjectivity in interpretation and implementation of universal human rights obligations brought about by genuine differences in culture.**

It needs to be recognized that apart from the vitriol over the 'Asian Values' debate, dilemmas that arise within different cultural frameworks can also be genuine and legitimate. It is foreseeable that different cultural thresholds can be problematic in what children's' rights in the CRC really comprise. For instance, Singapore read Articles 19 and 37 of the CRC as not prohibiting the 'judicious application of corporal punishment in the best interests of the child'. Similarly, a cultural and ideological clash on the role of women is apparent with respect to the CEDAW. For instance, complications arise where the Islamic framework of Syariah law intersects with human rights on the issue of gender roles and property ownership.<sup>32</sup>

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<sup>31</sup> 'Komnas HAM-The Indonesian Human Rights Commission: A Long Way to Go' –*Human Rights Features*, 6 December, 2000.

<sup>32</sup> Abdullahi Ahmad An-Na'im, 'Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights' (Englewood Collins, NJ: Prentice Hall, 1994).

There is also concern about the subjectivity of terms such as ‘public morality’ and segments of civil society have called for the removal of such terms from the AHRD. It is argued that the use of traditional lenses to interpret human rights will invariably undermine women, LGBT and other sexual minorities as they are often the subjects of standards of morality especially when they transgress patriarchal and hetero-normative standards. A few instances of how forms of discrimination and violence could be justified by invoking public morality include the following. Despite a ban in 2006, Indonesian girls in rural communities still undergo female genital mutilation as a sign of chastity. In the Philippines, it is easier to charge a married woman with adultery than a man who has to be caught living with another woman. In some parts of Cambodia and Laos, women are obliged by their culture to give birth in the forest without birth attendants, risking both the lives of mothers and infants.

Contributing to morality’s subjectivity is the fact that the term has not been defined in any standard-setting international human rights document. Such a proposed omission of ‘morality’ from the AHRD will be of little adverse consequence. It would not prohibit states from invoking their own constitutional clauses relating to morality, from utilizing moral arguments that sustain human rights or provide a positive obligation on states.<sup>33</sup>

### **III. Under-inclusiveness of AHRD undermines its commitment to universal standards**

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<sup>33</sup> Asia Pacific Forum on Women Law and Development, *Adding Value: Removing morality from the ASEAN Human Rights Declaration*.

The AHRD has clear exclusions of certain communities in ASEAN. These communities are people who are indigenous to the country, people with diverse sexual orientations and gender identities and undocumented workers. This lack of protection in the AHRD is counter-intuitive to embracing universality as it has marginalised certain communities by exclusions; particularly vulnerable groups who are most in need of such protection in the first place. As such, it leaves the management of tangible problems these groups face to the prerogative of the states.

With regard to LGBT communities, it is unclear whether any amount of Ministerial Forums will breach a broad cultural divide on the issue. Acceptance of LGBT communities range from toleration in Thailand to criminalisation of homosexual conduct by 6 ASEAN countries no less. On such an issue, it is unclear if a consensus can ever be reached and as such a top-down approach may have been more appropriate.

Experts from the UN Office of the High Commissioner for Human Rights (OHCHR) called on ASEAN leaders to consider in their declaration the issues of statelessness, the right to seek and to enjoy asylum from persecution in other countries, and the international customary law principle of “non-refoulement,” which would guard against the return of people to countries where, for example, they might be subjected to torture. In particular, the recent plight of the Rohingyas comes to mind when examining this stark omission from the AHRD.

Lastly, the plight of migrant workers, an enormous demographic in ASEAN, should not be left to the prerogative of the International Labour Organization but should instead be viewed as an opportunity for ASEAN to assert itself and build human rights credentials.

#### **IV. Potential abuse of national security as a Trojan horse to curb human rights**

There is palpable fear amongst NGOs in the region that the Declaration, with the national security exception to compliance, will have the converse effect of legitimising ongoing human rights violations such as the violence between Buddhist and Muslims in Rakhine state in Burma and land rights violations and forced evictions in Cambodia. By this caveat, the declaration also potentially subverts the concept of human rights by defining them through the lens of national governments instead of affirming them as the absolute and irrevocable rights of individuals. This situation has not been helped by the poor example set by the major proponents of human rights i.e. the West.

Poor precedence in this respect has been set by the failure of the West to respect its own human rights values in the face of national security threats post-September 11. While the Obama Administration has put an end to the overt and sanctioned use of torture in American political prisons, human rights abuses in the name of national security are still prevalent. The National Defence Authorization Act of 2012 gives the US military extraordinary powers to detain and imprison anyone, including any American citizen, that it deems to be a threat to national security, thereby setting aside the bedrock legal principle of habeas corpus.<sup>34</sup> The American drone programme targeted US citizens accused of involvement in terrorist activities and "high value terrorists" for assassination abroad and, along the way, killed hundreds of innocent civilian

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<sup>34</sup> Charlie Savage, "Obama Drops Veto Threat over Military Authorization Bill After Revisions", *The New York Times*, 14 December 2011, <<http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html>>.

bystanders.<sup>35</sup> These transgressions render the United States hypocritical at best as it continues to claim that the promotion of "American values" of human rights and democracy is a major focus of its engagement with the Asia-Pacific<sup>36</sup> and the US State Department continues to issue annual reports on the human rights performances of other countries in the world.<sup>37</sup> Therefore, states which seek to be at the forefront of human rights advocacy must be cautious of their impact on the external international human rights environment that could undermine the human rights agenda.

ASEAN states will have to inspire confidence amongst NGOs and its populace that it will exercise the state apparatus responsibly and transparently. Yet, as the face of threats to national security shifts to more insidious forms such as terrorism, there are no easy answers as to how ASEAN states, with a fraction of the resources and infrastructure of the West, can combat such threats without infringing upon Human Rights.

## **V. Inherent structure of the ASEAN process as an obstacle to enforcement on Human Rights**

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<sup>35</sup> David Rose, "CIA Chiefs Face Arrest over Horrific Evidence of Bloody 'Video Games' Sorties by Drone Pilots", *The Daily Mail Online*, 20 October 2012, <<http://www.dailymail.co.uk/news/article-2220828/US-drone-attacks-CIA-chiefsface-arrest-horrific-evidence-bloody-video-game-sorties.html>>.

<sup>36</sup> Hillary Clinton, "America's Pacific Century", *Foreign Policy* (November 2011), <[http://www.foreignpolicy.com/articles/2011/10/11/americas\\_pacific\\_century](http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century)>.

<sup>37</sup> U.S. Department of State Human Rights Reports, <<http://www.state.gov/j/drl/rls/brrpt/>>.

The greatest challenge that the ADHR faces in a universal implementation of Human Rights is the decision making process of ASEAN. This process has been described as “informal and trusting”,<sup>38</sup> and the only rule that is strictly adhered to, is the one of non-interference.

The process by which decisions are made, is best described in the following extract:

*The central norm of the ASEAN Way is the principle of respect for sovereignty. It is from this norm that other norms and practices emanate. The second element ... is the forms of communication, which are embodied in the practices of consultation and dialogue. Finally, the third element is decision-making through consensus or the Consensus Rule. These elements are formally embedded into ASEAN diplomatic practices through the ASEAN Charter”.*<sup>39</sup>

In practical terms, this means that should a member state be guilty of a Human Rights violation, ASEAN as an institution can intervene only when a fellow member state feels sufficiently strongly about that Human Right violation to put at risk her political goodwill to raise this allegation at the ASEAN level meetings. With the greatest respect to Human Rights, they are often not the most pressing of issues that ASEAN member states are currently facing. Given the political pressure placed on the ASEAN state leaders to induce economic prosperity and ensure regional security (amongst other concerns), Human Rights issues may very well be relegated to the sidelines for future discussions, It has been academically noted that the human rights elements of the Charter seem incongruent with ‘traditional’ understandings of ASEAN norms,

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<sup>38</sup> Antolik, Michael. *ASEAN and the Diplomacy of Accommodation*. ME Sharpe Inc, 1990.

<sup>39</sup> TOBIA, IAN NICCOLO V. "Confessing to the Politicization of the ASEAN Human Rights Agenda: A Case for the Modification of the Consensus Rule." *Thammasat Review Vol. 15, Special Issue*, (2012): 25.

particularly sovereignty and non-interference (which were reaffirmed in the Charter: Article 2a). Moreover, they pertain directly to issues traditionally considered too 'sensitive' for official dialogue, and seem to suggest that ASEAN will now pay more attention to the domestic affairs of its member states.<sup>40</sup>

In addition, ASEAN employs diplomacy in a fashion that is different from western concepts of international relations like the EU. No minutes are published for ASEAN meetings, transparency in the decision-making and dispute resolution process is non-existent, and there is minimal involvement of civil society. Such an arrangement has been proven to allow speedy resolutions of problems when they threaten the economic or political livelihood of all member states.<sup>41</sup> However, questions remain on how such a system can extend towards convincing each member state to implement the ADHR to raise the levels of Human Rights within ASEAN. NGOs, a big driver of Human Rights globally, will be unable to lobby various agendas, or keep watch on the proceedings of ASEAN meetings vis-à-vis Human Rights issues.

Of course, an astute observer can point to the fact that ASEAN has taken into account such limitations, and made the necessary arrangements. The AICHR was recently set up, to create a regional human rights mechanism to govern the implementation of Human Rights within

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<sup>40</sup> Poole, Avery. "Rights or rhetoric: Does ASEAN's new human rights body matter?" *4th Oceanic Conference in International Studies, Auckland*. 2010.

<sup>41</sup> Emmers, Ralf, and See Seng Tan. *The ASEAN Regional Forum and Preventive Diplomacy: A Failure in Practice*. S. Rajaratnam School of International Studies, Nanyang Technological University, 2009.

ASEAN. Given the tension between traditional ASEAN understandings and the AHRD, it remains to be seen what ASEAN will do. Should member states continue the staunch adherence of most member states to the non-interference principle, and the notion that the internal affairs of member states are not to be scrutinized or criticized, then the AHRD, no matter how well drafted, will be ineffective in bringing change. The net result is that the effectiveness of the AHDR would be hampered by the very nature of ASEAN as an institution.

#### **E. CONCLUSION**

Overall, it is clear that ASEAN has transcended its reservations of the past decades and this is for the better given the veracity of some of these reservations. Presently, much of the prescriptive trajectory of ASEAN's institutionalization of human rights remains conjecture. There is a normative, formalistic accord for the universality of human rights juxtaposed against the reality of relative reception on the ground. There will be much discourse as rhetoric is translated to action but at least with the AICHR and the AHRD, the glass is at least half full. The ball is now in the court of the ASEAN states.



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