

# THE FRENEMIES WITHIN: SOVEREIGNTY AND HUMAN RIGHTS IN ASEAN

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The weaknesses in the ASEAN Human Rights Declaration (AHRD) are reflections of the principle of non-interference and ASEAN Member State sovereignty. Criticism of the AHRD can be seen as projections of domestic human rights challenges. ASEAN's history of interference and intervention, and its current process of integration, point to a more dynamic and flexible approach to non-interference and sovereignty than what is commonly perceived. ASEAN Member State leaders have been prepared to break with the principle of non-interference when protecting common establishment interests and political order. Human rights pose a challenge to political order and, hence, the establishment.

## 1. Introduction

According to its own statements, the Association of Southeast Asian Nations (ASEAN) is integrating by 2020. The ten ASEAN member states (AMS) have a total population of more than 600 million people. Few seem to doubt the potential, but most see the glaring weaknesses and obstacles that stand in the way of both integration and success for ASEAN. The ten AMS have more that sets them apart than brings them together. Conflict, suspicion, governance, level of development, and foreign policy interests make up broad categories of divisive issues. The AMS are perhaps best understood as polities where internal challenges outweigh external threats. Accordingly, traditional western concepts of international relations whether in the realm of security, political economy, or international law often fail to adequately guide, explain and predict state behavior in Southeast Asia (SEA). When approached with multilateral institutions such as the EU in mind, ASEAN makes little sense. Traditional international relations concepts such as liberal internationalism or realist balance of power theory are not irrelevant, but they too fail to “explain” ASEAN.<sup>1</sup> It is worth noting that ASEAN dismisses comparisons with the EU but continues to receive criticism for not being more like them. Despite its plans for an integrated ASEAN, which promises something akin to a single market and security community, the AMS remain stubbornly insistent on its principle of non-interference. For regional and international observers alike, it is becoming increasingly challenging to reconcile non-interference with prospects for functioning human rights institutions, security cooperation and trade agreements that are commonly perceived to require some form of legal basis. Perhaps what seems most strange is that ASEAN would state ambitions to these ends in the first place. Why make promises that seem impossible to keep?

The initial research question for this paper was: What does sovereignty protect in ASEAN’s member states? The reason for the question is ASEAN’s continued insistence on the principle of non-interference, which is a core constituent of state sovereignty. It will be argued that non-interference and subsequently sovereignty continues to be used to protect political orders in the AMS both individually and collectively. Although diverse in nature, the political orders within the AMS share commonalities with regard to establishment interest and power. Human rights pose a challenge to political order and the establishment. The discussion and criticism surrounding the ASEAN Human Rights Declaration (AHRD) and the ASEAN Intergovernmental Commission on Human Rights (AICHR) illustrate that foreign policy in ASEAN should be understood as projections of domestic politics. Criticism of ASEAN seems to emanate from expectations that are difficult to reconcile with ASEAN’s stated objectives and the AMS’ capacities.

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1 See for instance Emmers (2003), *Cooperative Security and the Balance of Power in ASEAN and the ARF*. New York: Routledge.

This paper is exploratory in nature and intended as a starting point for further research and analysis. A long-term objective of this research is to contribute to the managing of expectations with regard to what ASEAN is, and consequently what it has the capacity to become. The paper begins with examining ASEAN, Asian values and the ASEAN way before moving on to issues relating to sovereignty and statehood, which in turn inform the discussion of the AICHR and AHRD.

## 2. ASEAN, Asian Values, and the ASEAN Way

Most observers seem to agree that ASEAN upon its inception in 1967 was established as a bulwark against communism in East and Southeast Asia.<sup>2</sup> There were predecessors to ASEAN, such as the Association of Southeast Asia (ASA), MAIPHILINDO, and SEATO, but this paper will not go into greater detail about these entities. Some claim that ASEAN has come full circle as it yet again closes ranks against China. This is debatable.

A key difference between 1967 and now is that ASEAN has doubled its number of member states, and that ASEAN now consists of both democratic and semi-democratic states, in addition to autocracies and semi-autocratic states. The relations between the respective ASEAN member states (AMS) and China vary from poor to cooperative, and what some claim is clientelism in the case of Cambodia. Interviews with officials in Myanmar show that one of the main reasons behind Myanmar's recent reforms was that they feared becoming a client state under China. This was a fear they shared with neighbors such as Thailand (Sun 2012 and Pavin 2005).

The common threat identified by ASEAN in 1967 was communism, but the member states also sought to defuse regional conflict in the wake of the Sukarno era's Konfrontasi policies, and other skirmishes such as that between Malaysia and the Philippines. The reference made in the Bangkok declaration, signed by the member states in 1967, to ensuring security from external interference was primarily targeted at China and the Soviet Union, but it carried with it a greater objective in terms of overall resilience vis-à-vis former colonial powers such as Britain and the US.<sup>3</sup> This latter point was hotly contested amongst the member states, which eventually arrived at formulations in the declaration that were agreeable to all the members (Jones 2012, Acharya 2009, Emmers 2003).

Throughout the 70s and 80s SEA and ASEAN politics were shaped by the cold war, and particularly the Vietnam wars. In the case of Vietnam's invasion of Cambodia, the five AMS displayed their pragmatism as they joined forces with China, the US and other

2 The original members of ASEAN were Thailand, Indonesia, The Philippines, Singapore and Malaysia. They were later joined by Brunei in 1984, Vietnam in 1995, Laos and Myanmar in 1997 and Cambodia in 1999.

3 The notion of resilience was introduced by Indonesia, which domestic and foreign policy rested on resilience towards external pressures.

western powers in their struggle against Vietnam. The five AMS made a concerted and successful effort to prevent the Vietnamese backed Heng Samrin regime from acquiring the Cambodian seat at the UN. Accordingly, Cambodia continued to be represented by the former Khmer Rouge regime throughout the 10 year-long Vietnamese occupation. In the meantime the ASEAN states acted separately and in concert to overthrow the HengSamrin regime. Indonesian military intelligence aided and funded by the US and China trained Cambodian guerillas with a view to topple Heng Samrin, or if that failed, keep Vietnam engaged in Cambodia by extending the civil war (Jones 2012). Indonesia's intervention and subsequent occupation of East Timor in 1976 forms another interesting case study in light of the oft-cited principle of non-interference that ASEAN supposedly adheres to. As with the Cambodian case the threat of communism was perceived to be both internal and external in nature, and the AMS collaborated against a common enemy (Jones 2012).

With the end of the cold war, ASEAN needed a new *raison d'être*. Where the autocrats of SEA previously saw communism as the main threat, the new threat was identified as liberal democracy. ASEAN found common ground in capitalism and Asian values. The deregulation that took place in the west during the 1970s had aided the SEA export led economies, which by the 1990s had become second tier tiger economies. The political and financial elites of SEA now had considerable wealth and power to protect. They managed to modernize economically while remaining undemocratic and justify it with reference to Asian values. One of the main Asian values arguments posits that human rights and democracy are anathema to SEA as SEA culture emphasizes the collective rather than the individual. The main advocates included Mahathir Mohammad, Suharto, Ferdinand Marcos, and Lee Kwan Yew. It is commonly perceived that the Asian values debate and argument ended with the financial crisis in 1997, and the subsequent toppling of governments in SEA. Prior to the crisis the debate over Asian values had been both lively and diverse with critics such as Francis Fukuyama dismissing the concept as mere exceptionalism to protect autocracies, to Asian academics who engaged with the concept on a less political and more theoretical level such as Mochtar Pabottingi and Muthia Alagappa. The Asian financial crisis in 1997 put a dent in ASEAN's image that it is still struggling with. In 2000, following the Asian Financial Crisis, relations between ASEAN's member states took a turn for the worse. ASEAN's core member states were arguing over who was most to blame for the crisis, and international observers remained unimpressed with the inertia governing attempts to reinvigorate ASEAN by introducing much needed reform to avert future economic crisis. Chandran Jeshurun (2000) argued for a rethink of regionalism that entailed the scrapping of all things ASEAN, and particularly the ASEAN Way.

Where Asian values have retreated into history, the notion of the ASEAN Way persists as a defining feature of ASEAN. The ASEAN way is often seen as elusive and vague, but it found its expression in the ASEAN Treaty of Amity and Cooperation (TAC) that came

into force in 1976.<sup>4</sup> Noordin Sopiee has identified some key principles underpinning the ASEAN Way. They include seeking harmony and agreement, politeness and sensitivity, non-confrontation and agreeability. As a practice, the ASEAN way favors quiet, elitist, and private diplomacy. The ASEAN way is more about norms than objectives, and is non-binding and non-legalistic in nature (Sopiee cited in Goh 2003).

### 3. The State and Sovereignty in Southeast Asia

The ASEAN Human Rights Declaration “would have run counter to the ASEAN Charter had it adopted the universality principle in accordance to the Vienna Declaration” (Eberhard 2012).

The non-interference principle seems to remain a permanent fixture of ASEAN as it made its way into the ASEAN charter, and constrains the AICHR’s mandate. Although used interchangeably, non-interference seems to suggest a wider application than non-intervention as described in the United Nations Charter’s Article 2.4.<sup>5</sup> The Article stipulates that all UN member states shall refrain from the threat or use of force against the territorial integrity or political independence of any state (UN, 1945). As such, non-interference is a core component of sovereignty. Sovereignty is a contested concept this paper cannot engage with in full, but a brief outline of the concept and the debates is warranted. Kalev Holsti states that “sovereignty is an institutionalized legal or juridical status, not a variable or sociological condition” (2004, p.136). Robert Jackson (2007) makes a similar argument, and both point to what they argue is a confusion of authority with power and/or influence among critics of traditional conceptions of sovereignty in international relations theory. Criticisms of traditional understandings of sovereignty commonly point to globalization as having eroded or fragmented state sovereignty practically and judicially. Somewhat simplified, critics like Jan Scholte and Richard Falk argue that the state no longer has the capacity to uphold sovereignty in terms of territorial integrity, and hence state capacity no longer meet the criteria of sovereignty. Holsti quotes F.H. Hinsley who stated “we can believe that sovereignty will continue to be a viable concept without denying that it will continue to fail to fit all the facts” (2004, p.117). The dispute surrounding the definition and utility of state sovereignty will not be settled here. A useful distinction seems to be that between sovereignty as a legal concept and statehood as a condition. Simply explained a state is sovereign despite being weak and governed by authorities considered to be illegitimate in the eyes of world opinion or even parts of its population. Sovereignty in the words of Jackson (2007) is Janus faced. It faces inwards and outwards. Domestically, sovereignty denotes supremacy.

4 The principles of the TAC are: a. mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; b. the right of every State to lead its national existence free from external interference, subversion or coercion; c. non-interference in the internal affairs of one another; d. settlement of differences or disputes by peaceful means; e. renunciation of the threat or use of force, and; f. effective cooperation among themselves.

5 Here we refer to non-interference since this is the preferred term of ASEAN.

The government of a state is the supreme authority of that state even when authority is divided constitutionally. Internationally, sovereignty denotes independence. States are not supreme in the international domain they are independent (Jackson 2007).

Georg Sørensen distinguishes between the modern, postcolonial and postmodern sovereignty games (2001). Postmodern in his analysis does not refer to the philosophical school of thought but to developments in statehood where the modern sovereignty game is based on nonintervention and reciprocity. Nonintervention is the right to conduct state affairs without outside interference, while reciprocity suggests an aspired symmetry between states based on equal opportunity for giving and taking for mutual benefit. These Grundnorms of sovereignty create problems for the postcolonial state because they lack the capacity to fully play by the rules. Less developed countries cannot base their international relations with developed countries on reciprocity they require preferential treatment. Likewise, postcolonial states are more prone to violations of territorial integrity such as humanitarian intervention. The complexity of the sovereignty game is exacerbated by the arrival of the postmodern sovereignty game where states modify the rule of nonintervention such as in the case of the EU. Holsti discusses this as the pooling of sovereignty where the member states have delegated authority to a supranational body, but retain the sovereign right to withdraw. Sørensen describes the postmodern sovereignty game as one of cooperation rather than competition. To delegate autonomy to a supranational body can be seen as a sign of great state strength and not weakness. However, multilateral forums such as WTO, G20 and the UN display the inherent contentions involved when states playing different sovereignty games try to cooperate. Reciprocity and cooperation are difficult in areas such as world trade, security and climate change for the simple reason that the states involved have very different capacities and require different modes of cooperation and treatment.

The ASEAN member states (AMS) display great diversity in statehood. Acharya argues that there is a liberal – conservative divide based on commitment to human rights and democracy in ASEAN. This divide has pitted Thailand, Indonesia and the Philippines against Vietnam, Myanmar, Malaysia and Singapore. The divide also marks the difference between a more pro interventionist view of ASEAN and a pro sovereignty camp. Add to this the historical mainland versus maritime SEA divide, which has had profound impact on both culture and politics amongst the ten ASEAN member states. In addition, ASEAN is divided into new and old members, and there is a considerable income gap between the citizens of the ASEAN states (Acharya 2009). ASEAN seeks to unite some of the world's poorest countries (Myanmar, Laos and Cambodia) with one of the richest (Singapore). The ratio between the lowest and highest GDP per capita is 1:61 in ASEAN, while it is 1:8 in the European Union (EU) (Kaveevivitchai 2013). It is difficult to see Singapore and Laos playing the same game, and state conduct in Southeast Asia illustrate that sovereignty is far from a uniform game.

Lee Jones (2012) argues that the non-interference principle in ASEAN is not as static as it seems. ASEAN's history of interference and intervention, and its current process of integration, point to a more dynamic and flexible approach to non-interference and sovereignty than what is commonly perceived. Jones argues that ASEAN has undergone a diverse range of sovereignty regimes, and that when ASEAN states intervened militarily it was primarily to protect domestic order. The autocratic leaders of the 1990s tacitly accepted interference in each other's internal affairs when it served their common interests. This was true of the fight against communism, which was as much internal as external to the AMS, and it was true of the struggle to suppress liberal and democratic elements from gaining power in the 1990s. ASEAN has been consistent with regard to protecting its establishment and political orders. The ASEAN way indicates a *modus operandi* that has proved highly adaptive in protecting the sovereignty regime of the day. It may also be argued that the ASEAN way is representative of a political culture descendant from the mandala, and tributary systems in pre-colonial and pre-modern SEA. The mandala system was characterized by overlapping claims of sovereignty between the polities in SEA. Power was strongest at the center, and waned in the periphery. Sovereignty was centered upon the ruler and not territorially defined. The tributary system was one of suzerainty vis-à-vis the emperor in Beijing. The polities in SEA were highly diverse and consisted of sultanates, dynasties, and kingdoms. One can crudely distinguish between the Muslim, Indianized and Sinicized spheres of the region (Stuart-Fox 2003, Chew 2010). Time and space constraints prevent this paper from delving deeper into history. What is important to keep in mind is that the AMS were shaped by a set of historical experiences in statehood and governance that differ from those of for instance European states. This raises questions with regard to the foundation for Westphalian sovereignty in SEA.

Post-colonial states share a trait in that they all possessed weak capacities for upholding domestic and international sovereignty upon independence. Albeit to different extents, the majority of the SEA states continue to struggle with territorial integrity in the sense that they do not have centralized control over the entire demarcated area of the state. Challenges to centralized control and territorial integrity revolve around issues such as borders, national identity, race and ethnicity, or more particular issues such as local governance and increased autonomy, land rights and natural resource extraction. Weak domestic authority can be exploited internationally and can prove combustible as in the case of the South China, East or West Philippine Sea issue.

The ASEAN Political and Security Community "is weak in resolving disputes and maintaining peace in the region"...The ASEAN member states "should carefully and clearly redefine and reinterpret the scope and definitions of "sovereignty", "non-interference", and "territorial integrity" principles stipulated in the ASEAN Charter" (Brata 2013).

ASEAN seemingly wants security cooperation without any of the formal preconditions that historically govern more successful examples such as NATO. This is particularly salient when considering the ASEAN process of integration, which can be considered moving from modern to post-modern statehood. Mohammed Ayooob (2002) along with fellow academics such as Georg Sørensen (2001) argues that third world elites have internalized the principles embedded in the notion of the Westphalian state such as sovereignty, territorial integrity, and non-intervention, to an astonishing degree. SEA state behavior can be defined as explicitly modern. Ayooob explains ASEAN as “a form of cooperation built around ‘the convergence of regime interests relating to internal security’ to manage ‘threats to the security of states and the stability of regimes” (Jones 2012 and Ayooob 2002). This corresponds with the argument that ASEAN is primarily about domestic and not regional politics. ASEAN’s attempt at merging domestic and regional agendas meets domestic resistance. Roberts (2012) cites an interview with an official at Vietnam’s Diplomatic Academy who stated that when the ASEAN charter commits the members to the rule of law, democracy and human rights that applies to the ASEAN context and not to domestic politics. There are other examples indicating that some members of ASEAN appease countries like Thailand, Indonesia and the Philippines by signing the ASEAN charter and AHRD because they are non-binding (Roberts 2012).

It is worth noting that the AMS either lack foreign and defense policy white papers (Indonesia), or have drafted vague white papers of little value in terms of providing guidance to policy and making its intentions and interests clear internationally (Vietnam) (Sebastian and Lanti 2010). Consequently, it becomes difficult to understand what role and function ASEAN can have when its members seem non-committal, unclear or perhaps deliberately vague about their respective domestic agendas, policies, foreign policy and interests. Amitav Acharya sees cooperation amongst the ASEAN states as a social process, which has had a positive and transformative effect on their relations. His is a constructivist view where regulatory norms have been internalized and ASEAN can point to diplomatic successes in preventing and managing intra-mural conflict among its member states. The ASEAN Way and the principle of non-interference are central to his argument as they underpin and facilitate a process of transcendence. Lee Jones on the other hand, observes that taken at face value, “ASEAN states’ boring refusal to intervene in each other’s affairs translates into a boring academic consensus” (2012, p.223). Jones critiques both constructivist and realist scholars who tacitly accept non-interference as a defining feature of ASEAN. He states that there would be nothing left to say about ASEAN if non-interference was respected and upheld. Carroll and Sovacool (2012) argue that rather than an emerging security community ASEAN exemplifies contested regionalism within which entrenched domestic elite interests constrain regionalism.

Despite the criticism, ASEAN has come a long way since the Asian values argument posited that human rights were anathema to SEA culture. In Jones’ terms what is at display is “a highly uneven and complex, and even incoherent, sovereignty regime” (2012,



pp. 117). Amitav Acharya (2009) argues that the current debates over non-intervention, human rights and democracy are indicative of an ASEAN moving towards a collective identity. However, this requires the ASEAN member states to overcome considerable differences as well as bridging some key divides. In light of the previous discussions on sovereignty, statehood and diversity in ASEAN, the next section will examine human rights in ASEAN.

#### 4. The ASEAN Charter, AICHR and AHRD

With the ASEAN charter and the plans for an integrated ASEAN community, ASEAN seems to have opened up a new chapter in its history. ASEAN is proving both resilient and innovative in its search for renewed relevance. The charter of the ASEAN serves as the guiding document for deepening and widening of ASEAN integration in accordance with the three pillars of the ASEAN community - the Political-security community, Economic community and the Socio-cultural community.<sup>6</sup> The ASEAN community will, according to current ambitions, be established in 2020. The ASEAN Economic Community, which according to present plans will be launched in 2015, marks an acceleration of the process of integration towards 2020.<sup>7</sup> The charter commits the ASEAN member states to adhere to the principles of democracy, the rule of law and good governance, and to respect and protect human rights and fundamental freedoms (ASEAN 2009). In October 2009, ASEAN inaugurated the ASEAN Inter-governmental Commission on Human Rights (AICHR), and in November 2012 the ASEAN Human Rights declaration (AHRD) was launched. Tae-Ung Baik (2012) argues that SEA is leading the development of a human rights system in Asia. Despite the weaknesses and criticism ASEAN, AICHR and the AHRD receives, he makes a salient point when he asks us to consider how far SEA and ASEAN have come since the Asian values debate.

The establishment of AICHR took 16 years. Following the Vienna Declaration in 1993, ASEAN's foreign ministers agreed to consider the establishment of an appropriate regional human rights mechanism. In 1995, the Working Group for an ASEAN Human Rights Mechanism was created by the human rights committee of LAWASIA.<sup>8</sup> Its primary purpose was to establish an intergovernmental human rights commission for ASEAN. This paper will not go on to list all the subsequent meetings, but it is worth noting that it took six years (in 2001) before the working group held its first workshop on an ASEAN human rights mechanism, which was attended by national human rights institutions

6 The ASEAN Charter entered into force on 15 December 2008.

7 For greater detail see ASEAN Economic Community handbook for business available at: [http://www.asean.org/images/2013/resources/publication/ASEAN\\_Economic\\_Community\\_Handbook\\_for\\_Business\\_2012.pdf](http://www.asean.org/images/2013/resources/publication/ASEAN_Economic_Community_Handbook_for_Business_2012.pdf).

8 LAWASIA is an international organization of lawyers' associations, individual lawyers, judges, legal academics, and others that focus on the interests and concerns of the legal profession in the Asia Pacific region. For further detail see: <http://lawasia.asn.au>.

(NHRIs), Civil Society Organizations (CSOs) and government representatives.<sup>9</sup> In 2005, the Kuala Lumpur declaration committed the AMS to the establishment of an ASEAN charter, and set up an Eminent Persons Group (EPG) to give “bold and visionary” recommendations for the charter. The EPG report submitted to the ASEAN summit in Manila in 2006 stated that the ASEAN human rights mechanism was a worthy idea that should be pursued further. This may not impress observers as bold and visionary, but it was politically significant as the EPG report was endorsed by ASEAN leaders in 2007 and submitted to the High Level Task Force (HLTF) established to draft the ASEAN charter. HLTF went on to include Article 14 in the charter, which mandates the establishment of an ASEAN human rights body. Article 14 reads:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting (ASEAN 2009).

AICHR does not possess any compliance or enforcement mechanism, which means that there is no mechanism for submitting complaints and receiving binding judgments and remedies. This is a key criticism of AICHR along with a lack of transparency. One of the key mandates of AICHR was to draft the AHRD, which it did in 2011. AICHR was quickly criticized for the lack of consultations with civil society, and for not circulating the drafts. In 2012, drafts were leaked and AICHR representatives from Thailand, the Philippines, and Indonesia held informal public consultations. None of the other AMS held consultations. Briefly summarized the key concerns raised by amongst others the Office of The High Commissioner for Human Rights (OHCHR), and NGOs such as Amnesty International and Human Rights Watch related to:

1. The AHRD balances human rights and fundamental freedoms with corresponding duties (AHRD Article 6),
2. Human right must be considered in the regional and national context (AHRD Article 7),
3. Human rights are subject to limitation by national security and public morality (AHRD Article 8),
4. Certain basic rights, and amongst them, the right to life conform to domestic law (AHRD Article 11),

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9 An overview over the process and meetings is available from: <http://www.aseanhrmech.org/aboutus.html>.

5. Articles 16, 18, 19, 25 and 27 (2) that concern the right to nationality, marriage, political participation and trade union membership are limited with reference to domestic laws that will decide on the scope and practice of these rights.

Human Rights Watch issued a statement as follows: “Disregarding the deep concerns expressed by senior United Nations officials, human rights experts and hundreds of civil society and grassroots organizations at the national, regional and international levels, ASEAN leaders nonetheless adopted yesterday an “ASEAN Human Rights Declaration” that undermines, rather than affirms, international human rights law and standards. The document is a declaration of government powers disguised as a declaration of human rights” (HRW 2012). Major rights areas that suffer from omission in the AHRD include the freedom of association, minority rights and a more specific articulation of the right to freedom of religion and belief. Lesbian, gay, bisexual and transgender (LGBT) communities also expressed concern that the AHRD’s reference to public morality may give governments a pretext for crackdowns on LGBT communities.<sup>10</sup>

AHRD deserves being criticized for falling short of international standards. Criticism makes for a healthy debate. However, as Catherine Renshaw has pointed out, a number of the provisions considered to be claw back clauses or derogations do in fact relate back to the Universal Declaration on Human Rights (UHRD) and Article 29 in particular (Renshaw 2013). Given that the opening paragraph of Article 7 in the General principles of AHRD declares human rights to be universal references to derogations that are also stipulated in the UHRD may not be problematic. It depends on whether the AHRD is interpreted progressively or reactionary, and as long as ASEAN opts for a human rights body rather than a legally binding mechanism that includes entities that deal with complaints and enforcement, the rights will not be subject to legal interpretation and trial.

ASEAN seems to provide a useful regional avenue for debating human rights issues that remain unresolved within the respective member states. However, this may prove to be a futile exercise unless the issues are brought to bear on domestic debates and reforms. After all, the vague formulations, and potential claw back clauses and derogations in the AHRD are a reflection of the principle of non-interference and hence the AMS’ sovereignty. Briefly stated, the debates on the AHRD constitute projections of domestic human rights issues. They are not regional in nature despite some shared traits and commonalities among the AMS. The political diversity among the AMS requires them to play different sovereignty games and hence consensus on core human rights issues is out of reach. While this is a legitimate excuse, Cachavalpongpun (2005) makes the point that non-interference rather than openness distinguishes between the western and ASEAN way of constructing regionalism. The criticism of the AHRD is to a large extent substantial rather than structural. Shortcomings in the AHRD such as the missing

10 See more comments from OHCHR special procedures: [http://www.un.org/apps/news/story.asp?NewsID=43520&Cr=human+rights&Cr1=#.Ul\\_ESBYfnzI](http://www.un.org/apps/news/story.asp?NewsID=43520&Cr=human+rights&Cr1=#.Ul_ESBYfnzI) and summary from East West Center: [http://www.eastwestcenter.org/sites/default/files/private/apb197\\_1.pdf](http://www.eastwestcenter.org/sites/default/files/private/apb197_1.pdf).

right to the freedom of association represent a direct challenge to the political order in several of the AMS. It challenges the authority and hence domestic sovereignty of the governments. This clarifies an important distinction between the AMS and western democratic states, namely that in the latter sovereignty is popular. Who are the sovereigns in Southeast Asia and the AMS? In Thailand sovereignty is bestowed upon the king, in Vietnam the communist party, in Myanmar the military, in Brunei the Sultan. In a country like the Philippines, sovereignty may be articulated as popular with reference to the nation in the constitution, but closer analysis reveals the power and influence of strong men and landowners. Pak Nung Wong (2013) argues that this should be understood as Philippine statecraft. Competing interests have to be negotiated so as to keep the nation together domestically, and thereby project strength externally to protect its territorial boundaries and integrity. This is not only an issue in the Philippines. Garry Rodan and Caroline Hughes (2014) point out that where authoritarian rule has collapsed in SEA, elite rule has survived through what they label powerful state-business interests. Constitutional analysis across SEA reveals that nowhere in the world do countries revise and reform their constitutions more frequently than in SEA. Research currently being conducted reveals a correlation between constitutional reform and declining fiscal discipline. As explained by the researchers themselves, this means that constitutional reform is a process of elite political settlement in SEA (Bunte and Dressel 2013). The region is rife with references to elites, special interest groups, strong men, and the like, having great impact on policy and law making. The ASEAN way protects these power arrangements and is therefore difficult to reconcile with core human rights norms and standards. If the quiet, elitist, private and non-legalistic approach the ASEAN way promotes primarily serve establishment interests, it is not difficult to see that access to information, freedom of association, transparency, press freedom, freedom of expression, political participation and property rights, to name some, run counter to the overall goal of maintaining the established political order. Accordingly, there are considerable structural challenges to human rights reform.

Relating this back to ASEAN and the regional level we may ask how the respective sovereigns of SEA would go about ceding autonomy in certain areas of policy to ASEAN, but not to their peoples? What would a pooling of AMS sovereignty look like? These are questions for further research and deliberation. Within the context of this paper they serve the purpose of informing our expectations toward ASEAN. The AMS and ASEAN are products of diverse historical processes that are indigenous to the region and the respective countries. It seems naïve to expect that these countries with just a few adjustments would suddenly find themselves on a European path of political development. This is not a cultural relativist argument against democratization, the rule of law and human rights in SEA. What this tells us is that despite shared aspirations, the peoples of the world do not share histories and political developments. It is a subject of another paper, but the historical evolution of thought surrounding the concepts of statehood; sovereignty and rights in the western context are both peculiar and particular. According to some recent scholarship, they are also largely forgotten (Judt 2008, Moyn

2012 and 2014, Agamben 2011, Waldron 2011). What is lost is our understanding of the incremental, coincidental and incoherent aspects of the development of the Western democratic rule of law state. What we are left with is a simplistic linear narrative that all too frequently is turned into an equally linear development program that project cause and effect relationships that never took place in the west, but that we expect to take place elsewhere. When they don't, we refer to the lack of political will, which has become a euphemism for "we don't understand why we failed".

## 5. Conclusion

The substantive issues entailed in the criticism of ASEAN's human rights body and the AHRD are proof that ASEAN, the AMS, civil society and academia have evolved in SEA. They are leading the way in Asia. At the same time, closer scrutiny reveals structural issues relating to power, sovereignty and statehood that impact on governance and government that need to be resolved on the domestic level for an improved human rights regime to emerge in the region. As Rodan and Hughes (2014) point out, accountability remains a key issue and civil society in SEA remains weakened by government cooptation that prevents regional mass movements from emerging. Civil society is as much part of the establishment as the elites they criticize, and the disenfranchised and marginalized lack access to processes that purport to advance their agenda. Western policy makers, donors, multilateral agencies and NGOs within and outside the region should revisit their expectations vis-à-vis ASEAN. In its current state ASEAN has most likely survived not in spite of, but because of the ASEAN way. Were legally binding obligations introduced into the ASEAN framework on human rights, they would require a reconstitution of power and political order within the AMS. To some this remains an ambition, to others it spells mayhem, and to yet another constituency it is unattractive. As such, the ASEAN charter, AICHR and AHRD despite all their shortcomings can be argued to represent a realistic view of the current state of affairs in ASEAN. A perfect AHRD may have been equally troubling. The incentive to succeed with a deeper integration along all three pillars of the ASEAN community is strong. The rewards may be great for the peoples of the AMS, but we need to invest more in our understanding of the structural issues at play in the current sovereignty game of SEA.

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