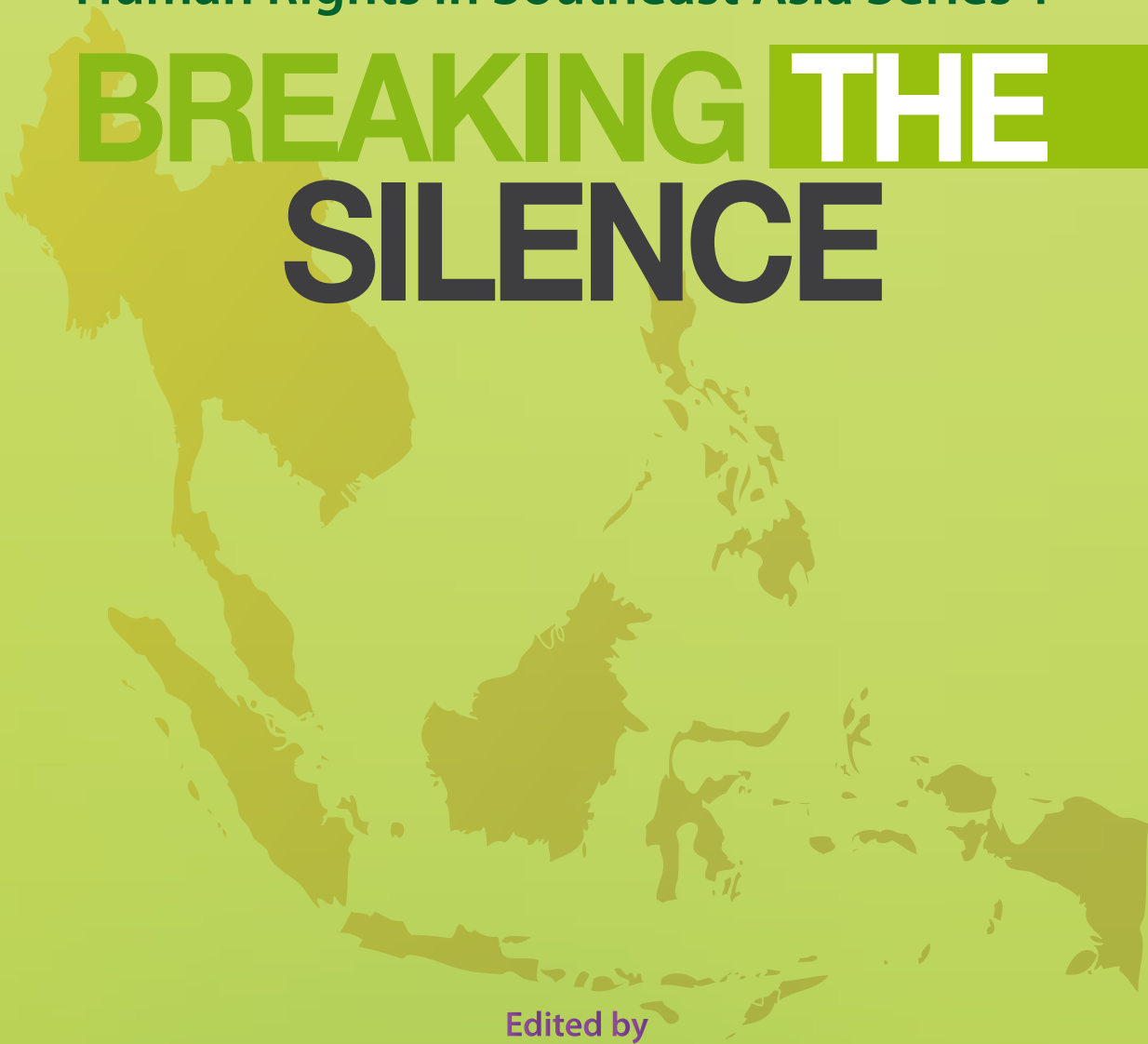
Human Rights in Southeast Asia Series 1

BREAKING THE SILENCE



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SEAHRN
Southeast Asian Human Rights Studies Network

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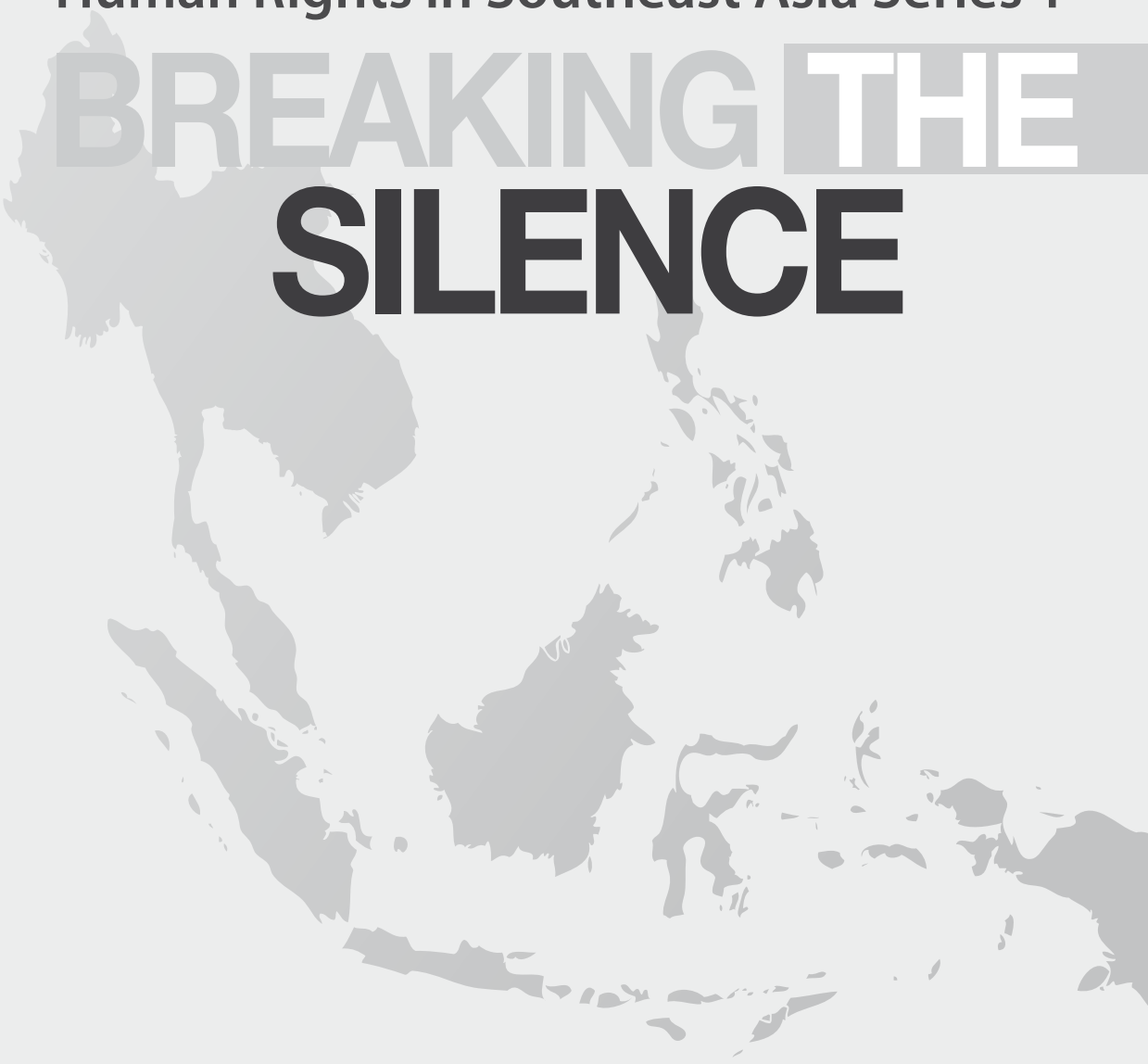

Southeast Asian Human Rights Studies Network
Bangkok, Thailand
2011

SEAHRN
Southeast Asian Human Rights Studies Network

The Southeast Asian Human Rights Studies Network (SEAHRN) is a consortium of academic institutions which provide human rights education through study programs, research and outreach activities within the Southeast Asian region. The network, which was established in 2009, has 14 founding member institutions from 6 countries.

The SEAHRN was born out of a common dream to enhance and deepen the knowledge and understanding of students and educators as well as other individuals and institutions from Southeast Asia in human rights. This goal will be achieved by engaging in collaborative research, improving course curricula and training programmes, sharing of best practices and conducting capacity building training of educators, staff and students and other interested individuals and institutions. Furthermore, it seeks necessary regional academic and civil society cooperation to sustain the effective promotion and protection of human rights in the region. The network desires to open its doors to interested institutions and individuals who share its vision for human rights in Southeast Asia.

Human Rights in Southeast Asia Series 1:
Breaking the Silence

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FOREWORD

Globalization creates cracks, cleavages, and vacuums of State powers along the increasingly porous inter-State boundaries not only in Southeast Asian Region but also in others. Slowly but surely the non-traditional threats such as carbon emission, climate change, eventual food crises, and some others are aggravating the traditional threats against the regional integrity—nuclear proliferation, territorial conflicts, shipping security, etc. Mixed together with permeably indefensible inter-State borders, these threats work wonders to worsen the situation of (1) the influx of people, such as refugees and migrants, on the move from armed conflicts and economic woes, (2) the increase of number of people under health threats such as pandemics or other contagious diseases, (3) the chronic state of the lack of quality education among population, (4) those who suffer from environmental degradation, and (5) other dire situations in all aspects of life. This growing list of challenges has indeed quickly replaced the usual issue of State security in our region.

An old quotation from one of ASEAN's founders thus resonates. Thus prominent was the former Indonesian Foreign Minister Adam Malik's foresight that, "The setting of a future of peace, friendship and cooperation is far too important to be left to the governments and government officials only." In this spirit, in 2008, the ASEAN Secretariat initiated a new mindset. The "Networked Secretariat" aims to reach out to as many potential partners, such as government agencies, civil society, academics and others, to deal with the old and new threats. The wider space has, to a certain extent, now allowed civil society to pursue interests with the ASEAN and its member States. Along with the permeable State borders, a country's problems can easily and conspicuously become problems of the others. In light of combating these potential and current drawbacks, the integration of the region, however, has its both dark and bright sides. Violence or arbitrary use of force, for instance, needs a response as to who could effectively offer some possible remedies or solutions.

ASEAN and the Governments alone cannot perform these complex tasks. The First International Conference on Human Rights in Southeast Asia organized by the Southeast Asian Human Rights Studies Network (SEAHRN) on 14-15 October 2010 in Bangkok, Thailand was a symbolic gesture for civil society's countless achievements in human rights work. In the backdrop of a number of regional developments like the formalization of the ASEAN Inter-governmental Commission on Human Rights (AICHR), the incipience of the ASEAN Commission on Women and Children (ACWC), and the mandate to evolve an ASEAN Declaration of Human Rights, this Conference has indeed enriched the academic discourse on human rights in the region.

Amidst the domination of western universities and researchers, published works on human rights in Asia, specifically in the Southeast, get their first drop of much deserved fresh water after a long thirst for recognition, understanding and acceptance. Out of more than 80 entries in the Conference, the SEAHRN Editorial Team has decided to narrow the list down to 12 papers for the post-Conference book entitled "Human Rights in Southeast Asia Series 1: Breaking the Silence". These selected papers were mostly done by Southeast Asia's homegrown scholars, researchers and activists. Their efforts, indeed, represent countless attempts to enhance the academic discourse on human rights, peace and conflicts in the region.

These academic works truly stand out as the complementary intellectual parts of the previously called participation of a larger civil society, i.e. academia, non-government organizations and other stakeholders as by the ASEAN Secretariat. Issues featured in these papers represent only the tip of the iceberg of gloomy human rights records in the region. These academic works serve as the breakers of the chilly silence simply by their synchronous voices and tones. The echoing voices of oppressed groups, of tortured prisoners of conscience, of discriminated transgender groups, of intimidated press workers, of cornered religious groups, of stateless refugees, of homeless working class, of victims of military oppressions, of protesting philosophers of human rights, of victims of violent conflicts reverberate throughout the "quiet" southeastern part of Asia. There is no way that the sheer sonic waves of screams of horrified victims of human rights violation can evade our ears.

These first-hand accounts have shaken the evolution of a "sense of community" among the ASEAN member States. These developments make it even harder for the ASEAN to realize economic integration, inclusive and equitable development, accountable and open societies, without disenfranchising the discriminated "others." Even much harder to launch is the initiative called "Contemporary Diplomacy" which allows the full promotion of human freedom. The whole scheme is to protect the vital core of all human lives in ways that allow both freedom and fulfillment. Human security thus means protecting fundamental freedom that is essential for life. This commitment, based on the report of the Eminent Persons Group of ASEAN in December 2006, is pivoting around the updated principles and objectives of ASEAN which are (1) "to respect human rights and fundamental freedom," (2) "to shred its image of being an elitist organization," as well as (3) "to become a 'people-centered' organization".

The protesting voices documented and enriched with academic rigor in this book are part and parcel of this commitment. Human security, human development and human rights are indeed complementary, supplementary, and naturally supportive of each other. The deficiency of one not only tends to bring the lack of the others but also potentially create protracted conflicts which eventually hinder sustainable peace and development.

Henry Kissinger once challenged, "East Asia as far as technology and economic development are concerned is in twenty first century; as far as institutions to address problems are concerned, a nineteenth century Europe". To take on this challenge, building a truly "listening" ASEAN means creating a set of pillars for and by people-centered institutions: opportunities, space, contribution, sense of belonging, and ownership for 600 million people of ASEAN to play their roles and realize their own destiny.

SEAHRN, through the 2010 Conference and this book, aimed to provide a venue to explore critical contributions by researchers and scholars in deepening the understanding of human rights-based framework and actual issues including peace and conflicts through in-depth engagement with localized sites within the region. Rather than setting an impossible mission for Governments and government officials to accomplish these purposes on their own, this is the time to map out and actualize a genuine "common journey" with the ASEAN population right through 2015 and beyond.

Dr. Surin Pitsuwan

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Chapter 4: Human Rights in Different Aspects

INTRODUCTION

STARTING GROUND

The Southeast Asian Human Rights Studies Network (SEAHRN) was established in October 2009. It is a consortium of academic institutions which work in the field of human rights and related areas including peace and conflict studies. The Network started with fourteen founding member institutions from six Southeast Asian countries. The driving force behind the creation of SEAHRN was the Centre for Human Rights Studies and Social Development (CHRSD) which recently became the Institute of Human Rights and Peace Studies, of Mahidol University, Thailand.

The main aspiration of SEAHRN is to enhance and deepen the knowledge in the fields of human rights and peace and conflict. It also aims at the promotion and protection of human rights and peace both in terms of academic endeavours as well as activism through greater cooperation between scholars and activists within the Southeast Asian region, by providing a loosely structured network within which such collaboration can work.

The pioneering activities of the Network were planned to be conducted in order to make this aspiration a reality were the holding of conferences and publications. This book is the direct result of these two planned actions. In October 2010, SEAHRN organized a two day conference entitled The First International Conference on Human Rights in Southeast Asia which was held in Bangkok, Thailand. It was very well attended by members of the academe, civil society, government agencies and international organizations from different parts of the world. It was graced by nearly five hundred participants and over a hundred paper presentations.

It was decided before the conference that from these papers some will be selected for publication. The founding members were tasked with making this selection. The criteria were based not only on the quality of the papers, but also with an emphasis on papers with a distinctly Southeast Asian perspective. This is in line with another of SEAHRN's aspirations, which is to provide a Southeast Asian voice in human rights discourse and to contribute to the growing knowledge on peace and conflict.

Contextualizing Human Rights, Peace and Conflict in Southeast Asia

It has been said that much of the success of the Association of Southeast Asian Nations (ASEAN) stems from its ability to maintain peace and security as well as to promote economic development in the region. It is true that since the establishment of ASEAN in 1967 and the end of the war in Indochina, there were no major inter-state conflicts

(with a few exceptions). The latest one is an on-going and long lasting dispute between Cambodia and Thailand. Despite this, at the national level, struggles for justice, self-government, self-determination which, in a number of cases, had resulted to violence which had cost lots of lives in a number of Southeast Asian countries. In spite of some conflicting incidences and violence, Southeast Asia could indeed be considered as a relatively peaceful region.

Southeast Asian governments, ASEAN members in particular, have committed (for the peoples and member states) to "live in peace with one another and with the world at large in a just, democratic and harmonious environment".[1] ASEAN members, in their ASEAN political-security community blueprint, further promised to "promote political development in adherence to the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights and fundamental freedoms as inscribed in the ASEAN Charter".[2] Indeed, for the first time in ASEAN history, the ASEAN Charter has recognised and legalised human rights and fundamental freedoms both in its purposes and principles. Article 14 of ASEAN Charter stipulates that "ASEAN shall establish an ASEAN human rights body. The said body, which was later named "ASEAN Intergovernmental Commission on Human Rights," was officially inaugurated on October 23, 2009 in Thailand. In April 2010, another human rights mechanism, "ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children", was formally established in Hanoi, under the Chairmanship of Vietnam.

In a span of less than a year, much needed human rights mechanisms were set up by ASEAN governments, the very first in the whole of Asia. To the disappointment of those who having pushed for effective regime, these Commissions have been criticised for their lack of protection mandates as none of them have been provided with complaint procedures. The two Commissions could not receive communications on human rights violations. Moreover, the Commissions are not equipped with monitoring powers. In ASEAN, the term "monitoring" is still as sensitive as "human rights". Due to political diversity of its members and different political space that each society has, the application of human rights has been constrained by ASEAN's principle and actual strict practice of "respect for state sovereignty and non interference in internal affairs of member countries". The legalisation and recognition of human rights and fundamental freedoms by the ASEAN Charter does not break the silence on human rights issues. Southeast Asian countries continue to "mute" any discussions on human rights challenges especially those concerning members of the Association. Muting of any human rights concerns has been further strengthened by the principle of consensus. With only one open objection of any single member State, no issue could be discussed in any of official ASEAN forum. Unfortunately, ASEAN solidarity has been taking precedence over the protection of human rights and democratic principles.

The relative progress made by ASEAN in terms of institution building and the current norms setting has not been followed by any positive changes in regional human rights diplomacy. Human rights development witnessed in a few countries are more sporadic than systematic. Initiatives for the promotion and protection of human rights and struggles for changes have been advocated mainly by NGOs, other civil society groups and academics. In most if not all countries of Southeast Asia, advocates become victims of human rights violations. Rights to freedom of thought, expression and participation or assembly have been limited. A number of them were intimidated, threatened, and in the worst case, got killed or enforced to disappear.

In a number of countries, criticising the government is interpreted as opposing the establishment. Some countries have been applying security laws, emergency laws and emergency measures to silence the voice. Laws to control human rights activists are being developed in a number of countries in Southeast Asia. So, political and civil rights are at stake.

In addition, due to the economic and social disparities among the Southeast Asian countries, a large segment of their people is still struggling against poverty, which in itself a serious human rights violation. In this globalised and aggressively capitalistic region, people seem to be powerless to fight against corporations and business enterprises. Indeed, tremendous poverty has been further perpetuated by massive corruption. Only one country in Southeast Asia, Singapore, has been considered as uncorrupted country. The others have been ranked very high in the corruption index during recent years. With prevailing poverty and corruption, economic, social and cultural rights of the people could hardly be actualised.

Forms and degrees of state repression and violence vary from one country to another. Furthermore, it is a common practice in the region that acts of State violence or human rights violations committed by State agencies/officials have gone unpunished. At both national and regional levels, the system of accountability has not been properly put in place and impunity still prevails.

The prospect for the promotion and protection of human rights may not be that bright. Nevertheless, one should not lose hope. The recent institutional development suggests that ASEAN is going to the right direction and there could be no return. Although ASEAN people-centred provided for by the Charter still remains in the air but ASEAN peoples as well as academics, NGOs and CSOs are now paying more attention to ASEAN affairs. They are monitoring and claiming their right to participate in activities which have been until now reserved for and monopolised by ASEAN "elites". ASEAN civil society is making their voice heard and ASEAN could not remain insensitive to the demand of ASEAN people, brought closer by common agenda including human rights concerns. It is not only human rights which is included in the principle legal instrument of organisation but also the same ASEAN Charter devotes the whole Chapter VIII

(articles 22-28) to "settlement of disputes" although no specific dispute settlement mechanism was prescribed except the ASEAN Summit in case any dispute remains unresolved. Not only do we realise that ASEAN Summit is highly political and, in many cases, politicised but the resolution to any dispute depends very much on the willingness and political will of parties to a dispute to agree to resort to "good offices, conciliation or mediation". Moreover, the dispute settlement as specified by the ASEAN Charter deals mainly with "inter-state dispute". The internal conflicts or violence within certain member states which may have spill over effects on others have not been addressed by the Charter. No mechanism was prescribed to address these issues. The term "conflicts" does not appear in the Charter and still perceived as sensitive. One may recognise that conflicts and violence which occur in the world today including in Southeast Asia are more national and internal in nature.

Conflicts over natural resources, conflicts over development projects, identity conflicts and conflicts related to some cultural issues are increasingly evident in Southeast Asian nations.

The First International Conference on Human Rights in Southeast Asia organised by the SEAHRN not only provides a venue for those working in the fields of human rights, peace and conflict to discuss the issues but also mainly contributes to "breaking the silence" in the region. The forum attested that human rights violations and conflicts are real challenges in the region and require concerted efforts to bring about change. The different articles which were selected to be published in this volume reflect only some aspects of the problems. Many more remain uncovered.

Synthesis of Selected Papers

The papers selected for this book can be broken into quite distinct themes and this introductory chapter shall be synthesising them accordingly. Underlying many of the papers in this collection is the philosophical debate between the universalism versus the relativism (or to use the term favoured in Southeast Asia, "Asian Values") of human rights. It is fitting therefore to begin this synthesis with a discussion of Vo Van Ai's paper "Universality and Particularity of Human Rights: A Vietnamese Buddhist Viewpoint".

Vo challenges this distinction by drawing upon Buddhist traditions to illustrate that the concept of human rights is not alien to Southeast Asian thinking. He rejects the idea that the concept of human rights is a western construct which does not fit easily within Southeast Asian belief systems. In his paper, he directly denounces the Vietnamese government's approach towards human rights. In Vietnam, the official ideological stance towards human rights is that the rights of the individual are intertwined with the nation state. Thus with the overthrow of imperialist forces and the creation of the Democratic Republic of Vietnam (now the Socialist Republic of Vietnam), it is deemed that with the success of the revolution, and the freeing of Vietnam, the individual's human rights has

been fulfilled as he too is, via the State's status, free. The individual is thus subsumed by the collective.

Vo argues that Buddhism demands not merely abstinence but a proactive approach towards compassion and this would include the constant and vigorous defending of the rights of individuals. This approach goes directly against the Vietnamese government's policy, and indirectly this paper also provides a strong intellectual argument against ideologues like Singapore's Lee Kuan Yew and Malaysia's Mahathir Mohamad who both espouse the Asian Values approach to human rights by rejecting human rights concepts as inherently foreign and unsuitable in their own countries. A side effect of which is the repression of civil liberties and the maintenance of political power.

By emphatically linking human rights to Buddhism, a belief which has been part of Southeast Asian ideology for millennia, Vo makes a clear stand against any such idea that as a region, human rights values somehow do not apply to its peoples and the leadership of the nations here have some sort of philosophical authority to deny or suppress those rights.

The next batch of papers deals with discussions of issues concerning Human Rights, Freedoms and People Power. Emily Hong in "When Rights Encounter Repression: Lessons from "People Power" Movements in Southeast Asia" espouses non-violent movements for human rights promotion and protection. However, she argues that for this to succeed, there needs to be two fundamental elements. The first is a shifting of paradigms where human rights activists do not view themselves as "rights holders" but instead as "power holders". This shift in perspective is needed to move away from a "victim mentality" to a more empowered mentality when pushing for human rights.

Furthermore, there is a need to understand the sources and pillars of power which those in authority have. Only with this understanding can a more effective strategy be formulated. Such activism however must have a strong domestic component and ought not to be dominated by international players and instruments. Citing the Philippines, Timor-Leste, and to a lesser extent Myanmar, she proposes that a tactically and strategically sound approach towards non-violent action is the way forward for human rights activism.

In this spirit, Steve Kibble, Tibor Van Staveren and Ed Hobey argue for the need of transitional justice. In their paper "Pathways to Justice: The Struggle of Civil Society to Define and Seek Justice in Timor-Leste", they revealed that Timor-Leste, as the newest country in the region, has had to go through a very difficult experience in attaining statehood. Since the 1975 invasion of Timor-Leste (then East Timor) by Indonesia, the territory has faced many human rights violations. The international community made certain superficial calls against such violations but in reality were either directly or tacitly supporting the Indonesia regime. Even after independence in 2002, violence still remained part of the Timor-Leste experience with armed retaliation from Indonesia, democratic

unrest and even attempts on the lives of their Prime Minister and President. The country is still very poor with a low level of education and employment.

They continue by defining Transitional justice as the quest from a once colonised peoples to obtaining "acknowledgment of crimes committed against them, have some form of reparation and move to reconciliation with their erstwhile oppressors". They go on to critically examine the efforts of transitional justice in Timor-Leste identifying several serious institutional weaknesses that hinder the implementation of the recommendations of the Commission of Truth and Friendship and the Truth and Reconciliation Commission. It is necessary for these weaknesses to be addressed for in order to move forward as Timor-Leste needs to find closure for the injustices and human rights violations of the past.

In the past five years, the issue of religious freedom in Malaysia has been particularly contentious. Malaysia likes to portray itself as a pluralistic multi-religious and multi-cultural nation, yet recent events have done much to make this claim questionable. Religious freedom which is guaranteed by the Federal Constitution as well as judicial decisions, has been sidelined by a decision of the Federal Court (the Apex Court in the Malaysian judicial system), where a Muslim woman's claim for her constitutionally protected right to change her religion was sidestepped by the court who held that such matters fell under the jurisdiction of the Syariah Court (Muslim religious court).

This abdication of responsibility, and abdication is the only term to be used as the Syariah Court has no jurisdiction to decide on Constitutional matters, can be seen in other cases where a man converts to Islam and then seeks to obtain a divorce and settle custody issues in the Syariah Court; an action which was supported by the civil courts when approached by the wife; when the Syariah court has absolutely no jurisdiction over the non-Muslim spouse.

Other government activities such as the banning of the use of the word "Allah" amongst Christians and the banning of Malay language bibles appear to show that Malaysia is heading towards a quasi-Muslim autocracy. It is fitting therefore to include Dian Abdul Hamed Shah and Mohd Azizuddin Mohd Sani's paper entitled "Freedom of Religion in Malaysia: Debates on Norms and Politico-Legal Issues". In it they explore this complex issue from a constitutional, political, historical and philosophical perspective with an emphasis on constitutional judicial decisions, ultimately submitting that "the dignity of individual choices should be respected without unnecessary state imposed hurdles".

Herlambang Wiratraman asks "Does Post-Soeharto Indonesian Law System Guarantee Freedom of the Press?" A pertinent question in the light that Indonesia, after the overthrow of the Soeharto regime due to the "Reformation Movement" of the late 1990's, has been held as a shining light for human rights in the region. The euphoria that accompanies such a dramatic change in Indonesia's social and political life may

well obscure the finer points in the practice of human rights which may well lead to complacency.

During the Soeharto era, the basis of controlling press freedom was the creation of the policy promoting the press as a tool for the furtherance of Indonesia's "national ideology", the Pancasila, or more accurately the Indonesian government's interpretation of the Pancasila. Towards this end, direct controls of the press were enforced in order to ensure that they would not stray from this policy. Such controls include the requirement for a permit to publish and print and the requirements for all members of the press to be part of the Indonesian Journalists Association, which is a government approved and controlled body. Furthermore, there were anti-subversion and emergency laws that could be used against the press.

Following the end of the Soeharto regime, new human rights laws were passed which guaranteed the freedom of expression (it must be noted here that even during the Soeharto era there were laws supposedly protecting free speech; however they were interpreted narrowly and circumnavigated). Although the press in Indonesia now appear to be freer, caution still ought to be exercised for there still exist laws such as criminal defamation legislation and anti-pornography legislation which can be used against the press. Furthermore, there have been a greater number of direct attacks on members of the press for stories that they have written. In this was press freedom is affected not so much by legislation but by personal intimidation.

On a more optimistic note, Herlambang's paper does emphasise the growing appreciation of the freedom of speech and press freedom amongst the Indonesian judiciary who have been expressing this appreciation through progressive decisions. This paper strikes a cautionary yet hopeful note that in order to maintain the momentum for the development of human rights in the post Soeharto era, constant vigilance is required to prevent complacency and a backward movement for press freedom.

Bo Kyi and Hannah Scott open the third chapter with a very compelling topic. In their paper, "Torture, Political Prisoners and the Un-Rule of Law: Challenges to Peace, Security and Human Rights in Burma', the authors use Amnesty International and United Nation's definition of a political prisoner; that is to say a person detained for speaking against the government, practicing their religion, or for their culture, ethnicity and gender; as a basis for their examination of the political prisoner situation in Myanmar where they submit there exists 2000 such men and women.

The Myanmar government views any form of opposition as dissent, regardless of its peaceful nature. Thus an intellectual, religious or even artistic expression of opposition is sufficient to deem one as a dissident. There is no need to be part of a political party or group, opposing the government would cause one to be viewed as a "political threat", a term which is given a very broad meaning.

Drawing their information from case studies and documentation from the Assistance Association for Political Prisoners (AAPP), the writers state that torture is a common place amongst political prisoners. This takes the form of beatings and general deprivation. However, they do contextualise this by noting that this practice of torture by the military is not a new phenomenon. It was used even before the 1988 pro-democracy movement. Hence the appalling treatment of political prisoners in Myanmar is hardly new. This paper is valuable for its clear assessment and criticism of the systematic and government sanctioned abuse of political prisoners in Myanmar, perhaps the country with the most blatant disrespect for human rights principles in the Southeast Asia.

Jaime Arroyo, Ayesah Abubakar and Kamarulzaman Askandar write about the conflict situation in the Philippines. Arroyo's paper entitled "Achieving Peace with Human Rights and International Humanitarian Law at the Forefront: A Look at the Philippines' Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRILL)" is a detailed examination of the CARHRILL between the Philippine Government and National Democratic Front of the Philippines (NDFP). The CARHRILL is essentially a humanitarian law document but it has a strong human rights content demanding as it does that both parties respect human rights principles. The acknowledgement of these principles, Arroyo asserts, has had a positive effect on Filipino jurisprudence and law making; providing a rallying point for individuals and civil society organisations to campaign against rampant human rights violations that were taking place in the countryside and from these movements impetus was provided for the development of human rights nationwide.

Abubakar and Askandar's paper examines the Bangsamoro issue in Southern Philippines from an interesting economic and developmental angle. In "Defining the Bangsamoro Right to Self Determination in the MILF Peace Process", the authors emphasize the importance of the work being done by the Bangsamoro Development Agency (BDA). The economic development efforts of the BDA are entwined with the Bangsamoro claim to self determination and it supports as well as becomes an integral part of the struggle. Economic self-sufficiency brings with it empowerment and the ability to "develop" in a manner suitable to the community seeking self determination is surely an important component of the principle as well as the reality of self determination.

Commencing the fourth part of the book is Patricia Miranda's "Lessons Learned from Cardiz Street: Strengthening the Right to Housing through Metalegal Strategies". She suggests a multi pronged metalegal (or extra legal) approach when claiming human rights (in the case of her paper, specifically the right to shelter). Using the Cardiz Street area in Quezon City as a case study, she explains how political lobbying, mediation and community action such as community mortgage programmes, can obtain results more effectively than merely using the usual legal pathways.

There are two papers on the issue of human rights for the Lesbian, Gay, Bisexual and Transgender (LGBT) community. In his paper, "Shopping for Their Own Pair of Pink Stilettos: LGBT Rights vis-a-vis the Magna Carta of Women and Other Recent Laws and Jurisprudence in the Philippines", Sherwin Ebalo suggested methods on how to assert LGBT rights at a domestic level. He states that although the developments in the protection of women's rights in the Philippines do not necessarily translate into LGBT rights, much can be learnt from these developments. The primary lesson is that there is a need for a strong philosophical and jurisprudential basis upon which to make a case for LGBT rights, for example equality. Using such established human rights and constitutional provisions, the LGBT community must then build upon and strive for the kind of legal developments to protect their own rights as opposed to piggy backing on other developments, for example the Philippine's Magna Carta of Women, or to take a cue from the paper's title, they need to buy their own pair of pink stilettos.

A fitting companion piece to Ebalo's work is Witchayanee Ocha's "Thai Transsexual's Experiences with Discrimination in Employment: Migration and Commercial Sex in Thailand and the Netherlands". Through extensive and methodologically stringent fieldwork, the author explores the legal limbo that transgendered individuals in Thailand and the Netherlands experience. Her work illustrates how for many transgendered individuals, they are faced with little option except to enter the entertainment or sex industries as opportunities elsewhere are very limited, either through social prejudice or the legal confusion that their transgendered state places them. Ultimately, Witchayanee argues that a fundamental right to life and equality is denied. The writer asserts that based on the United Nations Human Rights Council Resolution of 17 June 2011 which affirms equality and dignity in rights for everyone without any distinction, these forms of discrimination is recognised and opposed on the international stage and should pave the way for a more equitable future solution.

Lastly, "Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in Southeast Asia" by Laura van Wass is an exhaustive study of the issue of statelessness in all ASEAN countries. It discusses international human rights obligations as well as the domestic laws of the various countries related to statelessness. There is a critical examination of the countries' experiences to reduce and limit statelessness through efforts at birth registrations, verification and confirmation and citizenship campaigns amongst others. The paper proposes a strong framework within which countries can tackle the issue with greater efforts made towards ensuring that the identification, prevention and reduction of statelessness and the protection of the stateless is the foundation of future policy and legislative developments.

Moving Forward

There is a wealth of experience and knowledge in the field of human rights, peace and conflict to be found in Southeast Asia. It is submitted that the broad yet in-depth selection of papers in this book is reflective of that. The spaces are expanding in the region and for the first time the ASEAN member States have acknowledged formally in their Charter the need to promote and protect human rights. Article 1(7) of the Charter states that one of the purposes of ASEAN is:

> **To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN**

It is up to scholars, researchers and activists in the field of human rights, peace and conflict to continue pushing the agenda so that whatever momentum that can be found in the region is maintained. It is hoped that the work of SEAHRN, including this collection of papers, will be a step in that direction.

ENDNOTES

1 Association of Southeast Asian Nations(ASEAN), Roadmap for an ASEAN Community 2009-2015, ASEAN Secretariat, Jakarta, 2009, p. 5.
2 Ibid, p.6.

1

UNIVERSALITY AND PARTICULARITIES OF HUMAN RIGHTS

UNIVERSALITY AND PARTICULARITY OF HUMAN RIGHTS: A VIETNAMESE BUDDHIST VIEWPOINT

Vo Van Ai

The debate on universality and particularity of human rights in Southeast Asia is overshadowed by the "Asian Values" premise which contends that human rights are not universal, but "Western-imposed" or contingent on national cultural and religious particularities. Taking Vietnam as a starting point, the author argues that human rights are a fundamental and an ancient feature of Asian culture, rooted in a cultural heritage many thousands of years old

The debate on universality and particularity of human rights inevitably raises the spectre of "Asian values" – the concept advanced by a group of Southeast Asian leaders in the 1990s and formally enshrined in the "Bangkok Declaration" to the UN World Conference on Human Rights in 1993. The concept collapsed after a financial crisis in 1997 caused Southeast Asia's economic bubble to burst; but it still haunts international *fora,* generally as a justification for escaping international human rights commitments. This paper considers this argument from a Vietnamese perspective, examining both official and popular perceptions of human rights, the conflicting imperatives between the official government human rights discourse and internal policies, and the relevance of the cultural heritage – especially Buddhism – in the development of a contemporary, dynamic human rights culture in Vietnam and Southeast Asia in general.

1. Universality vs. Particularity of Human Rights

When considering universality and particularity of human rights, two false premises must be exposed. Firstly, that recognizing the particularity of human rights justifies its derogation to internationally-recognized human rights standards and norms. In fact, the 1948 United Nations Universal Declaration on Human Rights (UDHR) enshrines a set of political, social, cultural and economic rights that are both universal and indivisible, and any State acceding to UN instruments has a binding legal obligation not only to uphold and promote these rights, but also to incorporate their provisions into domestic law. Ironically, many of the States that most vocally challenge the universality of human rights today are signatories of UN human rights covenants. Vietnam, for example, has acceded to seven core UN human rights treaties, yet it continues to publicly reject universal principles and declares that it has its own particular concept of human rights.

The second false premise is that human rights are a "Western concept" imposed from the outside and used as "the Trojan horse to insert Western cultural power into non-Western contexts" as Monshipour, *et al* (2003) have observed.[1] On the contrary, I believe that human rights are an ancient feature of Asian culture, rooted in a cultural heritage many thousands of years old. In Vietnam, as this paper will examine, Confucianism and Buddhism are the two pillars of this original human rights concept, which was incorporated into Vietnamese laws and daily life from a very early date.

2. The Rise and Fall of Asian Values

Articulated principally by ASEAN leaders such as Prime Minister Mahathir Mohamad of Malaysia and Lee Kuan Yew of Singapore, and supported by countries such as the Philippines, Indonesia, China, Burma and Vietnam, the "Asian values" premise contended that Asians do not aspire to individual freedoms like people in the West; that Asians traditionally place society above self, family, clan or dynasty; that they value duties as opposed to rights, prosperity more than freedom, single party rule over pluralism. Singapore, with its high income rate and lack of public contestation, was put forward as proof that Asians accept authoritarian rule because it is the key to economic success. In fact, for the fast-growing economies of the "Asian tigers", the values argument was a way of challenging what they perceived to be Western political and economic hegemony, and asserting their independence.

Vietnam entered the "Asian values" debate at the 1993 Bangkok Regional Preparatory Meeting to the UN World Conference on Human Rights. Although it had formally accepted the principles of universality by acceding to UN human rights instruments such as the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) since 1982, Vietnam's delegation nevertheless stated at Bangkok that *"there exists no ready-to-serve formula for human rights that can be imported or, worse still, imposed successfully from outside"*. Along with 49 Asian countries, Vietnam signed

the Bangkok Declaration which emphasized the principles of *"non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure"* and stressed the *"significance of national and regional particularities and various historical, cultural and religious backgrounds"*.

Implicitly, the Declaration's signatories demanded for a re-drafting of the UDHR to accommodate the Asian exception to universal rule.

Vietnam's adherence to the "Asian values" concept reflects a paradox, to say the least. Whilst Vietnam denounces the incompatibility of "Western-imposed" human rights with Vietnamese cultural traditions, its own political system is based on a fundamentally Western ideology – Marxism-Leninism - to the exclusion of all other forms of political expression or thought. Indeed, the monopoly of this doctrine, imported and completely self-imposed, is enshrined in Vietnam's 1992 Constitution: "*The Vietnamese Communist Party, acting upon the Marxist-Leninist doctrine and Ho Chi Minh thought, is the force leading the State and society"*, (Article 4).

Although the Bangkok Declaration was the first time Vietnam used cultural relativism as a conceptual argument to challenge the West, the Government has long held its own perception of human rights which differs markedly from the universal view.

3. Human Rights and Independence

The idea of human rights was introduced to Vietnam at the beginning of the 20th century, initially by way of the French, who initiated Vietnamese intellectuals to the works of Voltaire, Montesquieu and Jean-Jacques Rousseau, to the 1789 Declaration of the Rights of Man and the Citizen, and later through translations of Western thinking published in China and Japan. Perceived as a means of emancipating the individual, human rights became a central theme in the Vietnamese movement for independence from French colonial rule in the 1910-20s. The first Vietnamese intellectuals to seriously examine this concept were Phan Boi Chau and Phan Chu Trinh, both of whom advocated *"the right to life, freedom and human rights for the Vietnamese people"*, although they differed on the methods by which this should be achieved. Phan Chu Trinh adopted a non-violent, legalist position, contending that non-violent advocacy within French colonial structures could bring about human rights through a process of education and reform. Phan Boi Chau chose the path of resistance, firmly convinced that human rights could never be achieved under the French colonialists' obscurantist policies which reduced the Vietnamese people to a state where they *"have ears but are forbidden to hear, have eyes but are forbidden to see, have arms and legs but are forbidden to move, have minds but are forbidden to think."*[2] His vision of human rights was universal, and he believed that one day *"human rights will rise like a golden sun, flooding the world with light"*.

Inspired by this example, many Vietnamese patriots adopted the human rights discourse in the 1930s to denounce political repression under the colonial regime. Articles calling for civil and political rights such as press freedom, worker rights and the right to set up trade unions were published in independent newspapers such as *Tiêng Dan* (The People's Voice), *Tiêng Chuong Re* (The Cracked Bell), *Dân Chung* (The People) in Central and Southern Vietnam. A particularly forceful Petition denouncing the inhuman detention conditions and calling for the release of political prisoners was addressed to the French Overseas Territories' Inquiry Commission by a prominent revolutionary figure, Huynh Thuc Khang in 1937.[3]

The Vietnamese Communists also adopted the discourse of human rights during this period, but primarily as a weapon to attack the French colonialists or to attract popular support for the international communist cause. Their prime objective was the establishment of a communist state, as can be seen by the peasants' demonstrations in Nghe An and Ha Tinh provinces in 1930-31 which were portrayed as the "Nghe Tinh Soviets".[4] Ideologically, the Vietnamese Communists rejected the idea that human rights belong to all people on the basis of human nature. They believed that rights were contingent on the class background, political opinions and revolutionary contribution of each individual, and that they reflected the objective economic and social conditions of each society.

As Marxists, they considered civil and political rights as *"bourgeois"*. As pragmatists, they perceived human rights in general as cumbersome impediments. The people's ultimate right, in the Vietnamese communists' view, was the right to national independence. Consequently, the establishment of an independent communist state became synonymous to the fulfillment of human rights.

This concept is enshrined in Ho Chi Minh's "Declaration of Independence" of the Democratic Republic of Vietnam pronounced on September 2nd 1945 which opens with the phrase from the 1776 American Declaration of Independence "All men are created equal..." and continues: *"if we enlarge the sphere of our thoughts, this statement conveys another meaning: All peoples on the earth are equal from birth, all peoples have the right to live, to be happy and free"*.

An article in the official *Tap Chi Công San* (Communist Review) on *"The Declaration of Independence and the problem of Human Rights"* analyses the key importance of this statement in the Vietnamese Communists' perspective:

> *"By "enlarging the sphere of thought" in such an original way, Ho Chi Minh established a totally logical and fitting link between individual rights and the rights of all peoples. Since individual rights are self-evident and natural, thence peoples' rights are also natural. From there, He (sic) concluded that all imperialist forces aggressing or encroaching upon Vietnam are acting against nature and violating human rights as defined by the American Declaration of Independence and*

the French Declaration of the Rights of Man. [...] In regards to Vietnam, by establishing the parity between individual rights and peoples' rights as an irrefutable truth, Ho Chi Minh made an even more positive affirmation: that the creation of the Democratic Republic of Vietnam is self-evident and natural, for it emerges from the principles of human rights, and is approved of by history." [5]

Thus, the core of the Vietnamese Communists' human rights concept consists in the belief that the establishment of the Democratic Republic of Vietnam (now the Socialist Republic of Vietnam, since reunification with the South in 1976), under the leadership of the Vietnamese Communist Party (VCP) is in itself the fulfillment of individual human rights. Consequently, all those who disagree with the Communist doctrine are violating the people's rights. This is the key argument for the legitimacy of the Communist Party rule, and it justifies the government's measures to suppress criticism and debate on human rights and democratic reform.

This concept is also reflected in Vietnam's legal framework. Although four different Constitutions have been adopted since 1946 incorporating various guarantees in the domain of human rights, the official legal journal *Luat Hoc* (Jurisprudence) commented that *"each constitution... is but the incarnation of the Party line and policies in a specific historical period, satisfies the needs of that stage, and must be suitable for the latter."* [6]

4. Human Rights in Vietnam: The Official Discourse

When North and South Vietnam were united as the Socialist Republic of Vietnam on 2 July 1976 there was no "debate" on human rights, in the sense of an exchange of ideas. Official discussion was no longer necessary, since the Communist Party considered that the Vietnamese people were now free from foreign aggression and had thus achieved their basic rights. Unofficial discussion was prohibited. In North Vietnam, virtually all discussion of rights had been silenced during the post-1954 period with the repression of the *Nhan Van - Giai Pham* (Humanism - Belles Lettres), a movement for freedom of expression led by prominent writers and artists which, although similar to the Chinese "Hundred Flowers" movement, was a spontaneous initiative on the part of writers and intellectuals, not a campaign orchestrated by the Party like its Chinese counterpart.[7] Debate within the Communist Party itself was further curtailed in Vietnam in the 1960s, with the arrest of hundreds of Communist Party members accused of "revisionism", including many top-ranking officers from the People's Army, government officials, editors of official newspapers and even Ho Chi Minh's personal secretary, Vu Dinh Huynh. Some of these men were to spend the next 20 years in prison and under house arrest for questioning the orthodox Party line.[8]

New human rights language was incorporated into the official discourse during the late 1980s, when Vietnam embarked on its transition towards a "Socialist-orientated market economy" under the policy of *"doi moi"*, and revised aspects of its legal framework. The

revised Criminal Code (1985) and Criminal Procedures Code (1989) incorporated new guarantees such as the right to presumed innocence and the compensation of victims. Nevertheless, far from providing increased human rights protection, the new legislation presented a real set-back to human rights, codifying the suppression of political and religious dissent under a whole chapter of *"national security"* offences, many of which are punishable with the death penalty. With the introduction of the new Criminal Code, prisoners of conscience became common criminals, thus enabling Vietnam to declare before the UN Commission on Human Rights in Geneva that *"there are no political prisoners in Vietnam, only people who violate the law".*

5. "Hostile forces" and the "Peaceful evolution"

Despite Vietnam's accession to UN human rights instruments and its adoption of legislation on the harmonization of international provisions with domestic law, a rigid attitude on human rights continues to prevail. Civil society calls for progress are equated with what Vietnam calls the *"peaceful evolution"* – an alleged internationally-supported conspiracy to erode the Party's authority by attacking it from within.

A new human rights magazine published in Hanoi in June 2010 illustrates this mindset. At its launch in Hanoi, Foreign Minister Pham Gia Khiem declared that the magazine's purpose was to *"disseminate the Communist Party and state's policies on human rights"* and help to fight "*erroneous and hostile allegations"* on Vietnam's human rights performance. One of its contributors, Deputy Minister of Public Security Nguyen Van Huong, explained the government's approach in an article entitled *"For a correct understanding of Vietnam's human rights."* [9]

> *"Some [Vietnamese] people cannot recognise our achievements. They copy the thinking of foreign countries and call themselves "opposition". They even connive with hostile, reactionary forces to overthrow the regime… We deeply respect religions and create favourable conditions for their development, but we will resolutely prevent any plots to make use of religion to engage in political activities and sabotage the people's unity… We struggle to protect accepted human rights norms, but we cannot accept "Western-style" democracy or human rights".*

The magazine takes a similar line to Vietnam's first "White Paper" on human rights published in 2005. After listing the government's achievements in human rights promotion, the White Paper devotes a whole chapter to "False allegations on human rights", denouncing with very strong rhetoric the *"hostile forces" "hiding under the mask of democracy and human rights"* who *"make fabrications against Vietnam on issues related to human rights, democracy, religions and ethnicity."* [10]

One striking example of Vietnam's intolerance of any dialogue and discussion on human rights is the fact that I was unable to travel to Bangkok to present this paper myself at a human rights conference. Under pressure from the Vietnamese government, the Royal

Thai Embassy in Paris announced that I would be granted a visa to attend this Conference only on condition that my paper did not mention Vietnam.

This lack of debate and consultation cannot be justified as a feature of Vietnam's cultural particularity. On the contrary, throughout our history, Vietnamese kings often consulted the population in times of need. In 1283, for example, when Vietnam was threatened with invasion by the powerful army of the Yuan Dynasty led by Khublai Khan, King Tran Nhan Tong summoned the elders from all over the country to a conference at the Dien Hong Palace. Knowing the terrible sufferings that the war would incur, he asked the people if they wanted to fight or surrender. All said they wanted to fight. The Vietnamese successfully defeated the 500,000-strong Mongolian army, and the "Dien Hong Conference" became a symbol of Vietnamese democracy and the people's determination to fight for freedom and independence.

6. The Emergence of an Alternative Human Rights Discourse

Increasingly, however, scholars and academics are publicly challenging the official human rights discourse in Vietnam. At a recent conference in Hanoi, Professor Dao Tri Uc, former Deputy Chairman and Secretary-General of the Vietnam Union of Lawyers called on the authorities to review their perception of human rights:

> *"Human rights and human rights institutions should not be perceived just as a means of countering attacks [on Vietnam's human rights performance]. Human rights should be the philosophical foundation of Vietnam's development, the most important factor in our development doctrines".*

Human rights specialist Nghiem Kim Hoa supported this view:

> *"Today, we treat human rights as an aspect of foreign policy. But if we realise that human rights truly contribute to peace and national development, we will understand that human rights are essentially an internal affair… If we remain suspicious and defensive about human rights, we will never develop a human rights culture in Vietnam."* [11]

Unofficial calls for human rights are becoming increasingly vocal through new media such as the Internet, specifically via blogsites. Since Vietnam opened its economy, use of the Internet had sky-rocketed, with an estimated 25 million of Vietnam's 89-million population regularly surfing the World Wide Web. Blogsites have opened up new horizons for communication, social exchange and on-line journalism. What is new is that bloggers are not necessarily dissidents or human rights activists, but a whole generation of citizens who are bypassing the official media to seek information or engage in a debate that is impossible in the State-controlled press.

7. The Foundations of "Vietnamese Values": Buddhism and Confucianism

Although I find no foundation in Vietnam's theory of cultural *exceptionalism,* I do believe that Vietnam has its own traditional and original concept of human rights - based more on ethics than on law - which reinforces, rather than detracts, from the universal rule. Indeed, individual rights and freedoms are a fundamental and ancient feature of Vietnamese culture, rooted in a cultural heritage over four thousand years old. The two pillars of this concept are Buddhism, which reached Vietnam more than 20 centuries ago, and Confucianism, which the Buddhists integrated into the State apparatus from the Eleventh Century AD onwards.

Confucianism has many different schools, but all are united in the belief that the universe is governed by three driving forces - Heaven, Earth and Humankind - and that Humankind is the central pivot of all. As Mencius said (ca. 380-289 BC), *"The people are of paramount importance, second comes the State and last comes the Sovereign, who is least important of all"*. On a similar basis to the "Western" concept of human rights, Confucianism recognises the legitimate right to resist oppression, and to overthrow the ruler if he is unjust. To use the image of Xunzi (ca. 340-305 BC), *"Water can keep the boat afloat, but can also overturn it"*.

But it is undoubtedly Buddhism, introduced into Vietnam from India in the First Century AD, and adhered to by three-quarters of the population today, which inspired the culture of liberty, social justice and tolerance inherent in Vietnamese traditions, and made the most important contribution to the development of Vietnamese civilization and the foundation of an independent political system in Vietnam.

The Buddhist concept of human rights dates back 2,500 years ago, when Sakyamuni Buddha revolutionized the thinking of his time by defying the caste system and demanding the integration of pariahs (untouchables) and women into the clergy, becoming one of the world's first advocates of equality and gender rights.

"There can be no caste system, no discrimination between beings whose blood is identically red, and whose every drop of sweat is tinged with salt". Although Buddhism does not enshrine individualism as it is perceived in the West, but rather *"Vo Nga"*, the Non-self, or interdependence, there is perhaps no higher tribute to the inherent dignity, equality and inalienable rights of the individual than that expressed by Sakyamuni Buddha when he declared, twenty-five centuries before the UDHR that : *"Each person is the Buddha to be"*. This means that every individual is endowed with Buddhahood, the potential ability to extinguish suffering and injustice for the liberation of humankind, and with the capacity to overcome every imaginable form of slavery, oppression and ignorance. Thus, the Buddhist vision of human rights, based on the mutually-reinforcing precepts of *Karuna* (Compassion, Love) and *Prajna* (Absolute Knowledge), not only defines the framework for the protection of human rights, but re-examines the whole question of mankind's place at the centre of society and within the universe.

Vietnamese Buddhism is deeply impregnated with this spirit of freedom and social justice. In fact it was the influence of Buddhism that ensured the survival of Vietnamese civilization and formed the basis of Vietnamese cultural identity. Whereas all the other *"Bach Viet"* (Hundred Viet) tribes from the provinces of Guangdong and Guangxi were absorbed by China, only the Viet people in Giao Châu (modern day Vietnam) survived, preserving a unity of thinking, language and culture from the origins of their history until today. The profound influence of Buddhism on Vietnamese thinking and cultural expression also stems from the fact that Buddhism was introduced into Vietnam through the oral narration of Buddhist *"Jataka"*, simple tales of the Buddha's earlier lives, rather than through learned Buddhist sutras accessible only to the intelligentsia. Thus, Buddhist thinking permeated Vietnamese society from the grass-roots upwards, rather than being imposed from above.

From the very outset, Vietnamese Buddhism developed a tradition of activism and a commitment to social justice unique in Southeast Asia. Predominantly following the Mahayana School, which stresses the link between self-enlightenment and the commitment to emancipate one's fellows from ignorance and injustice, Vietnamese Buddhists practice "engaged Buddhism", actively participating in all aspects of the nation's social and political life. Early Vietnamese Buddhist sutras such as the *"Luc Dô Tâp Kinh"* (Book of Six Ways of Liberation) dating back to the Second Century AD taught these principles of individual engagement : *"[Each one must say to him/herself], if the people are unhappy, it is my own fault",* or *"When the Boddhisattva*[12] *hears the cries of his people, he must set aside his own troubles and throw himself into the combat against tyranny, whereby saving the people from suffering"*. The sutra also articulated the Buddhist vision of an ideal society which defines extremely modern concepts such as the protection of the environment, social equality, promotion of universal education, the abolition of decadent literature, the practice of non-violence and clemency in all affairs of State[13].

The Buddhist spirit of liberation defined in these early sutras encompasses the combat against obscurantism - (liberation from ignorance), the combat for social justice (liberation from suffering) and the struggle for national independence (liberation from foreign oppression), in brief, the liberation of the individual, the community and the nation.

Inspired with this spirit, the Vietnamese raised innumerable resistance armies to free their homeland from Chinese domination for over more than nine centuries. Moreover, the Buddhist concept of equality and social justice permeated all organizational levels of the State, to an extent that took the Chinese invaders by surprise. Mouzi, a Chinese Taoist and Confucianist who came to Giao Châu (Vietnam) in the late Second Century AD was so impressed by Vietnamese civilization that he became a Buddhist and wrote the *"Ly Hoac Luan"* (Doubts Raised, 198 AD), a 37-chapter critique of Confucianism and Taoist ethics in which he exclaimed: *"Perhaps the Han nation is not the centre of the universe after all!"*. Moreover, the annals of Chinese

history relate that in 43 AD, when China invaded Vietnam, the Vietnamese already had an advanced legal system which *"differed in ten points from the system of Chinese law."* [14]

Throughout the whole period of Chinese domination, Zen Buddhist monks played a prominent role in resistance movements and contributed largely to the foundation of the first independent Vietnamese State in the Tenth Century AD. In the Eleventh and Thirteenth Centuries, Buddhist monarchs of the Ly and Tran dynasties heralded a golden age in which politics, culture, diplomacy, science and the arts flourished like never before. Under the Lê dynasty in the XV century, the outstanding Hong Duc Penal Code, or Lê Code[15] was drawn up which codified modern concepts in advance of contemporary European equivalents. In his preface to the English translation of the Lê Code, Oliver Oldman states:

> *"We see in Lê Dynasty Vietnam's endeavor centuries ago a peculiarly Vietnamese effort at building a strong nation-state and protecting legitimate private rights through a progressive legal system with many functional equivalents to contemporary Western legal concepts. We see in Lê law a rather modern legal order, in which there were notions and practices equivalent to present-day Western legal standards, such as the protection of civil liability compensation (including punitive damages) for the victims and the guarantees of procedural due process for the defendants in criminal law, the larger role of public policy in favor of the economically weak in contract law, the consistent and explicit provision of damages payments for all kinds of torts against property, person and reputation, the fair distribution and protection of property ownership, the equality of men and women in civil and property rights, and last but not least, the popularization and standardization of legal forms used among the population".*[16]

Article 3 of the Code gives "Eight special considerations" which allow certain categories of people to apply for reductions of their penalties, including *nghi hien* (people of superior moral virtue), *nghi nang* (people of great talent) and *nghi can* (officials who display zealous service to the State).

Article 16 provides for redemption of penalties for people aged 70 years or older, and fifteen or younger in cases of lesser crimes; people aged 80 or older and ten years or younger in cases of serious crimes may submit a petition to the king; people aged 90 or older, and seven or younger will not be punished, even if they are guilty of a crime punishable by death. In many aspects, the fairness and leniency of the 15th Century Lê Code provided greater legal protection than the vaguely-defined provisions of the present-day Penal Code in Vietnam.

The Buddhist spirit of liberation was also the driving force of the Vietnamese independence movement against French colonial rule. An important Buddhist "Renaissance" movement in the 1920-30s launched vast educational programmes to counteract the colonialists' obscurantist policies, and although Buddhists sought no political role, monks, nuns and followers participated actively in national resistance movements after 1945. Subsequently,

although Buddhism was virtually suppressed in North Vietnam under the government of Ho Chi Minh[17], it continued to exercise an important influence in the South, especially after the overthrow of the Ngo Dinh Diem regime in 1963, stimulating the country's spiritual, cultural, social and educational life. The Buddhists' independent stance was especially salient during the Vietnam war, when Buddhist monks massively opposed war and campaigned for a peace solution that would win political independence for Vietnam and preserve the country from becoming a satellite of either the socialist or capitalist blocs. After the end of the war and the reunification of Vietnam under the Communist regime, Buddhists of the Unified Buddhist Church of Vietnam (UBCV) engaged in the movement for human rights, despite a ban on its activities and the detention and harassment of its leaders and followers.

8. Panca sila – a Buddhist Manifesto for Human Rights

This tradition of engagement which inspires Vietnamese Buddhism and defines its particularity stems from its original interpretation of a fundamental Buddhist teaching called the Five Precepts, or *Panca sila*. The Five Precepts, which all Buddhists pledge to observe, include the vow to refrain from killing (*destroying life*); from stealing (*taking what is not offered*); from sexual misconduct (*rape, exploitation etc*); from false speech (*lying, harsh words, idle gossip*) and from using intoxicants (*which lead to heedlessness*).

For most Buddhists, observing the Five Precepts is an act of abstinence. But Vietnamese Buddhism demands a positive interpretation. Instead of individually refraining from committing these evils, Buddhists engage actively to prevent their development in society, thus transforming compassion into a dynamic force for the liberation of humankind.

This positive interpretation of the Five Precepts is the basis of the Buddhists' engagement in the movement for human rights in Vietnam. It is also the crux of the conflict between the UBCV and the Vietnamese Communist regime. UBCV Buddhists vow not to kill, but beyond this promise, they engage to stop the killing. If the perpetrator of killing is not an individual, but a regime which arbitrary kills its citizens, then Buddhists will rise up against state repression.

They promise not to steal, but if the government steals the people's lands or deprives them of their freedom, they will stand up to defend their rights. Buddhists pledge to refrain from sexual misconduct, but when corrupt Party officials and policemen organize human trafficking for sexual exploitation, they challenge the government to cease such abuses. Buddhists vow not to lie, but when the government publishes false information, stifles free speech, muzzles the media, and imprisons citizens for expressing their opinions, UBCV Buddhists engage in the battle for freedom of expression and the press.

The Buddhist vision of human rights also grows from the "Six Harmonies" (*Luc Hoa*), or principles for maintaining harmony and understanding within a group. Practiced by

the Sangha (community of monks and nuns) and by lay-followers, the Six Harmonies are: *"Living together as a group; speaking without conflict; sharing the same viewpoint (reaching consensus); observing the same precepts; experiencing Joy in the Dharma; sharing benefits (material possessions). The Six Harmonies teach the basic rules of democratic living, based on the practice of mutual respect. This "democracy of sharing" is complimentary, not contradictory, with the Western democratic concepts based on universal suffrage and the individual voice.*

9. Contradictions of the Particularity Premise in Vietnam

While the Buddhist vision of human rights seeks genuinely to be universal, striving for the liberation of Asian societies from authoritarian rule and the establishment of a dynamic human rights culture for the 21st century, the Vietnamese government is turning back the clock. Just as French colonialists relied on alcohol, opium, and superstition to maintain the people in ignorance, Vietnam is now reviving antiquated rites, festivals and folklore to assuage the people's spiritual needs and maintain political control. At the same time, it is developing State-sponsored religious bodies whose activities are strictly confined to the celebration of prayers, meditation, fasting, even fortune telling, thus supplanting freedom of religion with the minimal right to freedom of worship and reducing religion to the practice of quasi-superstitious rites.

The long-term implications of this policy are extremely serious, and they lie at the core of the current discussion on the universality and particularity of human rights in Vietnam today. By emptying the great religions of their moral and spiritual content and preventing them from contributing their immense potential to the development of a vibrant, stable and prosperous society, Vietnam is stifling the very traditional and cultural values that make up our nation's particularity.

These elements of our cultural heritage are not impediments to progress. On the contrary, they can be building blocks for a culture of peace, harmony and understanding, both inside Vietnam's borders and beyond.

ENDNOTES

[1] Mahmood Monshipouri et al. *Constructing Human Rights in the Age of Globalisation,* M.E. Sharpe, Armonk, 2003.

[2] Phan Bôi Châu, 1923, *"Thiên Hô, Dê Hô"*. Hanoi, 1978: Social Sciences Publishing House.

[3] Huynh Thuc Khang, 9.11.1937, Petition to the French Overseas Territories' Inquiry Commission, Boite 31, Fonds Commission Gernut, Centre des Archives Nationales d'OutreMer, Aix en Provence, France.

[4] In 1930, peasants uprisings against the oppressive policies of the French colonialist broke out in Nghe An and Ha Tinh Provinces. The Vietnamese Communists appealed for help from the French Communist Party to transform this uprising into a movement for Com munism in Indochina. Six propaganda leaflets in Vietnamese with a print-run of 25,000 copies each were printed by the French Communist Party in Paris in 1931 and sent to Viet Nam to support the Communist movement. See *Nhân Dân* (The People), Hanoi, 14.9.1980.

[5] Nghiêm Dinh Vy - Lê Kim Hai, September 1993. *The Declaration of Independence and the problem of Human Rights*, Tap Chi Công San, Hanoi.

[6] Nguyen Dinh Loc,1985. *Luât Hoc* 4, Hanoi.

[7] See Vo Van Ai, p. 8-13, preface to "*Un Excommunié* : Hanoi 1954-1991, *Procès d'un Intellectuel"* by Nguyên Manh Tuong, *Quê Me Editions,* Paris 1992 for a more detailed analysis of this movement, which lasted from 1955-1958. After its suppression, over 500 writers, poets, artists and intellectuals were subjected to reeducation and forced to write self-criticisms. Over one hundred were imprisoned or sent to New Economic Zones, and remained forbidden to write for the following thirty years, e.g. Trân Dân, Phan Khôi, Hoàng Câm, Lê Dat, Phùng Quan, Trân Duc Thao, Dao Duy Anh, Huu Loan, Nguyên Manh Tuong... See also this book of memoirs by Nguyen Manh Tuong, written (in French) in Hanoi and sent clandestinely to *Quê Me* for publication in France, in which this brilliant lawyer describes his own fall from grace and the subsequent thirty years spent with his family in poverty and solitude, ostracised from society and forbidden to write or work.

[8] For details on top-ranking cadres and intellectuals arrested in the revisionist purges, see *"Report to the 52nd Session of the UN Human Rights Commission in Geneva"*, FIDH and Vietnam Committee on Human Rights, Paris, March 1996, and *Quê Me magazine,* Paris, No 136, July 1996.

[9] Nguyen Van Huong, Deputy Minister of Public Security, *For a correct understanding of Human Rights in Vietnam*. Tap Chi Nhan Quyen Viet Nam, (Vietnam Human Rights Magazine) No 1. June 2010, Hanoi.

[10] *The book: Achievements in Protecting and Promoting Human Rights in Vietnam.* Hanoi, August 2005: Press and Information Department - Vietnam Ministry of Foreign Affairs. Chapter IV on "False allegations on human rights" specifically accuses the Vietnam Committee on Human Rights and this article's author of *"taking advantage"* of his position in the FIDH to *"tarnish the image"* of Vietnam in the United Nations.

[11] *State apparatus: human rights, not power sharing,* report on a Conference on the need for a national human rights mechanism in Vietnam, 21.12.2009. *VietnamNet, [online]* Available at <http://vietnamnet.vn/chinhtri/200912>.

[12] Boddhisattva: literally an "enlightened being", i.e. a being who seeks Enlightenment not only for himself, but for others.

[13] The Book of Six Ways of Liberation, Luc Dô Tâp Kinh, II Century AD: *"The State will not implement warring policies, not imprison unduly, the seasons will be respected, the nation will be strong and the people prosperous, people will have no grievances, no-one will read spurious literature, the six precepts (of Buddhism for harmonious living) will be followed by one and all"*.

[14] The History of Ma Yuan, The Books of the Late Han Dynasty, Book 54.

[15] Nguyên Ngoc Huy, Ta Vạn Tai and Trân Van Liêm, The Lê Code : *Law in traditional Viet Nam*. Volume I, Book I. Athens, l988: Ohio University Press.

[16] Oliver Oldman, Director of East Asian Legal Studies, Harvard Law School, Page VIII, Vol.1, Preface to the English translation of *"The Lê Code : Law in traditional Viet Nam"* (as above).

[17] Venerable Thich Quang Do wrote a detailed account of religious repression in North Viet Nam in *"Nhân Dinh vê nhung sai lâm tai hai cua Dang Công san Viêt Nam dôi voi Dân tôc và Phât giao"* ("Observations on the grave offences committed by the Vietnamese Communist Party against the people and against Buddhism"), *Quê Me Editions,* Paris, February 1995. An English translation of this book is in available on request.

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2

HUMAN RIGHTS, FREEDOMS AND PEOPLE POWER

WHEN RIGHTS ENCOUNTER REPRESSION: LESSONS FROM "PEOPLE POWER" MOVEMENTS IN SOUTHEAST ASIA

Emily Hong

Human rights scholars have examined how activists use persuasion, socialization, and pressure to gain leverage over much more powerful organizations and governments. Such pressure-based methods become less effective when dealing with governments, such as Association of Southeast Asian Nations (ASEAN) member states, that are less susceptible to normative pressures. Operating in a largely separate realm, scholars of nonviolent conflict have studied the dynamics of civil resistance through boycotts, strikes, and other methods of protest and non-cooperation. This paper argues that the most significant strides towards the realization of human rights in "tough" cases in Southeast Asia are a result not from activists shaming power holders into granting rights, but from the realization of the grassroots that they are both rights-holders and power-holders, who have the ability to undermine sources of opponent power in order to reach their goals.

Drawing upon the examples of the People's Power movement in the Philippines, East Timor's independence movement, and Burma's yet unfinished movement for democracy and ethnic rights, this paper explores the basic theories foundational to the study of nonviolent conflict including pillars of support, loyalty shifts, and the backfire of repression. It also discusses the strengths and weaknesses of human rights and nonviolent action approaches, and areas in which combining aspects of both approaches can offer insight. Finally, it explores three concrete areas which may offer profound implications for human rights activists in diverse struggles.

1. Human Rights at an Impasse: The Need for New Strategies and Tactics

Within just the last few years, we have seen some momentous gains with regard to human rights in Southeast Asia—an ASEAN Charter which explicitly endorses human rights norms, a regional commission on human rights, and on a national level—governments in the region actively building national human rights institutions and loudly campaigning for seats on the UN Human Rights Council. These "wins" for human rights are a result of what have become the go-to tactics for human rights in most of the world—(1) advocating for policies and mechanisms that promote and protect human rights norms, (2) monitoring government compliance, and (3) "naming and shaming" governments when these rights are violated (Johnson, 2004: 7).

We should not understate the victories that have been achieved through these strategies of persuasion and pressure. But, for human rights advocates around the world, it has become increasingly clear that such methods are not, in and of themselves, sufficient to solve the "tough cases" of human rights. For those of us working in Southeast Asia, we know this frustration first-hand. Here we are faced with some of the worst governmental perpetrators of human rights who, as members of a regional bloc that includes authoritarian regimes, one-party states, and repressive democracies, are also least susceptible to normative pressures based on the logic of human rights.

In some cases, these governments may even "talk the talk" when it comes to human rights, but they are getting rather skilled at a sort of two-faced approach in which they rhetorically campaign for human rights on the one hand, and readily violate rights on the other. In other cases—such as the explicitly authoritarian Burmese junta— governments are hesitant to even employ the language of human rights, which makes it even more challenging to see results from these now conventional pressure tactics.

Last year, a satirical news outlet called *Not the Nation* published a humorous article titled "Burmese Junta Overthrown by Online Petition." At the time, I was working for the Burmese democracy movement in support of their international advocacy, and this article hit a bit too close to home.

The article quoted Senior General Than Shwe at the imaginary press conference announcing his peaceful surrender of power due the pressure brought to bear by the mass signatures collected in the "strongly-worded petition." Sometimes satire gets at truth better than the facts themselves.

Letter-writing campaigns were, when first introduced, quite powerful; and sometimes they still prove to be a useful tactic. But over the years, governments have adapted to these tactics, rendering them less and less forceful. The question is, can we simply throw

our hands up and blame the seemingly insurmountable impasse on the tough conditions in the region—namely the undemocratic and unresponsive nature of governments?

In this paper, I argue that the most significant strides towards the realization of human rights in "tough" cases in the region are a result not from activists shaming power holders into granting rights, but from the realization of the grassroots that they are both rights-holders and power-holders, who have the ability not only to mobilize the normative framework of human rights but to wield people power to undermine and sever sources of opponent power in order to reach their goals. If we shift our rights-based perspective to include a power-based perspective that emphasizes innovative strategic and tactical thinking, I believe we may be on our way to overcoming some of the substantial obstacles we face in this work.

2. The Rift between Human Rights and Nonviolent Action

Human rights scholars, like their practitioner counterparts, also attribute change largely to persuasion, socialization and pressure. Political scientists, Keck and Sikkink, for example, who are known for their book on Transnational Activist Networks and the so-called "boomerang effect," argue that a combination of changing norms and targeted pressure often causes states to modify their human rights practices (Keck and Sikkink, 1998). I am a believer in the power of ideas, but as I mentioned earlier, we seem to have reached the upper limit on what norms and conventional pressure alone can accomplish in the region.

Operating in a largely separate realm, scholars of nonviolent conflict have studied the dynamics of civil resistance through boycotts, strikes, and other methods of protest and non-cooperation. They argue that such nonviolent struggles for human rights and democracy have achieved success not only through conversion (i.e. voluntary concessions on the part of the opponents), but more frequently through nonviolent coercion, or by forcing accommodation and even disintegration, on the basis of skillfully targeted noncooperation and defiance that has undermined the sources of prevailing power (Sharp, 2003). A study from Freedom House demonstrates that the power of nonviolent action goes beyond theory, and in fact, has been increasingly employed by people's movements around the world. The study shows that out of 67 democratic transitions in the last three decades, nonviolent civil resistance played a crucial role in 50 (Freedom House, 2005). Several of these transitions have taken place in Southeast Asia.

In this paper, I hope to demonstrate how scholars and practitioners of human rights would benefit from a serious examination of the literature on nonviolent conflict. In fact, in many ways, the strengths of each approach address the weakness of the other. Surprisingly, however, no scholars have yet brought these two strands of theory into conversation with one another in a systematic way. In consideration of the focus of this conference, I will begin with a brief explanation of what the theory of nonviolent action

brings to the table, and later discuss the strengths and weaknesses of each approach, and how we may consider bridging the divide.

3. Shifting our Thinking: From Rights Holders to Power Holders

The first perspectival shift when moving from a human rights approach to a nonviolent action approach is an analysis of power. This is not to say that human rights activists don't consider power—in fact we often talk about leverage in advocacy, and generally about "applying pressure," but rarely do we see advocates discuss where this power comes from or with which tactics it can be applied most strategically. Ultimately, what human rights practitioners share in common is a distinct idea of people as rights-holders, but not necessarily as power-holders.

For nonviolent action theorists, while ideas are important, they are made significant only when they leverage power. We may not always be able to change the heart of the oppressor, but we can certainly be more strategic in targeting their Achilles heel instead. The logic of nonviolent action assumes that people are stubborn—that they won't give in unless they have to.

Gene Sharp—who can probably be considered, without exaggeration, the "father" of the social scientific study of nonviolence—differed from his predecessors in one significant way. He approached nonviolent action not from a principled or moralistic perspective, as Gandhi did, but from a pragmatic viewpoint. This pragmatic perspective is perhaps the reason he is known as the "Machiavelli of nonviolence." Sharp explicated a theory of power which has become emblematic of the nonviolent action approach. This theory of power shows how, contrary to conventional beliefs, political change often occurs more effectively through non-institutional and nonviolent means than through the barrel of a gun.

In contrast to a monolithic view of state power that assumes power is imposed from above based on the threat of violence, Sharp's 'relational' view of power suggests that the strength, even of dictatorships is dependent on sources of power in society, which in turn comes from the cooperation of institutions and people. Without people and the institutions through which they work, rulers cannot collect taxes, enforce laws, print money, or even direct traffic.

3.1 Sources and Pillars of Support

There are two simple but useful concepts which help explain the nonviolent action theory of power. One is the "sources of power" from which power is derived in society. These include (1) authority of the ruler (2) human resources (3) skills and knowledge (4) material resources, such as financial resources and communication (5) intangible factors which induce people to obey, usually related to tradition, and (6) threatened or applied sanctions or punishments (Sharp, 2003). From a human rights perspective, we might assume that

the first source of power mentioned above—authority—is the most leveragable one, as the approach of norm setting, monitoring, and naming and shaming, aims to target the legitimacy of the ruling government. "Intangible factors" are also quite relevant, as human rights education and awareness campaigns can play a powerful role in empowering previously obedient and apathetic citizens to take action to address rights violations. A nonviolent action approach, while accounting for the importance of ideological factors, also shows the importance of other sources of more "hard" power, including human and material resources, skills and knowledge, and sanctions.

Another useful concept is Robert Helvey's "Pillars of Support." These are the institutions and sections of society which provide the rulers with continued sources of power (Sharp, 2005). Some examples include the police, military, educational system, religion, media, business community, and others (Popovic et al, 2008: 34-35). These "pillars of support" can provide support to the ruling government, or in some cases, to an opposition movement. Sometimes these pillars of support are propped up by institutions and resources outside of the country, a subject which I will discuss in further detail. Power-holders depend on the replenishment of such power, power which may or may not be refused by the people and institutions. This can leverage political power in significant ways (Sharp, 2003). In this sense, people power comes from the power of refusal. Actual or threatened non-cooperation, in many cases, is the most powerful weapon of resistance.

Gandhi knew this quite well when he said, "The British have not taken India from us; we have given it to them" (Gandhi, 1938). By this he meant that the power of the British Raj derived from the sources of power which Indians, most unknowingly, provided to the British through their consent and cooperation, by paying taxes, obeying laws, buying British products, and serving in the bureaucracy and military.

3.2 An Illustrative Example: People Power in the Philippines & Pillars of Regime Support

One example which clearly shows the importance of targeting the regime's pillars of support is the Philippine movement which managed to bring down Dictator Ferdinand Marcos through a so-called "People Power." In particular, it shows the effect of nonviolent tactics on loyalty shifts, in bringing those people and institutions which previously served as pillars of support to the regime, towards the support of the people's movement.

Any brief sketch of the People Power movement is sure to tell only a part of the story, but here I would like to briefly mention what human rights scholarship says about the role of human rights norms, before I discuss the movement's progression from a nonviolent action perspective. Anja Jetschke's case study in Risse, Ropp, and Sikkink's *The Power of Human Rights: International Norms and Domestic Change,* attributes human rights, almost to a surprising degree, in facilitating a change of power in the Philippines. The cry for human rights was mobilized first, significantly speaking, in the World Law Congress in 1977,

leading Dictator Marcos himself to pledge his irrevocable commitment to human rights (Jetschke, 1999:150). Since then, she argues, domestic political action became legitimated with reference to human rights. From church groups to the communist-affiliated "New People's Army," the opposition mobilized human rights rhetoric, in part due to its international salience, particularly under the Carter administration. After opposition leader Benigno Aquino Sr.'s assassination, human rights became the rallying cry for the democratic opposition, and according to Jetschke, was crucial in giving Aquino's widow Corazon Aquino legitimacy in her later contestation of presidential elections. The author herself acknowledges, however, that despite Marcos's adoption of human rights rhetoric, this had little impact on his human rights practices. As for the regime change brought about by the people's movement, human rights did indeed serve as a rallying cry, but it alone cannot explain the events as they unfolded.

I would argue that a narrow focus on the power of norms, legitimacy, and international powers only tells part of the story, and the development and impact of the People Power movement and its resulting impact can only be understood by looking at the underlying power structures, and how effectively the movement mobilized nonviolent tactics to target the regime's pillars of support.

Following the declaration of martial law, much of the opposition to Ferdinand Marcos was pushed underground, but armed groups, reformists, grassroots, and church groups pushed on with their political activities, which ranged from armed insurrection to nonviolent non-cooperation. But it was the assassination of Aquino in 1983 that united the previously divided opposition, and catalyzed the action of the previously passive middle and business classes, as well as the mainstream Catholic Church (Shock, 2004:74).

In an attempt to placate international and domestic criticism, Marcos called for snap presidential elections in 1986, confident in his ability either to win or rig them. The election, which was challenged by Aquino's widow, Corazon Aquino, was characterized by ballot stuffing, vote-buying, and the murder of 70 opposition workers (Paulson, 2003: 239-243). When Marcos claimed he had won, Aquino did not concede, but at a two-million strong rally instead proposed an intensive "people power" campaign of nonviolent civil disobedience. On the day of Marcos' proposed inauguration, she proposed the mass withdrawal of funds from crony-controlled banks, a boycott of the state and crony controlled media, a refusal to pay utility bills, and other such actions. Before this campaign was able to be implemented, however, the four-day Epifanio de los Santos Avenue (EDSA) Revolution took place.

A group of reformist Army officers led by Defense Minister Juan Ponce Enrile planned for a coup d'état to force Marcos out of office, but when their plans were discovered, Enrile and two mutinous battalions of soldiers took refuge inside two military camps. At a press conference, Enrile as well as the Vice Chief of Staff, Fidel Ramos, announced their resignations from Marcos's government, and their recognition of Corazon Aquino

as the legitimate winner. That same evening, Archbishop Jaime Cardinal Sin made a nationwide appeal to for people to go to the camps and protect the rebels. Within two days, the number of civilians, led by nuns and priests, grew to the hundreds of thousands, with unarmed protestors forming a human barricade between the rebels and the troops sent in by Marcos. Not only did this "people power" protect the rebel soldiers, but it also had a dramatic effect, and sparked the defection of military officers nationwide. Most significantly, the protestors maintained strict nonviolent discipline, and made gestures of friendship towards Marcos' soldiers instead of taunting them with violent words or actions. This played a significant role in preventing violent crackdown, as we can see from the refusal of soldiers to implement Marcos's orders to attack the camp with violent force. By the last day, on February 24, 90% if the armed forces had defected. Marcos attempted a "final suicide assault" against the camp, but the U.S. Embassy convinced him to call off the attack, instead offering him a chance to step down and leave the country. He left the next day, shortly after Corazon Aquino was inaugurated as President of the Philippines (Paulson, 2005: 243).

One common interpretation of the event is that its success was dependent on the military's revolt, but as the following words from General Fidel Ramos himself make clear—it was not a "civilian backed military revolt," but rather, a "military backed civilian revolt" (Zunes, 1994). He said, "We have no intention of surrendering inasmuch as it is the people's power protecting us. This certainly is a more powerful weapons system at our disposal. These people are unarmed. However, the power that they hold to support us is much more powerful than the hardware at Marcos' command" (General Fidel Ramos, quoted in Paulson, 2005). In other words, the success of the uprising was not due to the power or popularity of the mutinous generals, but rather the exceptionally organized nonviolent support provided by hundreds of thousands of unarmed civilians (Shock, 2005, 79).

The People Power movement in the Philippines exemplifies the potential power of nonviolent struggle, particularly the importance of pulling out from, not pushing into the opponent's pillars of support, and as a result, contributing to major loyalty shifts.

Following the assassination of Benigno Aquino, the opposition united in their struggle against Marcos, strategically targeting his sources of power, including his legitimacy domestically and internationally, and eventually his ability to mobilize even his own army. By sticking strictly to nonviolent methods and the normative force of human rights claims, the opposition was able to gain crucial third party support, first from the previously less vocal business community as well as the powerful Catholic Church, and eventually cause loyalty shifts within the military itself. Without the continued power drawn from his various "Pillars of Support," including the military, religious, and business communities, Marcos was unable to continue his hold onto power.

4. Bridging the Gap between Human Rights and Nonviolence

As illustrated by the Philippines case study, a theory of change focused solely on human rights norms tells only part of the story. Where human rights activists and scholars typically focus on "pressure" more generally, the nonviolent action approach provides a theory of change based on power. Here, it is important to emphasize that the literature on nonviolent action offers not only a theoretical explanation for how nonviolent change occurs, but also some very concrete tools that activists can use to supplement their thinking about human rights strategies and tactics. These analytical tools include strategic ways to think about power, such as the sources and pillars of support mentioned above, as well as some other key concepts. I would like to explore three other main areas which can serve as fertile ground for discussing the intersection of human rights and nonviolence, where one or the other may have more to say, but also where combining the strengths of both can have some profound implications. These are (1) Local strategies (2) International advocacy and (3) Tactical thinking.

4.1 Local Strategies

One of the characteristics of the human rights approach—in both theory and practice—is its overemphasis on the international, at the expense of the local.

This is in some ways an unintended consequence of the human rights regime's inception as a body of universal international norms and mechanisms, and its growing global reach. In order to remain relevant, however, the human rights approach must address the question of utility for local peoples and communities. As I mentioned earlier, the human rights approach defines people as rights holders, not necessarily as power holders. A corollary of this view is that the only way that people and communities can realize those rights is in a context where these rights are recognized at some level. Generally, this implies the international system—international human rights conventions, UN treaty bodies and regional human rights mechanisms, or a country context which has sufficiently internalized these norms and developed its own mechanisms for human rights protection and promotion. Many communities however, have to operate in governmental contexts with very little recognition of such rights. Human rights can have a huge impact on the empowerment of local communities—that role in and of itself is hugely important—but once communities recognize that they have such rights, what relevance can human rights have in a local context in which there is no system in which to claim these rights? While community voices and engagement in international mechanisms can be powerful, it is increasingly clear that such strategies have their limitations.

Burma is one such example. The ruling State Peace and Development Council has some limited recognition of human rights norms—it is party to the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW), and ILO conventions. Activists from Burma, inside the country and in exile, engage with all of these conventions and their related mechanisms, with some success. But as they do, the ruling regime continues its systematic violation of human rights unabated—within the past decade, over 3,500 ethnic villages have been destroyed, and in the run up to the first elections in twenty years, violations continue, including forced labor and sexual violence against women in ethnic areas, and violations of political rights to free speech and assembly throughout the country. In their engagement of international mechanisms, human rights activists from Burma have seen some successes, but also many obstacles; recently there has been backlash from use of the ILO mechanism, with local people who choose to report cases of forced labor being disappeared or arrested.

To address such challenges, human rights activists must expand their definition of what constitutes human rights tactics and strategies. I would argue that the perspective of strategic nonviolent conflict can help inform such a broadened perspective. Methods of nonviolent action encompass a range of tactics, which can be categorized into three broad types. (1) "Methods of protest and persuasion" are largely symbolic, serving the means of exposing injustice, and can include demonstrations, distributing leaflets, etc. (e.g. the symbolism of colored shirts in Thailand). (2) "Methods of noncooperation" involve the withdrawal or restriction of expected participation or cooperation—and can include such things as social and economic boycotts (e.g. the monks' social boycott of generals during Saffron Revolution in Burma). (3) "Methods of nonviolent intervention" disrupt normal operations that sustain the status quo or create alternatives to state institutions, such as hunger strikes or land occupations (Sharp, 2003).

Human rights activists from Burma are using many of these strategies, and I will argue, expanding the definition of what constitutes human rights tactics and strategies. One specific example is the Karen Human Rights Group, which while doing important human rights documentation work in conflict areas for international advocacy, including on the issue of child soldiers, also does trainings in ethnic Karen areas inside Burma, allowing local communities to share successful examples of local human right tactics and strategies. In order to address the issue of forced portering, for example, some village chiefs have learned to lie about the number of villagers, which consequently reduces the number of villagers that have to be sent for forced portering to serve the SPDC military (Karen Human Rights Group, 2008). While not a conventional human rights tactic, this would fall under a nonviolent method of non-cooperation, and as it addresses and helps prevent a specific human rights violation, one could argue that it should indeed be considered a local and effective human rights tactic. This is only one example of a diverse number of methods being used by local human rights groups from Burma, but it shows that there are unrealized possibilities for using the combined strength of both human rights and nonviolent approaches. By expanding our definition of local human rights

tactics, activists can make human rights relevant on a local level, even within political contexts which have little or no recognition for rights. After all, these are precisely the contexts most in need of human rights strategies and tactics.

4.2 International Advocacy

In the local-international spectrum, the nonviolent action approach, contrary to the human rights action approach, emphasizes local, indigenous, and national strategies, almost to the exclusion of the international. On the other hand, one of the strengths of the human rights approach is the extent to which it effectively engages international advocates. What nonviolent action can offer, however, is a strategic framework for understanding at what point and in what ways this advocacy can have the most strategic and powerful impact.

One of the only scholars to address the dearth of nonviolent action literature on international advocacy is Maria Stephan. Her concept of "extending the battlefield of nonviolence" can be quite useful in terms of considering the most strategic impact of advocacy (Stephan, 2008: 7-44). Just as waging conflict on the local battlefield of nonviolence requires a power-based perspective, external actors can play a crucial role in situations where rights-violating regimes rely heavily not only on domestic pillars of support, but also external pillars. These can be military pillars—such as activists' successful targeting of the U.S.'s support for the Indonesian military, which had a significant impact on the largely nonviolent battle for Timor-Leste's independence, or investment pillars—such as activists from Burma targeting international companies invested in Burma's rich oil and gas sector, which provide billions of dollars to the military regime.

Another strategic window of opportunity for international advocates is their crucial role in moments of severe repression. Nonviolent movements for human rights and democracy are often faced with the potential of violent crackdown from the government. Contrary to armed guerilla warfare, whose repression can be justified more easily by governments, democratic and undemocratic nonviolent movements create an asymmetrical conflict.

This dynamic is sometimes called the "backfire of repression" or "political jiu-jitsu." Basically the contrast in types of action—violence by the government, and nonviolence by the people—sometimes causes repression to rebound against the government and weaken their power (Sharp, 2003). In other words, the illegitimate use of violence by government can cause loyalty shifts from pillars previously supportive to the government or in a neutral position, to join the side of the opposition.

In the critical moment of imminent repression, international attention stemming from strategic international advocacy can provide crucial support for activists inside the conflict. At a time when they are faced with the potential for horrific violence, attention to the struggle can provide a degree of predictability, and increase the likeliness that

repression will "backfire." This dynamic has taken place in many contexts, including the Philippines, Timor-Leste, and Burma.

Similar to the assassination of Aquino in the Philippines, the turning point in the struggle for independence in Timor-Leste was a massacre. In 1991, Indonesian troops fired upon East Timorese marching in a peaceful funeral procession, killing more than 200 people. Both in this instance, and almost a decade later, when Indonesian-backed militias attacked Timorese following an 80 percent "Yes" vote in a referendum for independence, we can see a clear set of evidence showing one of the most powerful impacts of nonviolent action—the ability to defy and at times reverse the effects of repression. In the face of violent crackdown by the state, when activists maintain nonviolent discipline, it can highlight the violence, and thus, illegitimacy of a regime or power-holder, subsequently causing major loyalty shifts. In Timor-Leste, the Dili massacre and the continued nonviolent campaign produced significant loyalty shifts—the mass mobilization of Indonesian students eventually led to a shift in support among business elites and members of the security forces. Timorese activists also advanced these strategies through tactics targeting international attention. One such tactic was "fence jumping," which essentially entailed jumping over the fences of Western embassies in Jakarta during periods of heightened international attention, and staging nonviolent sit-ins while distributing documentation of human rights violations in East Timor, highlighting the regime's brutal repression. International human rights advocates played a major role in echoing the voices of brave Timorese, by raising their voices through media advocacy and lobbying.

4.3 Tactical Diversity

One final area in which dialogue between human rights and nonviolent approaches can be fruitful is in the area of tactics. The ancient Chinese military strategist Sun Tzu famously said "Tactics without strategy is the noise before defeat." While theorists of nonviolent action consistently emphasize the importance of grand strategy, as Douglas Johnson puts it so clearly, it is not that tactical thinking or training supersedes strategic thinking, but rather that tactical development enriches strategic thought (Johnson, 2004). First as founder of the Center for Victims of Torture in the U.S., and later as one of the founders of the international project, "New Tactics in Human Rights," Johnson is one of the only human rights activists to clearly articulate both a need for new human rights tactics, as well as an incredibly ambitious and practical approach to address this need. In his work on addressing torture, Johnson realized that most human rights tactics were initiated on the international level, which meant they had to work through many layers and relationships before affecting torture victims.

Johnson's observation about tactical limitations is something that I briefly addressed in the beginning of this paper, in reference to the satirical article about an online petition bringing down the Burma's military dictatorship. Perhaps due to the professionalization of

NGOs, and a consequent distancing of NGOs from people's movements, human rights activists seem to rely on many of the same tactics, often those related to international advocacy. From my own experience working with human rights organizations, it is not atypical for activists to have a tactic in mind, and then later define targets and strategies. Often, we use the tactics we know, but not necessarily those that we need.

In this regard, human rights activists, I believe, can learn a lot about tactical diversity from nonviolent movements. Gene Sharp famously articulated "198 tactics" in a booklet which has since been translated into dozens of languages.

Activists are constantly inventing new creative tactics, especially within the burgeoning field of digital activism. Examples from nonviolent movements in Southeast Asia show us that different tactics can help reach different audiences, which can be crucial in creating loyalty shifts which can in turn leverage power in significant ways. Another lesson is the power of using tactics that expose injustice. Martin Luther King Jr.'s exceptional penchant for employing tactics that "dramatize the injustice" resulted in significant gains for the civil and political rights of African Americans, particularly in the Southern United States. Especially in view of the more widespread recognition of human rights norms in recent years, tactics which dramatize and focus attention on specific human rights violations have the potential to be exceptionally powerful.

The New Tactics in Human Rights project has been working for the past several years to collect and share information on the use of innovative tactics to advance human rights, including a database of tactics and many useful training tools. As Johnson describes in "The Need for New Tactics," in order to advance human rights, we must indeed create a broader human rights field which engages with and learns from various sectors of society. I have argued here that nonviolent action has a lot to offer in this regard, and a conversation between activists and scholars of human rights on the one hand, and nonviolent action, on the other, can be incredibly fruitful for thinking tactically and strategically.

5. Concluding Thoughts

I began this paper by explaining a few basic theories that are foundational to the logic of strategic nonviolent conflict—pillars of support, loyalty shifts, the backfire of repression—as well as discussed the strengths and weaknesses of both human rights and nonviolent action approaches, and the areas in which combining aspects of both approaches can be illuminating. Fortunately, such theories could be supplemented with examples from Southeast Asia's incredible history of powerful people's power movements, including the People's Power movement in the Philippines, Timor-Leste's independence movement, and Burma's yet unfinished movement for democracy and ethnic rights. One might ask why I chose to focus on such major movements who fought

not only for human rights but for regime change or independence. Simply put, if the strategic use of people power can exert influence over the most authoritarian regimes, surely these examples have something to teach us about the tough cases we continue to face in the region. The area of intersection between human rights and nonviolent action has yet to be deeply explored, however, and it is my hope that further discussion between scholars and activists with expertise in these fields can lead to innovative, strategic, and powerful approaches that can help break through the barriers to advancing human rights in the region and internationally.

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PATHWAYS TO JUSTICE: THE STRUGGLE OF CIVIL SOCIETY TO DEFINE AND SEEK JUSTICE IN TIMOR-LESTE

Steve Kibble, Tibor Van Staveren, Ed Hobey

The paper explores justice-seeking by civil society actors in Timor-Leste within a historical context of unequal international and regional relations, the role of charismatic leaders within a nascent state, and the politicisation of impunity, amnesty and reconciliation. It examines the practical complexities of applying the concepts of transitional justice, as well as assessing the usefulness of such concepts as opposed to popular or retributive ones. While the framework of crimes against humanity and widespread human rights violations during the Indonesian occupation of Timor-Leste and in its aftermath is well known, the complex interplay of local and regional politics that drives or impeded the struggle for justice and standardisation of human rights has been less well examined.

Nine years on from independence, Timor-Leste is still fragile, having experienced recurrent cycles of violence and impunity. In fact, this hides some considerable progress in areas of human development since independence, including impact on poor people. However, notwithstanding such progress, the United Nations and other reports suggest that the country's security and justice institutions remain fragile. Such fragility will need increased political as well as technical capacity and pressure, but human rights activists suggest that currently the response of leaders to potentially troublesome constituencies, as with 'the petitioners' who were the trigger for the 2006 crisis, or the IDPs, tends to be paying money to get the problem rather than the root causes of the problem to go away.

Our paper is based on a research undertaken during Progressio's *East Timor: Who Cares?* campaign in 2009, the organisation's discussions around a follow-up institute for the Post-CAVR (the truth and reconciliation commission) Technical Secretariat, and interviews and discussions with civil society actors during 2010 and 2011. We conclude that a more sustained and egalitarian engagement between international and local actors will be necessary in effecting justice and suggest some practical steps in improving the capacity of local NGOs, as well as parliament in their oversight and lobbying roles. We also point to the need to engage far more with Indonesian institutions, including civil society.

1. Introduction and Background

Timor-Leste is a small nation, of 15,000 square kilometres, with a population of just over 1.2 million people. Nine days after it declared independence from Portugal in 1975, Indonesia launched a full-scale invasion of the territory, starting a bloody 24-year occupation.

The subsequent Timor truth commission *Chega!* reported that at least 102,800 Timorese civilians died of conflict-related causes during this period.[1] During a general climate of fear and violence, many were displaced at least once whilst forced disappearances, arbitrary detention, torture and sexual violence were common.[2]

During this period, the international community ,while it publicly acknowledged Timor-Leste's right to self-determination, tacitly supported Indonesia's illegal occupation by providing military assistance and turning a blind eye to the human rights violations taking place due to their desire to improve relations with Indonesia, and 'promote regional stability' in the circumstances of the Cold War.[3] This violated numerous United Nations resolutions and human rights treaties such as United Nations (UN) Security Council Resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976 and eight General Assembly resolutions, all condemning the Indonesian occupation of Timor-Leste and resulting human rights violations.

In 1999, the East Timorese voted for independence through a popular consultation,[4] leading to retaliatory violence from the departing Indonesian military and their militias in which almost all of the capital Dili's public buildings and documentation were destroyed. In international law, the violence amounted *prima facie* to war crimes (serious violations of the laws and customs of armed conflict; grave breaches of the Geneva Conventions) and crimes against humanity. This violence has been seen as a systematic campaign with two objectives: first, to send a message to the Acehnese and Papuans in relation to their independence struggles and, second, to make it nearly impossible for Timor-Leste to survive as a viable independent country. The destruction included many torn down homes and killings as well, plus wholesale displacement, and another motive appears to have been looting and personal gain on the part of those responsible. Although Indonesia subsequently embarked on a transitional path to democratisation, this, despite considerable gains, is incomplete with the military being both a powerful player, and unwilling to confront entirely the crimes of the past. This obviously has an effect on its less powerful neighbour, as well as those regions seeking greater autonomy. In 1999, UN Security Council Resolutions 1264 and 1272 demanded "that those responsible for such violence be brought to justice".

Since independence in 2002 (following the 1999 referendum when the overwhelming majority of Timorese voted for independence from Indonesia), there have been several outbreaks of violence. The worst occurred in 2006 when divisions within the Timorese

security forces lead to a complete break down in law and order, with 10% of the country's population being displaced and requiring an international peace-keeping intervention. In February 2008 assassination attempts on President José Ramos-Horta and Prime Minister Xanana Gusmão threatened to further destabilise the country.

Nine years after independence, Timor-Leste is still fragile, with an estimated 50 per cent of the population living on less than 88 cents a day. Unemployment is 6.7% (but this has little meaning, since 88% of the population live in the rural sector, and most are subsistence farmers), and is 12% in Dili. However, for the 15-24 age group, it is 35%, and 50% for that age group in Dili, in 2009 Timor-Leste fell from a "Medium" to "Low Human Development" category due to a decline in educational enrolments (UNDP, 2008; UNDP, 2009).

But this hides some considerable progress in many areas of human development since independence (Economist, 2011; Hermengildo, 2011). For example, its under-five and infant mortality rates have improved substantially, as has its literacy rate. The country undoubtedly has benefited from the increase in oil revenues since 2007; the subsequent additional amounts in budgets have been used to improve livelihoods, particularly in the rural sector.[5]

Against this, optimism must be set the UN Secretary-General's February 2010 report to the UN Security Council (UNMIT Reports, 2010). Ban cited tensions among the political elite, difficulties with the security institutions, poverty, persistent unemployment and the lack of an effective land and property system as being the underlying causes of the crisis. Others point to additional factors such as alienation, trauma, hopelessness, land conflicts and the increasing gap between rich and poor as significant causes of the 2006 crisis. The report said little, however, about justice issues and, there appears little appetite among UNSC members to follow up their resolutions on Timor-Leste (UNSC, 2010; UNSC, 2011). The latter's leaders deal with potentially troublesome constituencies, as with 'the petitioners' who were the trigger for the 2006 crisis,[6] or the internally displaced peoples (IDPs), by paying money to get the problem rather than the root causes of the problem to go away.

Surprisingly, since the attempted assassination of President José Ramos-Horta in February 2008, there have been no major outbreaks of violence and increased joint efforts at reducing potential for conflict, at least in part due to increased UN Police (UNPOL) numbers and presence of the International Stabilisation Force (ISF). Possibly more effective was the very tight control exercised by Xanana Gusmão over the joint command structure, creating better coordinated action and less insecure forces. 2008 - 2011 saw a successful effort to reintegrate 150,000 IDPs and close all transitional camps. There is still concern over the effectiveness of the UN police training programme.

2. Transitional justice

We look at justice within the debate on how 'transitional justice' is a useful concept or not whereby people[7] can have acknowledgement of crimes committed against them, have some form of reparation, and move to reconciliation with their erstwhile oppressors. The difficulty in this context occurs when the oppressor does not inhabit the same territory and has difficulty in acknowledging its own history of oppression. If peace-building is concerned with the consolidation of peace, transitional justice is seen as integral in moving towards a just and stable society, fostering reconciliation between both individuals and communities. For some, transitional justice is narrow, concerned with the past and *retributive* legal mechanisms to hold the perpetrators of the conflict's direct violence to account; for others, a broader restorative definition of justice looks to the future and addresses the structural violence underpinning the conflict. Transitional justice, while a concept, requires practical implementation and is inherently political and contextual as in Timor-Leste's failure to address adequately its past or to institutionalise ideals of justice.

2.1 Narrow/ Retributive

Transitional justice has typically been seen as a legalistic instrument to do with accountability and fairness in the prevention and punishment of wrongs (UN Security Council, 2004: 4). Holding individuals to account-even for the actions of many- will provide societal catharsis and a break with the past. This narrow definition is based around the search for absolute justice with the duty to prosecute those accused of perpetrating human rights abuses, to demonstrate the accountability of state structures and the credence of the rule of law. Offenders are punished because they committed crimes, and not only because punishment will deter others. In Timor-Leste, the Special Panels and the Indonesian Human Rights Commission encapsulate this legalistic approach.

Judicial processes are integral to halting the impunity on which violence and resentment are perpetuated, and as in any functioning democracy, the judiciary is the main mechanism for protecting human rights. The 2006 crisis in Timor-Leste has been blamed on the failure to foster a strong culture of rule of law, exposed by the security vacuum that re-emerged following the United Nations Mission for Timor-Leste (UNMIT) departure the previous year (Amnesty International and Judicial System Monitoring Programme, 2004).

2.2 Broader/ Restorative

Yet peace-building is held to be more complex than *narrow* assumptions with reference to "subjective" peace-building, the importance of reconciliation, trust and forgiveness for individuals and communities (UPI, 2004: 7). In this view, transitional justice is not just about the past and providing redress for victims, but is an opportunity to transform political systems and the roots of the conflict. Addressing structural forms

of violence helps societies "procure an equitable future" and is therefore integral to securing conditions conducive to a sustainable and meaningful peace (Arbour, 2006). Transitional justice is a range from truth and reconciliation commissions and criminal trials to lustration or reparation.

In Timor-Leste, the liberation movement viewed independence not just as freedom from Indonesia, but as a prerequisite to the realisation of fundamental human rights (Montiel, 2006: 4). The breadth of this social transformation means that transitional justice must do more than simply place perpetrators in front of judicial mechanisms. Repairing frayed social fabric requires a broader definition of justice than it is traditionally afforded, with criminal, restorative and social considerations. *Restorative* justice is more concerned with the impact of violence on a community as a whole (societal justice). Zehr claims that *restorative* justice is "participatory, focuses on needs and obligations, tries to heal and resolve problems, and is future orientated" (UPI, 2004: 39). Sharing responsibility and blame leads to a common identity, and therefore reconciliation (Gibson, 2004).

Timor-Leste seems to indicate, however, that this more positive interpretation of justice provides problems if it entirely replaces judicial approaches. For many, there remains a need for societies to hold perpetrators of human rights abuses accountable; a moral obligation to punish those individuals found guilty. Not to do so is to offer impunity to the authors of the violence at the expense of the credibility of the state.

2.3 Importance of Context

In rural areas of Timor-Leste, customary conflict resolution is based around discussion, compensation and ritual reconciliation (Schenk, 2005). The emphasis on communal justice has, however, resulted in a "justice gap" as perpetrators of more serious crimes have been overlooked (Pigou, 2003: 8). It does appear that addressing the root causes of these grievances has been overshadowed by a desire for reconciliation. It has been argued that this is because local concepts of justice are starkly different from the individualist approach of the United Nations Transitional Administration for East Timor (UNTAET), although we would argue that in fact that it is this combined with a personalist executive diktat prioritising reconciliation over combating impunity without regard to the cost. There is a third notion of justice at play, the *pragmatic* (Pankhurst, 1999) - that the pursuit of accountability should be determined by its impact. While it shares the same goals of peace and stability as *retributive* and *restorative,* it concedes that justice can be detrimental to their quest and hence that the latter is a matter of political negotiation and compromise. In a nascent state, transitional justice will be shaped by considerations of the present and future so as not to endanger the political transformations underway. It will also be shaped by the past, and political, social and legal traditions. There are several contextual preconditions which determine the form and progress of transitional justice: the institutional capacity to carry out the various processes effectively, some consensus on what constitutes justice, and, perhaps most importantly, political will. In the case of

Timor-Leste, it is the latter which has meant that transitional justice has been described as "stillborn" (UPI, 2004: 5).

There are structural concerns about the feasibility of legal justice for Timor-Leste. It has been noted that transitional justice is shaped by power relationships in communities, but it is a less explored phenomenon across international borders (Gibson, 2004; Quinn and Freeman, 2003; Mendeloff, 2004). The asymmetrical relationship between Indonesia and Timor-Leste makes the pursuit of justice practically difficult and politically sensitive. Despite indictments by the SCU, high ranking officials and military commanders including General Wiranto live freely in Indonesia; the extradition agreement between UNTA and the Indonesian Government appears to be a victim of political realities.[8] Indonesia's "dismal handling" (Huang and Gunn, 2004: 24) of procedural justice is due to the continued influence of the army (TNI) as an actor in domestic politics. The influence of the TNI would explain why the annexation of Timor-Leste is still viewed, by those hindering attempts at justice, as having been necessary to stop Fretilin subversion and Communist contagion of Indonesia. Bilateral relations appear too important- security, crime, dependence for food and agriculture, membership of ASEAN - for Timorese politicians to campaign forcefully for the Indonesian Government to engage in meaningful judicial processes.[9] Even a small response in Jakarta could wreak havoc in Timor-Leste, such as suspension of cross-border trade for a time.

This is not to mention the less transparent influences that Indonesia could continue to exercise, both through legal and illegal channels (e.g. banking and criminal networks). These facts influence thinking on issues such as justice. While José Ramos-Horta may be serious in his assessment that "Indonesia has changed since 1999… [the government] cannot be blamed for what happened" (Huang and Gunn, 2004: 25), the former considerations also form part of Dili's thinking. In the wider international context, the strategic importance of an Islamic state between the Pacific and Indian Oceans meant that there has been little international desire to upset Indonesia with calls for a justice tribunal.[10] With the impasse in Timor-Leste, it appears that Edward Newman was correct and that transitional justice is "a process that is conditioned by political compromises and practical constraints" (UPI, 2004: 39).

As transitional justice is supposed to encourage popular trust in nascent political structures, abortive and inefficient attempts can undermine public confidence in them. If structures fail to inspire confidence, agency in the form of charisma- one of Weber's three sources of authority - comes to the fore. This is particularly true during transient and unstable times, when strong characters are able to appear more worthy of trust than political institutions struggling to manage processes of change. In post-conflict States, this can be positive as individuals are seen as nation builders, coming to be "personalised symbols of a nation - the collectivity that provides the major source for social allegiance" (Spinrad, 1991: 301). Popular allure is frequently the result of involvement in the independence movement as with Xanana Gusmão and José Ramos-Horta. The transitional justice

processes undertaken have been shaped by their personal convictions, and the esteem in which they are held.[11] Both supported *reconciliatory* justice and both campaigned forcefully for a truth and reconciliation commission after 1999.

It has been argued that the most successful examples of transitional justice are those that have built on the lessons and experiences of previous processes. Comparative studies prove difficult for Timor-Leste as it appears to be unlike many of the conflicts of the 1990s; it is neither a failed state nor is it plagued by ethnic antagonism, while the liberation movement had credible leaders and political structures. This is also the first time that transitional justice has been attempted in an Asian country.[12] Unlike the similar systematic human rights violations in South Africa, perpetrators and victims came from the same villages. Indonesia - neither shattered nor divided - is in a much stronger position to resist the imposition of exogenous justice than either Rwanda or the countries of the former Yugoslavia. With little historical guidance and with the government privileging reconciliation leading to impunity and recurring cycles of violence, Timorese civil society is searching for creative solutions to overcome political apathy and find a form of justice which works within this context.

3. What has happened so far in addressing Justice issues?

Persistent outbreaks of violence in East Timor in 2002, 2005,[13] 2006[14] and 2008 show that peace and stability remain fragile. Attempts to obtain justice for the victims of the Timorese 1975 internal conflict, the Indonesian occupation and the violent aftermath of the 1999 referendum on independence have so far yielded unsatisfactory results.
Indonesian courts have acquitted all Indonesian suspected human rights violators tried in relation to the occupation.[15]

Commission for Reception, Truth and Reconciliation (CAVR) was established to determine the truth regarding human rights violations which took place in Timor-Leste between 1974 and 1999, promote reconciliation, restore the dignity of victims and assist in reintegrating individuals back into their communities. The CAVR was required to recommend reforms and initiatives that would prevent the reoccurrence of these human rights violations.

In a different initiative in 2005, the Presidents of Timor-Leste and Indonesia created the bilateral Commission for Truth and Friendship (CTF). The CTF had originally stemmed from an idea of José Ramos-Horta, who proposed an international panel of eminent persons from Asia (i.e. not limited to Indonesia or Timor-Leste). Indonesia responded by engineering the CTF which had several crucial differences to the original proposal.

It was entirely bilateral; only Indonesian and East Timorese commissioners would preside over it, meaning that there would be no opportunity for multilateral involvement. It would have no power to compel testimony (or even the attendance) of witnesses. It

would have no power to compel people or institutions to produce any documentary evidence. It would have no institutional independence from the two states. It would be unable to determine individual responsibility. It would have the power to recommend amnesties and clear the names of those 'wrongfully accused'. This was, obviously, a way of absolving those who bore greatest responsibility for the crimes.

The CTF stressed on reconciliation and better bilateral relations as priorities rather than truth seeking. It was also time-limited, meaning it did not address 99% of the killings and a full generation of suffering nor did it therefore enquire into the Indonesian state policy of invasion, occupation, and human rights abuses. Many Timorese and human rights specialists charged that the commission would provide a 'whitewash' for the 1999 violence (ETAN, 2005). The UN and many civil society organisations refused to cooperate with its investigations because the CTF was (originally) empowered to recommend amnesty for perpetrators of human rights violations but not to recommend prosecutions (United Nations News Centre, 2007).

The CAVR submitted its final report, *Chega!,* to the President of the Republic on 31 October 2005 and to Parliament on 28 November 2005. But political factors, such as fear of souring relations with Indonesia initially prevented the report from being discussed and acknowledged officially, despite widespread internal and international pressures. Subsequently the President established a government-funded body – the Post-CAVR Secretariat – to disseminate the report, and complete CAVR's publishing programme which included the landmark publication of the report in Jakarta in 2010. *Chega!* contains a detailed account of the 1975 - 1999 conflict, outlines the human rights violations which occurred and makes over 200 recommendations. The CAVR calls on the Timorese state to establish a victims' reparations programme, undertake institutional reforms particularly in the justice and security sectors, ensure a free media and a vibrant civil society, conduct memorialisation activities, educate Timorese citizens about their history and human rights, and bring the perpetrators of human rights violations to justice.

The 2005 CAVR report also made a number of recommendations as to how the international community can contribute to peace, truth and justice for Timor-Leste. The international community is urged to take action and support the people of Timor-Leste by implementing these recommendations, specifically by discussing *Chega!* in parliament, supporting the development of a CAVR follow-up institution, releasing relevant classified materials on Timor-Leste, and petitioning the UN Secretary-General to refer *Chega!* to the Security Council, General Assembly, Special Committee on Decolonisation and Commission on Human Rights.

Both the CAVR and the UN Commission of Experts recommended the creation of "an ad hoc international criminal tribunal for Timor-Leste" should Indonesia, under a strict time frame, continue to fail to credibly prosecute senior officials responsible for the devastation in 1999[16]. An alternative proposal has been for the UNSC to fully

reconstitute the Serious Crimes process, providing it with sufficient resources and backing in accordance with recommendations 7.1.1 and 7.1.2 of the CAVR Report - namely, the UN itself should provide the resources and judicial expertise, not Timor-Leste's court system. The Serious Crimes process could investigate war crimes and crimes against humanity committed from 1975 onwards, not just those committed in 1999. Indonesia should according to the recommendations extradite for trial those charged by the Serious Crimes process. A major cause of resistance to CTF was the fear that it would undermine CAVR which was just finishing its work when CTF was established and whose terms of reference, though wider, also included 1999. Many worried that CTF would override the CAVR report and neutralise its findings and recommendations on TNI by presenting an alternative version of the truth, and therefore responsibility, about 1999.

These concerns were shared by CAVR and prompted it to include a number of last minute warnings about CTF in *Chega!*. Although it did not write the initiative off completely, it called for CTF to complement CAVR, not conflict with it, especially in relation to the rights of victims to redress and criminal justice. It wanted CTF to add strength to truth-seeking human rights violations in 1999, and to forgiveness being linked to proper judicial process.

In fact the Commission for Truth and Friendship did have some positive outcomes and was not as much a whitewash as many feared when it was set up[17] (Walsh, 2008). The launch of the final report *Per Memoriam ad Spem* (Through Memory to Hope) on 15 July 2008 was attended by Indonesia's President Susilo Bambang Yudhoyono (SBY) and President Ramos-Horta In the end, the international criticism had an effect; the CTF refused to recommend any amnesties. It found that the Indonesian military, the Indonesian civilian government and anti-independence militias bore institutional responsibility for thousands of "gross human rights violations in the form of crimes against humanity" including "murder, rape, and other forms of sexual violence, torture, illegal detention and forcible transfer and deportation" against the East Timorese civilian population.

The CTF had no power to prosecute the perpetrators. The report includes recommendations for responding to those human rights violations including for victims' reparations, the establishment of a documentation centre, human rights training programmes, institutional reforms, and the creation of a centre mandated to investigate the whereabouts of disappeared persons and separated children. By not recommending amnesties, clearing names or claiming 'conclusive truth', the CTF also left the door open on the issue of future criminal justice. The CTF's recommendations are consistent with those of the CAVR. The report has now been made public and disseminated in Timor-Leste, although not yet discussed in the Indonesian National Parliament as far as is known.

Though it does not go as far as CAVR, CTF's report can be seen as having strengthened, not weakened CAVR's findings and recommendations. Both commissions call for an apology, for reparations to be made to victims and for reform of the TNI. Pat Walsh's further view is that 'CTF has also delivered significantly in an area where CAVR is yet to make much progress. Indonesia has so far officially ignored *Chega!* but, through CTF, it has now dropped its defensiveness about the violence of 1999. President SBY's admission of responsibility is shared by sections of the legal, military, ecclesiastical, academic and foreign affairs professions represented by the Indonesian CTF Commissioners, all of whom served – it should not be forgotten – during the Suharto period'.

There have been other initiatives with varying degrees of satisfaction such as the Ad-Hoc Human Rights Tribunal in Jakarta,[18] the Special Panels for Serious Crimes in Timor-Leste for crimes against humanity,[19] the UN Committee of Experts, and the UN Serious Crimes Unit in Timor-Leste. Of the persons tried by the Ad-Hoc Human Rights Tribunal and the Special Panels, nearly all have been acquitted on appeal or had their sentences commuted. The Indonesian legal process did not, however, meet international standards and the only defendant to serve a sentence in Indonesia was a Timor-Leste born militia leader who was subsequently released on appeal (Pascoe, 2006). Many of those indicted within Indonesia by outside bodies have treated such proceedings with disdain. For example, former Indonesian military commander General Wiranto was indicted by the UN backed Serious Crimes Investigation Unit for crimes against humanity in 2004, and then proceeded to run (unsuccessfully) for the Indonesian presidency the same year[20] (Human Rights Watch, 2004) and in 2009. A major reason for the failure of these judicial processes is the Indonesian government's unwillingness or inability to bring those responsible within the Indonesian security forces to justice. The TNI today is not a neutral instrument of the elected government but a partisan force with its own agenda. Through its territorial command structure, it remains embedded at every level of Indonesian society, including the bureaucracy, legislature, and economy. One reason the Indonesian military operates as a law unto itself is that it is not entirely dependent on the government for its finances. Its commercial activities bear little relation to the defence of Indonesia, but offer it the financial independence by which it can escape civilian control.

None of these initiatives have been equal to the task of delivering justice in accordance with international law (La'o Hamutuk, 2009). The Serious Crimes process (which dealt only with crimes committed in 1999) was terminated by the Security Council in May 2005 although its work was far from complete. UNMIT did though re-establish the Serious Crimes Investigation Team to complete investigations into outstanding cases from 1999. A total of 290 individuals already indicted under the serious crimes process remain at large in Indonesia, outside the jurisdiction of Timor-Leste.

No formal investigations or proceedings are underway for the crimes committed prior to 1999, with the exception being an Australian coronial inquest which concluded that the killings of five Australian-based journalists in Balibo by Indonesian forces in October

1975 just prior to the invasion of December that year was a war crime. The 2009 ban in Indonesia on public showing of the film Balibo illustrates the lack of openness over Jakarta's past.[21]

UNMIT's "Report on Human Rights Developments in Timor-Leste August 2006 - August 2007," highlighted the role that the CAVR could play within Timor-Leste in both "unifying" Timorese society and helping to "foster a democratic culture based on the rule of law." The CAVR report's recommendations were also addressed to the international community, specifically including the Security Council and its permanent members, as well as Indonesia on the former having an open debate that includes representatives of civil society to discuss implementing the report's recommendations.

In the light of all the above, given that the CTF did not have any authority to name names or conduct prosecutions, the next step is to prosecute the alleged perpetrators of crimes against humanity as recommended by CAVR and to demonstrate that the rule of law applies to all. One possible solution compliant with restorative justice is that Indonesia should follow South Korea's example and bring closure to the crimes against humanity committed in Timor-Leste by convicting and then subsequently pardoning those responsible. The call for formal justice for past crimes is widely supported within Timor-Leste, especially by the Church and civil society. However, the leaders of Timor-Leste have favoured CTF (and hence no further prosecutions), because of concerns about standing up to Indonesia. Timor-Leste's diplomatic position means that it cannot take the lead on the matter of justice in the face of opposition from its powerful neighbour. The international community, as embodied in the United Nations, should according to Timorese civil society active on the issues, address crimes which violated international criminal law, the UN charter and Security Council resolutions.[22]

However, in his inauguration speech as Prime Minister in 2006, now President Jose Ramos-Horta did acknowledge the "great teachings" of the CAVR report. Prime Minister Xanana Gusmao, in his speech at the swearing in of members of his government called for the consideration of the CAVR report. "We cannot ignore the lessons of the past in order to understand the current crisis, and protect the future," he said.

4. What is the process for institutionalising Chega!?

There are a number of parliamentarians who are committed to seeing implementation of the two Commissions' recommendations. Elements of civil society, victims, local NGOs, the Church and sections of the media are also keen to see progress in implementing *Chega!* There is currently discussion of possible structures to succeed the post CAVR arrangements, but endless delays on parliamentary discussion.

There are problems not just of a technical nature to be overcome before any CAVR/ CTF follow-up institution is formed and there are even bigger problems before

recommendations from Chega! to the national government and international bodies, including the Indonesian government, can be implemented. However, it will be a political struggle to create a widely accepted implementation programme which remains true to the intentions of the CAVR and CTF recommendations.

For organisations like the re-formed Alliance for International Tribunal (ANTI), an international tribunal and reparations are key issues. They told us that 'transitional justice' (combined with aid) is an easy way for Western nations to gain impunity for turning a blind eye to or supporting the Indonesian invasion and occupation. Transitional justice in their opinion is inferior to a formal judicial process ending in prosecutions and imprisonment for those found guilty. ANTI sees the present process as non-transparent and has renewed its call for a Western apology and for reparations for crimes of commission and omission, although it recognises there is little political will from any leadership in and out of Timor for this. The East Timor Crisis Reflection Centre added that CAVR was formed under UNTAET's (the predecessor to UNMIT) auspices, so the UN needs to stay on the case, given that its involvement goes back to the 12/75 UNSC resolution, condemning the Indonesian occupation of Timor-Leste.

In December 2009, the Timor-Leste National Parliament voted 34 to 0 that the *Chega!* and CTF reports should be implemented through a follow-up mechanism. Parliament tasked its Committee A (which looks at justice issues amongst others) to draft appropriate legislation by an original date of March 2010.

A Working Group of organisations, including NGOs, Post-CAVR, UNMIT proposed that the follow-up mechanism to CAVR/CFT should focus its work on truth seeking and documentation of abuses, reparations and memorialisation, missing and disappeared people, education and training in human rights, and reporting to parliament on the implementation of CAVR/CTF recommendations around these issues and other recommendations. Little happened until October 2010 amid continuing disagreements as to how much autonomy from government such an institution should have. On 29 September 2010, parliament voted to delay the process until February 2011 due to concerns over war veterans' benefits relationship to reparations in general as compensation for the victims of abuses by the liberation movement. As many in civil society have pointed out the proposed legislation was in any case really compensation rather than reparations – only one of the five key areas of reparations – restitution, rehabilitation, satisfaction and guarantees of non-repetition.

However, the Parliament, despite public commitments to do so, failed to discuss the draft legislation on 14 February 2011 and did not set a date for a future debate (ICTJ, 2011). The rationale given by MPs representing the war veterans was that problems with compensation for veterans should be addressed before Timor-Leste embarked on another compensation scheme (for civilian victims).

Whether or not other factors are at work is not clear but it is well known that both the President and the Prime Minister have strong reservations about the draft legislation for a reparations programme.

It seems clear, however that it is the relationship between Indonesia and Timor-Leste that is paramount in policy-making and thinking. José Ramos-Horta accused the UN of "hypocrisy" for using his government's anti-tribunal stance as a pretext for not setting up such a tribunal, a line he repeated in an interview in early October 2010 (ETAN, 2010). He said that key countries on the UN Security Council were against it – such key countries of course tell activists that they cannot call for such a tribunal without support from Dili.

The European Union (EU) and the International Centre for Transitional Justice (ICTJ) launched a programme in February 2010 to help bring awareness of justice issues and options to the Timorese public in general, the National Parliament and other state officials, victims groups, and other stakeholders – a process that is locally called 'socialisation'. The ICTJ has also discussed with the Education Ministry how to include Chega! as part of school curriculum, following on from the work of the existing post-CAVR institution (which is due to finish its work). The ICTJ proposed a meeting of female parliamentarians to work on the issue, although local campaigners around justice issues thought that the money could be better spent pressuring foreign governments and the United Nations.

Justice campaigners stress that, without strong pressure from their own citizens and from the international community, Indonesia will keep on trying to deny its past in Timor-Leste. Furthermore, Indonesian leaders will continue to obstruct justice, as is the case with the criminals indicted for their part in human rights abuses against Timorese they are shielding from accountability. In August 2009, the Indonesian Foreign Minister refused to attend the tenth anniversary of Timor's Popular Consultation celebrations unless an indicted alleged war criminal Maternus Bere, accused of murders in 1999, was released to them, which suggests that obstruction of justice is likely to continue. It further suggests that in the interests of 'good relations' between governments, some Timorese leaders will be prepared to ignore their own constitution in order to placate Indonesian wishes. The above case also brings into question the issue of parliamentary oversight functions in both countries, given that after initially protesting against the decision to release Maternus Bere from detention, the Timor parliament under some pressure from the government, voted to take no further action.[23]

5. An international tribunal?

One can note options from other countries. The Special Court for Sierra Leone (SCSL) did not rely on a Security Council resolution under Chapter VII of the UN Charter, but on an agreement - in effect, an international treaty - between the UN and the Government of Sierra Leone. Another suggestion from a long-time observer of the justice process

was that the Timor government could set up a trust fund for victims and invite foreign governments and companies (presumably including Indonesian ones) to contribute.

This could activate UNSC Resolution 1704 in 2006 which has never been implemented. While the activist suggesting this acknowledged the danger that Western funding of reconciliation work and aid could be conceived as buying off their complicity cheaply (and avoids their dislike of an international tribunal and reparations), practical politics would present this as both attractive for them and helping the victims - which is after all the key objective. It could involve greater commitment from international NGOs (INGOs) and solidarity people putting pressure on their (more or less complicit) governments to contribute. Another suggestion amongst human rights activists in the country is to sponsor a test case of a serious crimes violation. In fact Section 160 (Serious Crimes) states that 'acts committed between the 25th of April 1974 and the 31st of December 1999 can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts[24].' At present, there is presidential support for the process, given that the focus of the proposed body is not on prosecutions. But the process does in fact leave open the prosecutorial route and documentation would be useful in building indictments for the future. Significantly too, CTF also recommended documentation in both countries. How will it be possible to complete the serious crimes process to encompass crimes committed from 1974 – 1999? This will require too many resources and the judicial system could not cope. After five years, with 100 investigators, the Serious Crimes Unit was only able to complete a small number of prosecutions.

6. But where are the people?

A key question remains "where are the people in all of this, especially the thousands of victims and how will they be involved in overcoming the cycles of impunity and violence dogging Timor'? Many local NGOs we spoke with say that justice needs to be owned by the Timorese people; for the moment justice is stuck as a parliamentary/ technical process and it is now six years since *Chega!* was presented to Parliament.

Local human rights NGO La'o Hamutuk pointed out, in an October 2009 letter to the UN Security Council, "in 2008 the Asia Foundation conducted more than a thousand interviews …[and] when asked if a person who commits murder should sometimes avoid punishment… 90% of the respondents said no". As the letter says "recent … statements... of the Prime Minister and President... regarding justice, impunity … are out of step with the wishes of the large majority of Timorese people". La'o Hamutuk suggests that the president and prime minister insist that people want material benefits rather than formal judicial prosecutions.

In fact, they say, people are generally saying that cash payouts are welcome, but they still want formal justice, meaning a full judicial process, and achieving an end to impunity. In

further conversations with human rights activists there were queries around the ICTJ/EU project. While the project is to improve Timorese people's awareness of history, and to provide relief to selected survivors, it does not involve the perpetrators or activities within Indonesia. Therefore, according to such activists it cannot be deemed to be "transitional justice'; the people of Indonesia are largely ignorant of what happened under the occupation, and resources could be better directed towards overcoming that ignorance.

Responses from civil society in Timor-Leste over the years have been many and varied. In June 2002, civil society organisations felt the need for stronger advocacy coordination and established ANTI, whose main aim was to see perpetrators of gross human rights violations tried through a judicial mechanism. ANTI constitutes victims and victims' families, student organisations, individual activists, and national civil society organisations. Although ANTI was established with a unified vision and mission, the members were not restricted by its retributive justice seeking mandate. CAVR was fully established and ran many district-based reconciliation processes but was also quickly establishing a huge body of facts around human rights violations, also with the assistance of civil society organisations. By 2005, when the Chega! report was published many organisations and individuals originally critical of CAVR, including ANTI, found the resulting report commendable and supported its recommendations. At the same time, ANTI focused its efforts on criticising the CTF.

The voices and actions of ANTI's members started to differ, with some beginning to voice initial thoughts around a more reconciliatory approach, especially since the 2006 crisis. In answer to developments in the country, many members of ANTI started peace-building and reconciliation programmes. Some organisations felt that a main contributing factor to the crisis was unresolved issues with the past, especially around impunity, and therefore an international mechanism to try perpetrators of serious crimes was now more needed than ever, whereas others felt that a wider reconciliatory approach was necessary.

Hence, ANTI, although effective in its issuing of unified statements, for example its 2006 plea for an official recognition of the CAVR report and its 2008 response to the CTF report, has been less effective in cementing a unified long-term advocacy action plan. It took a major impunity inducing event, the release of Maternus Bere in August 2009, to rekindle a sense that work is not yet finished.

Norwegian Special Envoy, Bishop Gunnar Stålsett established a more cooperative atmosphere through a series of National Consensus Dialogues held in 2009, with a follow up seminar on justice held in Dili in October 2010. This, combined with continued civil society pressure[25] resulted in the Parliamentary resolution noted above on a follow-up institution to work on the recommendations of the CAVR and CTF reports.[26]

International and local campaigning and support could be mutually reinforcing. Although any solution must be Timorese-driven, the international community can help.

Those consulted looked for the continuation of international advocacy pressuring Timorese and Indonesian leaders and the international community for a focus on combating crimes against humanity. Internal and international campaigning for completion of the CAVR/ CTF process, would be reinforced by a follow-up institution to implement justice measures in accordance with the provisions in the Timorese constitution. This would entail reparations for individuals and communities, exhumations, establishing a displaced people register and measures designed to avoid repetition through security sector reforms and teaching human rights in schools.

All of this would undoubtedly be helped by firstly by the Timor National Assembly Parliament discussing Chega! and CTF which will overcome outside reluctance to discuss it. Impact would be even greater if the Timor-Leste government did the same, but the former would give impetus to outside and internal campaigners. This does not mean of course that Western countries will be any more keen to raise issues of international justice, including at UN level, but it does provide greater pressure points. Local demands here were that there should be support through a donor's conference, promotion of debate of the CAVR and CTF reports in the UN General Assembly and UN Human Rights Commission and in the European Union.

Western governments should also address the specific *Chega!* resolutions addressed to them. These include ones addressed to the Permanent Members of the Security Council to 'assist the Government of Timor-Leste in the provision of reparations to victims of human rights violations during the Indonesian occupation' and for the 'governments of Australia, Britain and New Zealand to undertake a joint initiative to establish the truth about the deaths of the six foreign journalists in Timor-Leste in 1975'. *Chega!* also requested that 'The United Nations and its relevant organs, in particular the Security Council, remains seized of the matter of justice for crimes against humanity in Timor-Leste for as long as necessary, and be prepared to institute an International Tribunal pursuant to Chapter VII of the UN Charter should other measures be deemed to have failed to deliver a sufficient measure of justice and Indonesia persists in the obstruction of justice'. On the issue of accountability for Serious Crimes, there is need to support the people and victims and the strong stance against impunity in the Security Council and European Union.

The other problem in calling for international support outside the judicial sphere is that donor governments are increasingly seeing Timor-Leste as a medium income nation, and a lower priority for aid. However the case needs to be made for assistance to Timor-Leste for the implementation of the CAVR and CTF recommendations process by pledging financial, moral and technical support for implementation. Donors can also provide an

example for others by recognising their own role in the Timor conflict and acting to remedy these past wrongs.

As well as support for work on such justice issues, this could mean supporting any CAVR follow-up, supporting military reforms and the professionalisation of military and police. Without this, there is the potential for renewed conflict between and within military and police.[27]

Accountability and due process of law is the only way to guarantee stability and ensure that the security sector is governed by law. Outside supporters will still call for an acceptable international justice process.

Another line of enquiry is how to work with/assist Indonesian NGOs, an issue which often receives little attention. The more pressure on the Indonesian Government to face up to its past and to be held responsible for serious human rights violations committed domestically and in Timor the better.

7. Conclusion

Implementation of the CAVR and CTF will decide the political landscape and the shape of transformation including within the judicial system. Experience from elsewhere suggests that accountability and real recognition of past atrocities is necessary to repair wounds before reconciliation efforts can complete the healing process. Recognition, debate and implementation of the CAVR report is something that the people have been awaiting for a long time. Now they want to be protected by the rule of law so that their human rights are guaranteed.

A general consensus on the ground in Timor-Leste appeared to be that there had been some improvements in the political, economic and security fields, but not in the justice sector. Work on developing the army into a modern defence force has been hampered by an uncoordinated approach by donor countries.

A confidential UN report of December 2009 (The Australian, 2010) pointed to some of these problems suggesting that the country 'remains a fragile state. Its institutions are weak and its judicial system and security forces vulnerable to political interference'. On the plus side, peaceful elections were held in 2007 and stability is holding, conditions which should hold until December 2012, when the UN is due to end its 12-year peacekeeping mission. While the factors that led to the 2006 crisis remain mostly unresolved, the UN says the best hope for East Timor is its nascent democratic institutions being robust enough to withstand another crisis. That could come from public discontent fuelled by corruption and inequitable distribution of oil and gas proceeds - rather than bickering among the country's ageing political elite. "Additional accountability mechanisms need to be put in place and strengthened, … the risk of corruption and weak delivery of services

are not addressed effectively by the government, in the presence of a relatively weak civil society with limited access to centres of decision making, public frustration might be fuelled… Socio-economic factors that fuelled the 2006 crisis -- land and property regimes, a large youth population and high levels of unemployment -- have not improved much and will take many years to address." The report cautions against the government's reliance on oil and gas revenue to pump-prime the country's weak economy. Government spending provides the only means to fund consumption and internal investment -- wealth distribution which is often poorly allocated.

One of the biggest areas of concern in 'pathways to justice' is Timor-Leste's judicial system which is both weak and vulnerable to state interference, shown only too graphically in the Bere case. The Timorese Constitution stipulates that serious crimes from 1974 – 1999 must be investigated by national or international courts. The reality, however, is that there is a lack of resources in the justice system .

Additionally many see a lack of government willingness to address the root causes of such problems. There is also the problem of what happens when there is no more money to buy peace or when the process of deciding who is to get money creates more conflict and injustice than it resolved.

Elections are due in 2012 (presidential in March/April and parliamentary in May/June) and while not a necessary cause of instability, they have been a source of concern previously (UN Dept of Public Information, 2011).

There are several scenarios for legislation. These are (a) the legislation will be addressed in 2011 either in its current or in modified form; (b) the legislation will not be addressed during the life of the current Parliament (for political reasons, a backlog of other legislation, and the proximity of elections in 2012); (c) the new Parliament will deal with the legislation - which could mean 2013; (d) the project will never happen; (e) the President, under whose auspices Post-CAVR functions, may decide to shut down the secretariat arguing it has completed its mandate and that further government grants of about $250,000 a year cannot be justified.

Supporters of the legislation have several options. These are (a) wait and see; (b) mobilise public pressure for the legislation to be passed soon,; (c) challenge the UN to act on its many expressions of clear public support for the legislation, before UNMIT's 2012 exit; (d) make concessions on the draft reparations legislation in a bid to at least get the Parliament to establish the Institute of Memory.

For some, however, the key pressure point and indeed problem remains Indonesia. It is suggested that if there is significant change in Indonesia, Timor-Leste would welcome it as happened in 1998-99. What is needed therefore is to devote more thinking, effort and resources to educating, mobilising and supporting Indonesian civil society regarding

Chega! This could be done using the recently published Indonesian language version, plus the Balibo movie, and linking it to Indonesian consciousness of historical violations by their military within Indonesia itself.

This could act to break the current privileging of reconciliation over justice. This is not just an internal matter as there are also consequences for the international community and the Indonesians. Crimes against humanity remain just that. Without a vision of what transitional justice means and has to offer for Timor-Leste, the debate remains frozen and structural violence has yet to be overcome – despite efforts especially within civil society to address the issues.

ENDNOTES

1 CAVR Timor-Leste, Chega!. O Comisão de Acolhimento, Verdade e Reconciliação Available at http://www.cavr-timorleste.org/en/chegaReport.htm [accessed on 13 May 2008]. Note that the CAVR figure differs from the often accepted figure of 200,000.

2 This is not to overlook the repressive role previously played by Portugal who by ignoring UN demands for decolonisation from the early 1960s contributed to the tragedy).

3 Chega! Recommendations for the International Community (CAVR Timor-Leste)

4 Our organisation provided two observation teams for this (which included one of the authors) and published Scott, C., 2000. East Timor – From Bullet to Ballot (CIIR).

5 Some scepticism over the reliability of government statistics is heard from sectors of civil society, as well as how the World Bank attempts to capture data on poverty.

6 Celebration of the 11 Anniversary of the Popular Consultation for the Independence of Timor-Leste. Excerpt from statement of Special Representative of the Secretary-General for Timor-Leste Ameerah Haq in Dili (30 August 2010): "Progress made to date in estab lishing and developing State institutions is undeniable. The political and security situation is stable. Democratic institutions stand firm on solid foundations."

7 The question of terminology re 'victims', 'survivors', 'combatants' etc was raised at an ICTJ meeting in 2008. How does one determine who a victim is? Also does calling them 'victims' put them in a passive position, should we consider them as "combatants"? Obviously the focus is on those who suffered serious human rights abuses, as defined by international law. Victims could also be all people who died from hunger or those whose family members were. There is a Victims Association which focuses on the needs of vic tims but also has a broader perspective on war crimes. Fernandes (2010) looks at the issues around terminology, definitions and the draft law of July 2010 which has victims as a broad category and 'vulnerable victims' as a narrow category attracting compensation.

8 Those convicted often receive lighter sentences than low level militia prosecuted in Timor-Leste. Major General Adam Damiri, the highest ranking official to face trial, was sentenced to three years imprisonment in 2003 (Huang and Gunn, 2004: 24).

9 Although many in civil society believe that Dili is far too ready to obey Jakarta's dictats and doubt that Timor would pay the price that the leadership suggests it would (authors' inter views 4 -12 October 2010 in Dili).

10 International aid to Serbia was conditioned on cooperation with the ICTY, but there have been no similar demands imposed on Indonesia.

11 One can see the problems with this in the Timor context in relation to the events of 2006 when the charisma factor lessened for Xanana, according to Irene Cristalis, and as justice and development failed to be institutionalised so a counter-charismatic figure like Major Alfredo Reinado could come to the fore as a iconic figure .(Christalis, 2009: 309).

12 Post- Suharto Indonesia had in fact drafted the necessary legislation to investigate human rights abuses by the military.

13 There were also other incidents. In 2002 several buildings associated with the Alkatiri family including that of the Prime Minister were burnt, in 2004 there were demonstrations about the government's failure to meet the needs of veterans and in 2005 the Catholic

Church organised protests about the secularisation of the school curriculum. Continuing unrest emerges from youth martial arts groups. See Nordquist, K- A., 2008, Timor-Leste: new times, new issues? (Life and Peace Institute, Uppsala).

[14] The proximate cause of this was the dismissal of nearly a third of the army which led to disputes between police and army and more than 100,000 people becoming displaced.

[15] See Cohen, D., 2003, Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta, International Centre for Transitional Justice.

[16] See ETAN, 2005, Executive Summary of Commission of Experts report (www.etan.org/news/200506exec.htm); Suter, K., 1999, United Nations on East Timor: Overview (www.ess.uew.ac.uk/Timor/document4.html); La'o Hamutuk (2008), UN sets justice bar low, then declines to jump www.laohamutuk.org/Justice08UNMITfails. Justice.htm)

[17] Patrick Walsh 2008 The CTF: from problem to partner. September.

[18] After lengthy deferrals in the Security Council, the Commission of Experts was finally able to release its report on the prosecution of human rights violations committed in Timor-Leste. The report called the Indonesian Ad-Hoc Court "manifestly inadequate" owing to the prosecution's "lack of commitment" and proposed the establishment of an international tribunal for East Timor if Indonesia failed to promptly strengthen its judicial system. The Commission also included the possibility of an exceptional International Criminal Court investigation (that would extend the Court's jurisdiction to crimes committed before its establishment) if the above recommendations were not implemented.

[19] The Special Panels for Serious Crimes is a hybrid national and international system. Although the UN provided funding and hires international staff, authority was officially with the Ministry of Justice and the Dili District Court except the Defence Lawyers Unit. To be effective outside Timor-Leste arrest warrants issued by the SCU must be forwarded to Interpol by the Timor General Prosecutor. Consequently, Timor incurs the costs of prosecuting high level Indonesian nationals. La'o Hamutuk, 2004. The Special Panels for Serious Crimes - Justice for East Timor?. La'o Hamutuk Bulletin. Despite the indictment of Indonesian military officers, trials did not occur because the Indonesian government did not recognise the court and did not extradite. SCU was suspended in 2005.

[20] As a reflection of the system of power in which it exists, the depth of impunity in Indonesia is largely due to the continuing influence of the military in political institutions and the perceived respectability of military officers regardless of their known involvement in serious crimes in Timor-Leste, West Papua and Aceh and regardless even of their formal indictment for such crimes..

[21] Although the ban was to some extent counter-productive with pirated copies being hawked extensively in Jakarta and Dili and many showings taking place.

[22] Commission of Experts Report (2005): "The Prime Minister of Timor-Leste has indicated to the Commission that he would support the creation of an international tribunal for Timor-Leste, although the Government has serious doubts whether the Security Council would agree to such a step. Former Deputy General Prosecutor for Serious Crimes, Mr Nicholas Koumjian observes that the Timorese leaders have a legiti mate concern that if they were seen as taking the lead in efforts to bring high level per

petrators to justice, it could harm the immediate and long-term relationship of Timor-Leste with their giant neighbour, the Republic of Indonesia..

[23] See also AP (2011), "Timor-Leste interested in buying Indonesia-made ships". 23 March

[24] There is a distinction "between crimes against humanity' and 'crimes of universal jurisdiction'. In both cases, there is an absolute prohibition against the commission of such crimes—but only in the latter is there a duty to prosecute. Whereas states have "permissive jurisdiction" to prosecute, or not, over crimes against humanity, states parties to the 1949 Geneva Conventions have an "absolute" duty—where those Conventions are applicable—to search for, prosecute and punish perpetrators of grave breaches of the Geneva Conventions unless they choose to hand over such persons for trial by another State Party. The Australian Deputy Coroner's report indicated that the Fourth Geneva Convention appears to be applicable to the Balibo Five murders".

[25] For example, by the end of 2009, a working group of NGOs, also consisting of various members of ANTI and supported by Progressio, submitted to Parliament a submission signed by almost 3000 people, mostly Timorese, urging Parliament to start discussing recommendations of the CAVR report.

[26] The draft law includes victims of violence enacted by independence fighters.

[27] Although note UN reservations, including more than 50 officers facing charges, As mentioned not all in civil society share this assessment.

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FREEDOM OF RELIGION IN MALAYSIA: DEBATES ON NORMS AND POLITICO - LEGAL ISSUES *

Dian Abdul Hamed Shah and Mohd Azizuddin Mohd Sani

Malaysia takes great pride in being a melting pot of different cultures, races and religions, co-existing under the purportedly "moderate Islamic nation" model. Yet, populations remain divided along racial and religious lines. Race and religion are not only politically salient; they are also jealously guarded to protect inter-ethnic sensitivities. Nevertheless, the vibrant development of human rights awareness and advocacy introduced an additional element into the dynamics of pluralism in Malaysia. Human rights have become standard talking points even amongst those in the vanguard of cultural, political, and religious conservatism.

In Malaysia, cases invoking the right to religious freedom in the past decade have garnered widespread attention and caused considerable public uproar in the Muslim-majority nation. They involve (though not limited to) apostasy, child conversions, and persecution against non-mainstream religious doctrines. These cases raise pertinent questions about the parameters of religious freedom for Muslims and non-Muslims alike, especially when pitted against particular religious rules, societal norms, as well as the bigger idea of collective social responsibility and national stability.

This paper offers a critical insight into the fundamental right to religious freedom in Malaysia. It examines several controversial cases which tackle the essential question of whether the Malaysian conception and practice of religious freedom is consistent with international human rights standards and entrenched constitutional rights. This paper demonstrates that while religious freedom is constitutionally guaranteed in Malaysia, there are other significant political, legal, and social dimensions to its exercise. It is hoped that this piece will prompt further discourses in drawing an acceptable idea of religious freedom informed by universal views of human rights, whilst maintaining aspects of common cultural values.

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1. Introduction

Malaysia prides itself in its recognition as a "moderate Islamic country" (Darshni, 2005). Through inter-communal compromises in drafting the post-colonial Federal Constitution (hereinafter "Constitution") in 1956, drafters agreed to establish Islam as the religion of the Federation (Fernando, 2006: 253). This was "part of a political settlement in return of which the non-Malays would obtain citizenship and the right to education in their mother tongue" (Harding, 2010: 499). The constitutional grounding of Islam however, does not affect the right of non-Muslims to practice and profess their own religions (Abdullah, 2003: 119). Indeed, this is the central feature of religious freedom in Malaysia as enshrined in Article 11 of the Constitution.

Almost five decades later, the rise of several high-profile cases invoking the right to religious liberty reveals serious problems regarding the parameters of that right (Barry, 2009: 409). In 2004, Lina Joy sought to change her religious status on her national identity card at the National Registry Department (NRD). Born a Muslim, Joy converted to Christianity and was baptized in 1998. The NRD refused her application in the absence of an order from a *Syariah* court affirming her conversion (Barry, 2009: 410). Joy did not resort to the religious courts, but applied to the civil courts on the grounds that the denial to remove "Islam" from her identity card interfered with her right to practice the religion of her choosing under the Constitution. Her appeals proceeded to the Federal Court - the highest court in the land - but Joy was unsuccessful (Barry, 2009: 409-410).

Needless to say, the *Lina Joy* case drew criticism from journalists, human rights lawyers, activists and organizations. But it was only one of the many cases questioning the extent of religious freedom in Malaysia. The landmark ruling was expected to permanently settle questions of whether Malaysia "will go down the line of secular constitutionalism or whether that constitution will now be read subject to religious requirements" (Prystay, 2006). Joy's lawyer, Malik Imtiaz Sarwar – himself a Muslim – sees the Federal Court verdict as "a potential dismantling of Malaysia's…multi-ethnic and multi-religious character" (Beech, 2007). Clearly, this case has many ramifications for the social, political and legal outlook in Malaysia. On the one hand, Joy's case is seen as a grave violation of a fundamental right enunciated in the Universal Declaration of Human Rights (hereinafter "UDHR") (1948). On the other, there is a fine distinction between freedom of religion as understood in the UDHR, and a more limited, carefully crafted religious liberty provision in the Constitution. Thus, the extent to which the constitutional recognition of freedom of religion is consistent with the universal idea of the same right is still a matter great of debate. This tension also demonstrates a broader theme: the tussle between universalist and relativist conceptions of human rights.

The UDHR has evolved from an aspirational statement to a body of norms accepted either as "part of customary international law, or as an authoritative interpretation of the UN Charter's human rights provisions" (Steiner et al., 2008: 161).

Its professed "universality" attracts much hullaballoo, especially from those resistant to these supposedly "Western ideas." With the rise of nationalism and claims of "culture as national essence" (Merry, 2007: 527), human rights are challenged as a product of the individualistic, liberal West. Therefore, they are seen as inconsistent with communal, conservative or non-liberal values. For others, the idea of a common standard of fundamental rights inherent to the virtue of being human – rights, which are inalienable and indivisible regardless of race, creed, and nationality – is a noble aspiration. Certainly today, the human rights movement has gone beyond mere idealism; it has transcended national boundaries, infiltrated international institutions, and embedded itself in the world's modern consciousness (UN General Assembly, 2009).

In multicultural and multi-religious Malaysia, disputes on matters of religion and race are only expected. But the extent to which the constitutional recognition of freedom of religion is consistent with the universal idea of the same right is still a matter great of debate. With the rise of high-profile cases implicating religious freedom, this issue has been brought to the forefront of the social, legal and political systems. In an attempt to address these, this article will proceed in four parts. Part 2 explains the international human rights conception of the freedom of thought, conscience and religion, and the two competing perspectives on the issue, namely the universalist and relativist debate. Part 3 underlines related provisions of the Constitution and some historical background as to how Malaysia's forefathers envisioned those crucial constitutional provisions. Part 4 examines recent cases with regard to the Malaysian experience in dealing with freedom of religion issues. Finally, Part 5 evaluates the issues shaping the extent of freedom of religion in Malaysia and attempts to propose a way forward, especially in context of the universalist-relativist arguments on that freedom. This paper will demonstrate that the parameters of freedom of religion in Malaysia are shaped by various political and legal forces, as well as the desire to maintain stability among the racially and religiously diverse population.

2. International Standards on Religious Freedom: Theories and Perspectives

2.1 International Human Rights Instruments

The post-World War II promulgation of the UDHR seeks to establish a foundational document that would transcend national boundaries and protect rights that are fundamental to a human being (Flowers, 1998). Religion is one of those rights. Article 18 of the UDHR (1948) provides the right of every individual to freedom of thought, conscience and religion. This is a truly broad provision, one that envisions not only the right to manifest, practice and profess a religion, but also the right to change one's religion. Meanwhile, Article 29(2) of the UDHR (1948) permits limitations to the exercise of one's rights and freedoms "solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Armed with the promise of respect for pluralism, equality, and non-discrimination, successive documents built upon and cemented the UDHR's provisions. For instance, Article 18(2) of the International Covenant on Civil and Political Rights (ICCPR) prohibits coercion that would impair people's freedom to choose their religion or belief. This right, however, is not absolute. Article 18(3) of the ICCPR allows limitations on manifestations of religious beliefs that are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Thus, according to the Human Rights Committee (hereinafter "HRC"), Article 18 "does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice" (UN Human Rights Committee, 1993). The HRC also states that "limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated" (UN Human Rights Committee, 1993).

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Beliefs (hereinafter "1981 Declaration") also refines the parameters of religious freedom. One striking provision is Article 2's prohibition on discrimination on the basis of religion or other beliefs. It also defines the right of parents or legal guardians of a child "to organize the life within the family in accordance with their religion or belief."

2.2 The Universalist Position

The key feature of the UDHR (1948), or any of the subsequent human rights instruments, is their universal aspirations, both in nature and application. The UDHR preamble evidences this when it speaks of the "inherent dignity and of the equal and inalienable rights of all members of the human family" and proclaims "a common standard of achievement for all people and all nations." Similarly, the 1981 Declaration proclaims the "universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."

It is obvious that the language of these human rights instruments does not contemplate any differences by way of background, creed, or geographical locations. They address all regions and states, regardless of the form of government, socio-economic situation or religious-cultural traditions (Steiner et al., 2008: 517). However, in terms of application, what 'universal' entails is a more complex question. Does this imply that all rights are to be conceived and implemented in the same manner everywhere? There are different schools of thought on what 'universalism' involves (Donnelly, 1984: 400), but the underlying belief of the universal movement is that the basic values and concepts underlying human rights are common to all people. It is certainly perplexing to imagine a situation where

rights are protected and afforded in one region and not another. As Higgins argues, "human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned" (Higgins, 2008: 539).

But a deeper reflection of this idea may expose inherent dangers. For instance, Jack Donnelly flags the problem of moral imperialism, especially given radical universalists' prioritizations of the "demands of the cosmopolitan moral community over all other ("lower") moral communities" (Higgins, 2008: 539).

On the freedom of religion, universalists claim that it is and must be the same everywhere, just like rights to equal protection, physical security, fair trials, free speech, and free association (Glendon, 2008: 142). Universal laws of human rights apply to all regardless of their religion, and states cannot deny the duties of humanity on the mere basis of religious differences (Orakhelashvili, 2006: 316). The human rights movement insists on a non-theistic basis for the modern human rights regime, reflecting a "quest for universal acceptance and universal commitment to a common moral intuition articulated in specific agreed-upon terms" (Henkin, 1998: 234). For this reason, human rights are often dismissed as promoting highly individualistic and secular ideas which differ from prevailing religious and cultural norms and practices (Henkin, 1998: 233).

2.3 The Cultural Relativist Position

The relativist argument is based on the idea of autonomy and self-determination (Donnelly, 1984: 400), both of which are not unknown concepts to international law. Amongst the relativists, the Western Enlightenment foundations of the human rights ideals (An-Naim, 2000: 96) render its validity to other cultures and regions questionable (Danchin, 2009: 95). They argue that the UDHR says very little about collective rights and is more directed towards a post-war human rights regime focused on individual rights (Danchin, 2009: 105). Relativists also consider it hard, if not impossible, to translate human rights into cultures which emphasize the role of the family and community living, particularly in cultures where religion (or religions) play an important role (Danchin, 2009: 118). Donnelly identifies different types of cultural relativism, but argues that the relativists' basic claim to human rights is grounded in respect for ethical and cultural diversity (Donnelly, 1984: 400-402). Rights and rules about morality depend on cultural contexts, and "culture" is used broadly to include not only indigenous traditions and customs, but also political and religious ideologies (Steiner et al., 2008: 518). For instance, Azizuddin Sani (2008: 2) argues that the Malaysian perspective of Asian Values, as propounded by former Prime Minister Mahathir Mohamad, is based on Malay-Islamic culture and the conviction that Western conception of rights can corrupt Malaysian culture and religious beliefs. Hence, on the basis that there are no trans-cultural ideas of rights that can be agreed upon (Steiner et al., 2008: 518), we witness the emergence of "Asian Values" and Islamic human rights.

Relativists find great difficulty in reconciling universal rights with the differing ideas of religious freedom (Henkin, 1998: 237). They also invoke the bigger idea of social responsibility and national stability to defend practices that arguably contradict such freedom (Robertson, 1995). It is argued that ideas and morality of religions differ from those of human rights, not only in their sources of authority, but also in their forms of expression and elements (Henkin, 1998: 230).

The secular human rights doctrine is deemed contradictory to the fundamental tenets of monotheistic religions because the former is based on individual autonomy and responsibility, as well as on systemic-rational principles, while the latter "is based on the subjection of the individual and the community to the will of God" (Raday, 2003: 668). Different religions also claim their respective moral codes as the basis of ethical, moral and social order, taking precedence over man-made laws and rights. The human rights corpus, underived from any holy texts or supreme higher order, is questioned by adherents who see themselves bound by the moral codes of their respective faiths (Henkin, 1998: 233).

Therefore, the UDHR is confronted with the question of "how the right mediates between its purportedly secular and objective position, and the subjectivity of particular religious norms" (Danchin, 2009: 96). The tension is evidenced by the concepts of religious duty and religious freedom, especially because in some religions there is a clear rejection of at least some religious choice, condemnation of apostasy, and resistance towards the proselytizing of their constituents by other religions (Henkin, 1998: 231).

3. The Malaysian Constitutional Law Framework

To conceptualize freedom of religion in Malaysia, it is important to understand several provisions of the Constitution. First, although the Malaysian legal system models the Westminster system, it is often taken for granted that there is a written constitution in place. The Constitution, according to Article 4, is the supreme law of the land. It is at the apex of the legal hierarchy, so any acts of parliament to the contrary may be deemed unconstitutional. Former Federal Judge Raja Azlan Shah's account on constitutional supremacy in Loh Kooi Choon v. Gov't of Malaysia (1977) 2 MLJ 187 is particularly telling:

> 'The Constitution . . . is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach . . . no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of the government'.

3.1 Islam as Religion of the Federation

Article 3(1) states that Islam shall be the religion of the Federation, but other religions may be practiced in peace and harmony in the Federation. This provision is a product of inter-communal compromises reached in a pre-independence memorandum (hereinafter "Alliance memorandum") constructed by the three main political parties in 1956 to safeguard the rights and interests of all communities (Thomas, 2006: 17).

Scholars have advanced various interpretations on Article 3, primarily connected to its ceremonial, historical and traditional significance (Thomas, 2006: 17; Fernando, 2006: 249). For instance, L.A. Sheridan and Harry E. Groves (1987) argue that Article 3 entails the use of Muslim rites in religious parts of federal ceremonies (Sheridan and Groves, 1987: 31; Thomas, 2006: 29).

Thomas suggests that Article 3 gives due regard to the elements and traditions of the Malay states long before the colonial period, i.e., the Sultanate, Islamic religion, Malay language, and Malay privilege (Thomas, 2006: 31). The constitutional ideas of the Malay states stem from the Melaka Sultanate in the fifteenth century, where Buddhist, Hindu and Islamic influences permeated through the systems of law and governance (Harding, 1996: 5-6). Shad Saleem Faruqi (2006a: 1) stressed that "the implication of adopting Islam as the religion of the Federation is that Islamic education and way of life can be promoted for Muslims. Islamic institutions can be established. Islamic courts can be set up. Muslims can be subjected to Syariah laws in certain areas provided by the Constitution."

Historical evidence suggests that although the Alliance memorandum discussed Islam as a religion for Malaysia, it emphasized that this should not affect non-Muslims' right to profess and practice their religion, and there is no implication that the State is not a secular State (Thomas, 2006: 18-19). Andrew Harding (2010: 506) suggests that despite the establishment of Islam as the religion of the Federation, it has always been agreed that this does not create an Islamic state, but simply allows for the religious nature of state ceremonies. Chief Justice Abdul Hamid, the Reid Commission member from Pakistan, also opined that the provision on Islam as the religion of the State is innocuous (Thomas, 2006: 19). However, "secular," as intended by the founding fathers, does not connote an anti-religious or anti-Islamic state of governance (Sarwar, 2007a). The Constitution envisages that Syariah laws would govern the personal law requirements of Muslims, but it recognizes that the Syariah would not be made the supreme law.

These views were espoused by the Supreme Court in the landmark case of Che Omar bin *Che Soh v. Public Prosecutor* (1988) 2 MLJ 55, 55-56. In this case, the accused was faced with a mandatory death sentence for drug trafficking. He challenged the sentence on the basis that the imposition of death penalty for the offence is contrary to Islamic injunction and therefore, unconstitutional and void. The Court reiterated the secular character

of the law and governance system, which resulted from colonial Anglo/Malay treaties. It also emphasized that the British establishment of secular institutions separated Islam into the public and private aspect. Islamic law "was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only". Despite the foregoing arguments, it is notable that the establishment of a particular religion over the State is not unique to Malaysia. In Norway, for instance, primacy on Christianity means that the king and a majority of the cabinet are required to be members of the state church (Shelton and Kiss, 2007: 575). In England, the Anglican Church remains at the center of public policy and has substantial support from the state (Shelton and Kiss, 2007: 576).

3.2 Freedom of Religion

Article 11 guarantees freedom of religion, which – on its literal wording – seems comprehensive enough to safeguard this fundamental right for Malaysia's plural society. A citizen has the right to profess, practice and – subject to Article 11(4) – to propagate his religion.

Religious groups have the right to manage their own religious affairs or any matters relating to the properties and the establishment of religious institutions. On its face, Article 11 does not expressly prohibit the conversion of a Muslim, though at the same time it does not explicitly include the right to change one's religion. However, it is suggested that Article 11 can be construed broadly to include one's freedom to relinquish or change a religious belief (albeit with limitations for Muslims under specific religious laws), and even to not be religious (Thomas, 2006: 34).

The religious freedom clause is reinforced by other constitutional provisions. First, to combat subversion Article 149 permits the enactment of laws which would otherwise be inconsistent with certain fundamental rights such as freedom of speech or personal liberty, but it prohibits any encroachments on religious freedom. Second, under Article 150 (6A), even in a state of emergency, any emergency laws enacted thereafter cannot curtail freedom of religion. Third, Article 8 prohibits discrimination on the grounds of religion against public sector employees, in the acquisition or holding of property, and in any trade, business or profession. It is also important to note that freedom of religion is not affected by Article 3's establishment of Islam as religion of the Federation. Article 3(4) clearly states that nothing in article 3 derogates from any other provision in the Constitution.

Even so, there are several restraints against freedom of religion. Article 11(5) limits this freedom on grounds of public order, public health or morality. Thus, any religious act deemed contrary to general laws relating to these grounds is unsustainable under Article 11. In the case of Muslim citizens, there may be additional restraints to religious freedom by virtue of Schedule 9, List II, Item I of the Constitution. This grants power to State

Assemblies to enact laws to punish Muslims for offences against the precepts of Islam, such as khalwat, adultery, apostasy, gambling, drinking and deviationist activities (Masum, 2009: iii).

A more controversial provision is subsection 4's limitation on the propagation of religion among Muslims. At first glance, it appears that this contradicts the idea of religious freedom especially for those religions that regard proselytizing as a crucial part of worship (Sheridan and Groves, 1987: 31). There are some important arguments against this view. First, laws controlling propagation are meant "to prevent Muslims from being exposed to heretical religious doctrines, be they of Islamic or non-Islamic origin, and irrespective of whether the propagators are Muslims or non-Muslims" (Masum, 2009: iii-iv). Shad Saleem Faruqi (2001) adds that such restrictions are meant to protect Muslims against organized international missionary activities and to preserve social harmony, rather than prioritizing any particular religion. Second, subsection 4 does not, in and of itself, restrict propagation. Sheridan and Groves argue that it merely renders it constitutional for state law (or federal law in the case of the Federal Territories) to control or restrict propagation (Sheridan and Groves, 1987: 76).

Case law has, to some extent, been instrumental in developing restraints on religious freedom. This is particularly true of the word 'practice' in Article 11, culminating in the non-mandatory practices doctrine. In essence, this means that freedom of religion extends only to those practices and rituals that are essential and mandatory (Masum, 2009: 4).

In *Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Another* (1994) 3 MLJ 61 the court rejected a woman's appeal to wear a purdah (a headdress covering a woman's entire face except the eyes) to work because the government was entitled to forbid non-essential and optional religious traditions in the interests of the public service. Similarly, *in Meor Atiqulrahman bin Ishak & Others v Fatimah Sihi & Others* (2006) 4 MLJ 605, 616 the court rejected demands by Muslim boys to be allowed to wear turbans to school.

4. The Malaysian Experience on Religious Freedom

Despite the constitutional grounding of religious freedom, the exercise of this right remains complicated in practice. The parameters of freedom of religion are not always clear, and it is often obscured by political, social and racial elements. The problem not only affects relations between Muslim and non-Muslim citizens; it raises many issues within the Muslim community itself. This strikes a chord between those intent upon a modern liberal interpretation of universal human rights principles, and those insistent on communally-based, constitutional-contract politics in Malaysia (Mohamad, 2008: 155).

4.1 Religious Conversions and Inter-faith Conflicts

In Malaysia, religious conversion cases raise multifaceted constitutional questions and human rights issues, primarily on the extent of a citizen's assertion of the right to religious freedom. These cases also involve questions on the role of Islam as religion of the Federation, specific Islamic rules on apostasy and the role of Syariah courts, as well as one's ethnic status. The most pertinent issue is whether the exercise of this freedom includes the freedom of Muslims to renounce the Islamic faith. The Malaysian courts have dealt with conversions and apostasy many times over the years, and the results are quite varied. For one, there is the notable case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM)* & Anor. (1999) 1 MLJ 489, 489-502. Soon Singh was brought up as a Sikh but converted to Islam. He later renounced Islam and sought a declaration that he was no longer a Muslim in the Kuala Lumpur High Court. The court dismissed his application on the grounds that the subject matter in the application fell within the jurisdiction of the Syariah Courts. In *Kamariah bte Ali v. Kelantan Government* (2002) 3 MLJ 657, a cult member was sentenced to two years in jail for apostasy. There is also the case of Siti Fatimah Tan Abdullah v. Majlis *Agama Islam Pulau Pinang* (2006) Case. 07100-043-0191-2006 (Syariah High Court of Pulau Pinang), which saw the courts exercising some degree of leniency in allowing the appellant, who converted to Islam to marry an Iranian, to later renounce the religion.

However, it was *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Another,* (2007) 4 MLJ 585, that has gained international attention and widespread local debate (Evans, 2009: 460). Joy argued that the National Registry Department's (NRD's) requirement of a Syariah court's confirmation of her conversion violated her constitutional right to freedom of religion. The Federal Court, however, upheld the NRD's requirement before Joy could officially change her religious status on her identity card. The majority opinion also held that one can renounce Islam but still must follow Islam's procedure to do so, and agreed with submissions of various Muslim Non-Governmental Organizations (NGOs) that willful and whimsical conversions could cause chaos to Islam and its adherents (Evans, 2009: 463-464). Although this case was largely an administrative law matter, it became rife with important constitutional and human rights questions.

First, if rights provisions are indeed a mechanism for preventing State interference with a citizen's fundamental liberties, Joy's argument is plausible. Civil and political rights, such as religious freedom, are of a negative nature, that is, the State simply must not encroach upon a citizen's exercise of those rights. Second, the fact that the majority required adherence to particular procedures for renouncing Islam (namely, a *Syariah* court confirmation), suggests that Article 11 is read in light of Article 3 (Evans, 2009: 464). Harding (2010: 511) argues that the ruling essentially "elevated article 3 to a higher status than article 11." Perhaps one could entertain the idea that Islam as the religion of the Federation means that it should be given precedence, and that any exercise of religious

freedom by Muslims is conditional on Article 3. However, this approach is sorely lacking of any constitutional basis because Article 3(4) clearly states that the establishment of Islam does not affect other provisions of the Constitution. The majority holding in *Lina Joy* also appears to betray the constitutional guarantee of equality regardless of race or religion.

Perhaps the most problematic aspect of the decision is the apparent side-stepping of constitutional issues and deference to the Syariah court in matters implicating freedom of religion. It reveals a lacuna in the legal system due to overlapping of civil and *Syariah* jurisdictions. On the one hand, constitutional rights and interpretation fall squarely within the purview of the civil courts. Harding argues that matters within the Islamic jurisdiction are personal rather than constitutional, and that the "constitutional law requires that jurisdiction of the ordinary courts to rule finally on matters of legality should be preserved" (Harding, 1996: 138). On the other hand, conversions out of Islam are perceived as a matter for the *Syariah* courts due to the separation of the civil-*Syariah* jurisdiction in 1988. The problem is that state-enacted Islamic laws regulating conversions are not always consistent with religious freedom. Moreover, barring a few states, there is no clear legislative enactment on how to deal with apostates or those who seek to convert (Hasan, 2008). It is also unlikely that individuals would voluntarily go to the Syariah courts to convert because these efforts may either be futile, or they will be subjected to punishment or counseling sessions. For instance, Articles 119(1) and 119(8) of the Administration of Islam Enactment (Negeri Sembilan) 2003 require an individual to first to apply to a *Syariah* court for a declaration that he or she is no longer a Muslim, attend counseling for a year, and if his or her position does not change, the court may grant the application. Constitutional arguments aside, it is worth mentioning that from an Islamic perspective, apostasy (for instance by pronouncing oneself to have or intend to renounce Islam) is considered valid regardless of its official endorsement by any particular authority (Abidin, 2007).

The outcome of *Lina Joy* restricts freedom of religion and, to a certain extent, puts it in a state of flux. There is no clear answer to whether the Federal Court would be willing to fight tooth and nail to uphold Article 11 and permit conversions among Muslims. The trend of side-stepping issues of constitutional importance and obscuring the boundaries of religious freedom in Malaysia continued in a recent child conversion case, *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Another* (2004) 2 MLJ 648. There, the consent of a single parent is deemed enough to validate the conversion of a child. There, a Hindu woman appealed against a High Court decision affirming the validity of her children's conversion to Islam without her consent. Shamala and her husband were both Hindus at the time of their marriage and her husband later converted to Islam and also converted both their minor children. The High Court also ruled that Shamala's application to invalidate the conversion is not within its jurisdiction because the children are now Muslims and as such, they are subject to the *Syariah* jurisdiction. The High Court

accepted that Shamala, being a non-Muslim, was without remedy as she is not within the *Syariah* jurisdiction. The Court only suggested that Shamala seek assistance from the Islamic Council of the Federal Territories.

One of the crucial questions on appeal is whether the Syariah court has exclusive jurisdiction to determine the validity of minors' conversion to Islam once they have been registered as Muslims (Harun, 2010). The Federal Court was also called upon to determine the appropriate forum for a non-Muslim parent to assert his or her rights and remedies in cases of unilateral conversion of children. In November 2010, the Federal Court rejected Shamala's referral application on the basis that Shamala was in contempt of a High Court order requiring her to bring her children to Malaysia. Shamala had apparently left the country with her children in 2004 (The Star, 2010). Commentators criticized the Federal Court's apparent 'hands-off' approach as a mere 'skirting of technicalities' (Harun, 2010). It appears that the Court had failed to appreciate the gravity of the constitutional issues presented before it, and that it missed the opportunity to clarify those issues, especially as there are other similar cases pending (Tan, 2010).

4.2 Minority Religious Doctrines

The extent of religious freedom in Malaysia is also challenged by restrictions on religious doctrines. As the preceding section demonstrates, states reserve the right to restrict or control propagation of any religious doctrines among Muslims. These limitations affect both Muslim and non-Muslim communities alike.

The first implication of this restriction is that non-Muslims' freedom to practice their religion may be severely curtailed with respect to propagation of their religion to Muslims. There are some State Laws and Federal laws restricting the right to propagate any religious doctrine or belief among Muslims except for Sunni Islam. One example is Terengganu's 'The Control and Restriction of the Propagation of Non-Islamic Religious Enactment' of 1980 (Adil, 2007). In the Federal Territories, Article 5 of Syariah Criminal Offence Act 1997 states:

> 'Any person who propagates religious doctrine or belief other than the religious doctrine or beliefs of the religion of Islam among persons professing the Islamic faith shall be guilty of an offence and shall on conviction be liable to fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both'.

As a matter of constitutional law, these legislations are rightly constitutional by virtue of Article 11(4) (Harding, 2002: 167).

Restrictions on propagation may be connected to concerns of widespread proselytism, conversions, and also non-Sunni religious Sects among Sunni Muslims (Harding, 2002:

168). While such restrictions interfere with the right to practice a religion, it is often taken for granted that proselytism itself may be deemed a serious encroachment of religious freedom. If this right is to be meaningful, individuals should be free from any compulsion or undue influence to adopt a particular belief. Thus, conversion resulting from compulsion or undue influence is more problematic than conversion out of one's free will. In a multiethnic society like Malaysia, the former is potentially divisive and may threaten social order. An instructive case is *Minister of Home Affairs & Another v Jamaluddin bin Othman* (1989) 1 MLJ 418, where an individual was detained under Internal Security Act 1960 ("ISA") for allegedly disseminating Christianity among Malays and converted six Malays to Christianity. It was suggested that this could ignite tensions between the Christian and Muslim communities and pose a threat to national security. However, the Supreme Court (as it then was) held that such detention was unlawful as it was contrary to the religious right conferred by Article 11(1). The Minister could not utilize the ISA to restrict an individual's right to profess and practice his religion. The Court also ruled that mere participation in meetings and seminars on Christianity, and conversion of Malays could not be regarded as a national security threat.

The second implication from the Article 11(4) restriction is that state laws may prohibit the propagation of other sects or doctrines within Islam itself. Mohamed Salleh Abas (1984: 45) argues that:

> 'This limitation is logical as it is necessary consequence that follows naturally from the fact that Islam is the religion of the Federation. Muslims in this country belong to the Sunni Sect which recognizes only the teachings of four specified schools of thought and regards others school of thought as being contrary to true Islamic religion. It is with a view to confining the practice of Islamic religion in this country within the Sunni Sect that State Legislative Assemblies and Parliament as respects the Federal Territory are empowered to pass laws to protect Muslims'.

Thus, state laws may prohibit 'deviations' from the Sunni sect. Since Muslims in Malaysia officially adhere to *Sunni* teachings, non-Sunni schools of thought are outlawed (Adil, 2007: 10-11). Although there is no constitutional provision entrenching the position of *Sunni* teachings among Muslims in Malaysia, certain state enactments such as that of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, provides that Muslims must conform with *Sunni* teachings, with emphasis on the *Shafi'I* school of thought (Adil, 2007: 10).

The executive and state religious departments have also been fairly active in crackdowns against adherents of other sects. For example, in the 1990s the *Arqam* Islamic group, formed in the 1960s to promote an 'Islamic' way of life based on self-sufficiency and strict adherence to Islamic teachings, faced persecution by the government (Adil, 2007: 11). In 1994, this group was labeled by the National Fatwa Council as 'deviant' and unlawful. The Ministry of Home Affairs also delegitimized *Arqam* under the Societies Act of 1966 (Adil, 2007: 11).

Between October 2000 and January 2001, the Federal government detained six *Shia* followers under the ISA. Although they were not charged either in civil or *Syariah* courts, *Fatwa* committees in the country, including the one at the federal level, issued a fatwa labeling the group as "deviant" (Adil, 2007: 10). More recently, authorities detained more than 200 Muslim Shiites in Selangor on grounds that the Shia doctrine is a threat to national security (Associate Press, 2010). The government claimed that *Shia* doctrine allows for the killing of Muslims considered as being infidels – i.e., non-Shiite Muslims. However, it is not clear if these threats are true or if they are in fact serious and imminent at all.

5. Analysis: Challenges to Freedom of Religion in Malaysia

5.1 The Dual Civil-Syariah Jurisdiction: A Legal Loophole?

A 1988 constitutional amendment separated the civil and Islamic justice systems through Article 121(1A). This provision simply states that the civil courts were to have no jurisdiction in matters within the *Syariah* court's jurisdiction. Thus, Muslims are subjected to *Syariah* laws in certain matters (as listed in the Ninth Schedule, List II, Item I of the Constitution), and any conduct contrary to Islamic precepts is liable to prosecution. The amendment seems fueled with the best intentions, but it now raises serious jurisdictional conflicts, as well as tensions within the plural Malaysian community.

While the amendment is justified, because *Syariah* is a distinct field that requires expertise in Islamic jurisprudence (Faruqi, 2006a), one problem with the separation of jurisdiction is that it did not create an authoritative mechanism to resolve a jurisdictional overlap. The *Lina Joy* case, like other cases implicating Islam and the freedom of religion, exposes a legal lacuna on jurisdictional propriety. Joy's case for instance, involves the tension between one's constitutional right to religious freedom and separate proceedings under the Syariah court to renounce Islam. Which court has the authority to definitively rule on the matter? In *Lina Joy,* dissenting judge Richard Malanjum demonstrates greater fidelity to constitutional supremacy, arguing that "civil superior courts should not decline jurisdiction by merely citing article 121(1A)". He also added that Article 121 (1A) "only protects the *Syariah* Court in matters within their jurisdiction, which does not include the interpretation of the provisions of the Constitution".

Another key question is whether the *Syariah* courts have jurisdiction over matters of apostasy, even without legislation granting them the power to do so. It bears reiteration that religion is a state matter and List II of Schedule 9 provides matters – such as the administration of Islamic law – in which states may legislate. In *Lina Joy*, no Federal Territories laws mention how to deal with apostates. Section 46(2)(a) of the Administration of Islamic Law (Fed. Territories) Act provides that a *Syariah* High Court in the Federal

Territories shall only have criminal jurisdiction to try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territories) Act 1984 or under any other written law prescribing offences against precepts of Islam.

The Syariah Criminal Offences (Federal Territories) Act 1997 Part III (Offenses Relating to the Sanctity of the Religion of Islam and Its Institution) is silent on apostasy. Furthermore, the fact that Joy was no longer a Muslim raises the question of whether she could properly be adjudicated under a *Syariah* court.

There are two competing views on the jurisdiction of *Syariah* courts. The first is that not all *Syariah* laws apply per se (Sarwar, 2007b). For example, Sarwar (2007b) criticizes the "erroneous assumption that 'unwritten' (or un-enacted) *Syariah* law . . . can be applied in the *Syariah* courts." Put differently, whether a matter falls under the jurisdiction of *Syariah* courts is essentially up to the laws enacted by State Assemblies (or Parliament in the case of the Federal Territories) (Sarwar, 2007c). This proposition – that state laws must expressly confer jurisdiction to the Syariah courts – has found favor in earlier decisions. For instance, *in Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor.* (No 2) (1991) 3 MLJ 487, 489, the court held that "if State law does not confer on the *Syariah* court any jurisdiction to deal with any matter in the State List, the *Syariah* court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication." Thus, in *Lina Joy*, the absence of laws governing apostasy in the Federal Territories renders the deference to the *Syariah* court debatable.

The other view, one that the majority in *Lina Joy* has adopted, is that *Syariah* courts possess jurisdiction by implication – that their power is inherent in State List of Schedule 9. In other words, just because State laws do not confer jurisdiction to the *Syariah* courts to adjudicate on apostasy issues, this "does not mean that such issues are to be adjudicated automatically by a civil court" (Rahman 1998: 1). Indeed, this approach is evident in a series of cases before *Lina Joy*, *such as Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* (1998) 1 MLJ. 681, 688-689 (where the court held that "the jurisdiction lies with the *Syariah* court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993.") and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) & Anor.* (1999) (where the court held that "since matters on conversion to Islam come under the jurisdiction of the Syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.") Against this, Judge Malanjum argues in *Lina Joy* that where fundamental rights are implicated, "there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted."

The first view seems more persuasive, especially in a constitutional democracy like Malaysia. It is quite absurd that un-enacted State laws that are merely implied from the state legislative list can thwart a Constitution, which is the supreme law of the nation. On this point, Judge Malanjum argued – and perhaps rightly so – that the State legislative lists of power is subordinate to fundamental rights of the Constitution. The continuous sidestepping by the civil courts in an area as important as the constitutional right to religious freedom renders the issue uncertain. It is also frustrating for citizens who resort to the highest court in the land to uphold their rights, only to see their appeals being turned down on technicalities.

5.2 International Standards and The 'Asian Values' Debate

The international human rights standard on freedom of thought, conscience and religion provision includes one's right to change his or her religion. Furthermore, "any coercion that would impair the right to have or to adopt a religion or belief" is prohibited, "including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs" (UN Human Rights Committee, 1993). This is the position of the Human Rights Committee (HRC) in its general comments to Article 18(2) of the International Covenant on Civil and Political Rights. Although these comments are not specifically directed at the UDHR, we can extrapolate these formulations to understand what is envisaged by the universal human rights regime in construing the meaning of religious freedom. After all, the ICCPR is a manifestation of the UDHR in its binding form (although the former is stated in considerably greater detail).

On its face, the Malaysian constitutional provisions on religious freedom compare favorably to international standards (Stahnke and Blitt, 2005: 964-966). But the Constitution's careful omission of the freedom of a person to renounce or change his religion or belief without punishment (although some argue that this freedom can be implied) raises questions on the true extent religious freedom in Malaysia. Moreover, in practice, conversion does not seem to be an option – at least to Muslims – due to certain state laws imposing punishment for apostasy (Masum, 2009: vii-viii). While capital punishments are never imposed on apostates in Malaysia, those who convert may be required, by state law, to attend counseling sessions (Hussain, 1999: 132). Even where there is no state law on point, such as in *Lina Joy*, it seems that the exercise of that right is virtually impossible because of uncertainties within the legal system.

Another potential friction between Malaysia's conceptions of religious freedom with the international regime concerns the prohibition against propagation of any religious doctrines among Muslims. This challenges the conventional idea of religious freedom, at least in the view of the international human rights doctrine. Although the restriction is defended on the basis of protecting social stability (Masum, 2009: iv), it implies some form of discrimination in the practice of religion, and places other religions at a disadvantage vis-à-vis Islam. Moreover, restrictions on propagation of other Islamic doctrines

may be seen as an over-regulation by state authorities seeking to impose their particular understanding of Islam on others. The controls may curtail religionists for whom proselytizing is an integral part of worship (Masum, 2009: iv).

In turn, this may affect the freedom to teach and practice one's religious beliefs. On the flip side, the concern with proselytism is that such practices may themselves exceed the bounds of religious freedom, especially when they amount to some form of coercion and undue influence on another to adopt another religion. It is worth mentioning that proselytizing is not only an issue in Malaysia; it has also been highlighted as something that "could eventually lead to the collapse of social norms and cultural identities in Africa" (Steiner et al., 2008: 607).

Nevertheless, the problem with an international checks and balances mechanism in Malaysia is the absence of any legally binding commitment to international human rights obligations. The standing of UDHR continues to be a matter of great debate. Although, as mentioned above, writers have argued that the UDHR has matured into customary international law, it is also not incorrect to insist on the declaratory nature of UDHR which imposes no obligation on states. Malaysia's reluctance to progress towards a concrete international human rights obligation is hardly surprising. During the Mahathir administration, there was an obsession with the 'Asian Values' doctrine circling within the politico-legal atmosphere in Southeast Asia (Freeman, 1996: 354). This doctrine, perhaps characteristic of the universalist-relativist tension in the human rights discourse, challenges the universal human rights scheme based on Asia's unique cultural traditions (Freeman, 1996: 353). The underlying idea is that preserving social harmony and collective welfare is more important than upholding a 'western,' individualistic notion of human rights (Freeman, 1996: 353-355).

However, even among the political elites, there is a lack of consensus not only on what the doctrine means, but also whether it is tenable at all (Freeman, 1996: 353). Indonesia's Foreign Minister, for instance, rejected the idea of an existing clash between the supposedly 'western' universal human rights concept and distinctively 'Asian' point of view (Freeman, 1996: 353). On the other hand Donnelly argues that leaders such as Singapore's Lee Kwan Yew and Malaysia's Mahathir claim that if a substantial deviation from the common international human rights standard is based on culture, it is legitimately allowed (Donnelly, 2003: 107). The Mahathir model of 'Asian Values' include the elements of strong authority, priority of community over the individual, and a strong family based society (Sani, 2008: 4).

These concepts are important because they shape the way the government (and to some extent, the courts) views the parameters of religious freedom. The underlying idea is that restrictions on religious freedom may be justified in exchange for maintaining social order not only among Malaysia's multi-religious society, but also within the Muslim community itself. It is worth emphasizing that the basic responsibility of a State is to safeguard

and prevent encroachments on the freedom of religion for all citizens. The problem in Malaysia, however, is the over-regulation by the State of private matters. For Muslims, it seems very odd that 'personal sins' such as apostasy become matters between an individual and the state. Prominent Islamic scholars such as Mohammad Hashim Kamali have spoken out against this, arguing that it is not for the state to legislate punishments for personal sins (Shah, 2009).

5.3 The Politics of Race, Religion, and Social Order

A strong assertion of the right to religious freedom is bound to attract competing interests in the multiracial Malaysian society. Thus, any analysis is incomplete without considering the socio-political and racial dimensions to the freedom of religion debate. For non-Muslims, freedom of religion is often taken for granted until various problems are brought to the public eye. These include cases implicating spouses and children, such as the religion that the children should be raised with. For the Malay-Muslim majority, the unease is attributable to the purported ramifications on ethnicity and politics.

Generally, many Malays are strongly attached to their religion. Hence, any attempt to weaken a Malay's faith may be perceived as an indirect attempt to erode Malay identity as well as political power (Faruqi, 2001). Within the Malay community, renouncing Islam is perceived as deserting the community because Article 160(2) of the Constitution defines a Malay as one who professes the religion of Islam (Faruqi, 2001). Furthermore, cases of apostasy strike immediate correlations with proselytism and impressions of an attack against the sanctity of Islam as the religion of the Federation. Faruqi (2006b) suggested that wide-spread conversion of Malay-Muslims to other religions will have grave implications for the delicate racial balance between the Malay and non-Malay communities and may well jeopardize the stability of the nation.

In *Lina Joy*, it is evident that social order considerations played a role in the majority opinion. The majority alluded to several Muslim NGOs' assertions that conversion at will could cause chaos among Muslims and Islam. However, the *Lina Joy* decision gave no clear guidance on when a 'public order' justification would ever be tenable. The majority did not explore this issue in great depth and it almost seems as if the threat to 'public order' argument is a mere assumption. It is duly accepted that the Constitution provides that the freedom of religion does not authorize any acts contrary to any general law relating to public order, public health or morality. Even from an international human rights perspective, there is no doubt that the freedom of religion is not absolute. However, where derogations are permitted on the basis of public order, this affects only manifestations of belief and not the freedom to adopt or profess a belief (UN Human Rights Committee, 1993).

To some, though indirect, extent, the rise of political Islam has some bearing on how most Malay-Muslims view religion and the expectations on the status of Islam in the

country (Harding, 2010: 502-503). Although Islam's role was initially thought as merely ceremonial, the resurgence of Islam in Malaysia's political landscape in the 1970s and 1980s arguably changed this. The Islamic Party, PAS, who vowed to establish an Islamic state where only Muslims would hold political power, subsequently took over the state of Kelantan (Harding, 2010: 502). In response to the change in political climate, the ruling *Barisan Nasional* ("BN") multiethnic coalition launched various Islamization initiatives in the legal and institutional sectors, as well as in education (Harding, 2010: 503). Although government policies leaned towards Islamic values, PAS gained noteworthy electoral successes which then put the federal government under pressure (Harding, 2010: 504-506). These events helped shape the emergence of the "Islamic State" rhetoric. As Harding (2010: 506) observes:

> 'The electoral successes of PAS created a new environment for the discussion of the role of Islamic law. Beginning around 1999, for example, there was public debate about the concept of an Islamic state, which intensified and broadened following an announcement by the Prime Minister Dr Mahathir Mohamad in Parliament that Malaysia was an 'Islamic state'. Dr Mahathir even went so far as to say that Malaysia was a 'fundamentalist, not a moderate Islamic state', and that it was also a 'model Islamic state'.

The language of 'social order,' often cited to curtail rights, is not a uniquely Malaysian concept. However, the more important question is where do we draw the line between maintaining social stability and securing individual rights of religious practice and freedom of religion? This needs to be re-evaluated in Malaysia where the politicization of the "Islamic State" identity and fear-mongering has had a considerable effect on defining the parameters of fundamental rights afforded by the Constitution. The restrictions on rights of others due to mere political insecurity cannot be tolerated if we are to uphold both human rights and respect for religious convictions.

5.4 Bridging Universalist-Relativist Debate

Malaysia's experience with freedom of religion is demonstrative the tension between the universal ideals of human rights and the relativity of cultural and religious norms. The former resists religious traditions that are arguably at odds with the modern liberal interpretation of universal human rights principles (Mohamad, 2008: 155), while the latter is often advanced on the basis of 'social order' and the desire to maintain distinct 'Asian Values.' But the exposé on the Malaysian practices suggests that there are also other unresolved questions. Any firm reconciliation with international human rights standards remains problematic, and local institutional and political obstacles to the exercise of religious freedom complicate this.

In attempting to bridge the universalist-relativist gap, one should first note that the two polar assumptions of human rights "would have been foreign to the framers of the Declaration" (Glendon, 2008: 142). Moreover, the final Vienna Document that all UN members have

accepted stresses that it is the participating States' duty to implement human rights while bearing in mind that countries have different religious and cultural traditions (Glendon, 2008: 142). Nevertheless the challenge to resolve the gap in the context of religious freedom lies not only in the tension between religious and secular spheres, but also in the relationship of religion to other rights (Danchin, 2009: 102) as well as of one religion vis-a-vis another (An-Naim, 2000: 95).

Another problem plaguing the human rights discourse is the failure to appreciate the human rights canon as a whole. Hence, there lies an obstacle in properly conceiving morality of human rights when construing the freedom of religion. In resolving this problem one should look at the UDHR's call for everyone to "act in the spirit of brotherhood" as a starting point for refuting claims that the human rights regime is inherently individualistic and discriminatory against non-Western cultures. One must remember that the human rights corpus, in its quest for a truly universal acceptance, accommodates varying circumstances through its limitation clause.

The freedom of thought, conscience, and religion must also be considered together with Article 29, which emphasizes that "everyone has duties to the community." Quite interestingly, the UDHR is silent on the meaning, origin and enumeration of such duties (Khalil, 2010: 8), so much so that this is open to interpretation and incorporation according to varying culture and religious norms. Steiner et al. (2008: 347-8) argue that "the ambit of human duties is wide; encompassing all dimensions of man's life, be they physical, spiritual and mental."

If one pays attention to the UDHR as a whole, then human duties should not be blatantly ignored when one speaks of human rights. Indeed, religious beliefs and human rights are deemed complementary expressions of similar ideas, although religion invokes the language of duties rather than rights (Steiner et al., 2008: 569). One problem, however, is that some religious duties may impinge on rights, and religious authorities routinely assert primacy of those traditions over certain rights (Steiner et al., 2008: 569). This is more challenging when that assertion is grounded upon highly conservative, counter-progressive conceptions of religion. Furthermore, religions are chiefly concerned with the rights of their constituents, including in exercising the right to freedom of thought, conscience, and religion (Henkin, 1998: 234). So the question becomes: do rights come first, or duties? It is problematic for human rights to be strictly defined by duties, or vice versa. Religious duties, in the Islamic context for example, offer different opinions on the extent of religious freedom, especially in cases of conversions and apostasy. More problematic is the differing implementation of religious laws in various countries, and respective claims of superiority by different religions. The human rights canon, as general secular construct, did not provide for these intricate contingencies.

Perhaps the ultimate resolution lies in focusing on the human rights morality, which is grounded upon the notion of human dignity – that all human beings are born free and

equal. This not only means that one's fundamental rights must be respected in spirit and essence, but it also denotes respect for the exercise of rights by others. It is indeed moral to respect individual rights, the exercise of which is essential not only for one to develop as a person, but also to contribute to collective development because individuals are in fact, part and parcel of a community. Thus, human duties to the community must be carried out concurrently with assertions of human rights as far as those duties are compatible with human dignity and the human rights ideal of respecting individual beliefs. This ideal exists "where the government does not prescribe orthodoxy or prohibit particular religions or beliefs" (Shelton and Kiss, 2007: 575). In the religious freedom context, it is consistent with human rights morality to respect one's independent choice of belief. Human duties to community should be allowed to run their course by providing room for discussion and resolution. But if such a process is ultimately futile, then the dignity of individual choice should be respected without unnecessary, State-imposed hurdles.

6. Conclusion

Religion is an important feature of the nation by reason of tradition and history, and it will continue to be important in the social, political and legal discourse. The relationship between law and religion is a complex, albeit evolving issue.

The foregoing sections demonstrate that not only is the Malaysian practice complicated from a constitutional perspective, but that it also raises serious questions in light of the human rights regime on religious freedom. If, as previously suggested, the *Lina Joy* outcome will "define the nation's character" (Prystay, 2006: 11), then the plural Malaysian society has a lot to cringe about.

It seems that discussions on Islam as the religion of the Federation and religious freedom fail to consider the Constitution in its entirety, much less pay attention to the intention of our forefathers in engineering the Constitution. The resolution of cases implicating freedom of religion does not seem to be conducive to maintaining religious harmony and pluralism in a divided society. The constitutional promise of religious freedom and equality, rosy as they may seem, are being eroded. Various political and social concerns, and unyielding insistence on 'Asian values' further complicate increase this issue.

The arguments above also have one thing in common – foregrounding the interests in morality, humanity, and social stability. While we remain cognizant of local conditions and allow society to evolve its human rights consciousness through education and advocacy, courts also bear an important responsibility in defining the parameters of citizens' rights. Furthermore, although human rights are secular and Western in origin, the UDHR is a document of persuasive moral authority. The morality stemming from respect for individual rights is important as the exercise of those rights will bear significant impact on community living and social order. It is also notable that duties to the community can be arbitrary or an exclusive matter for domestic law and politics (Opsahl, 1992: 457-

458). We should be mindful of this because authorities have an interest in imposing rules that arguably violate individual rights to buttress their position and maintain the status quo. For that reason, there must be solid recognition of human rights as a mechanism of checks and balances against the state. In the context of freedom of religion, the responsibility of a State to safeguard and prevent encroachments on this fundamental right is paramount.

A strong grounding on values, through both human rights and duties to the community, is the key to tolerance and social stability. There is an urgent need for a more receptive approach towards common morality that can be derived from both Universalist and Relativist conceptions of human rights. Instead of getting bogged down in ideological antagonisms and arrogant dismissals, freedom of religion has to be understood in the proper context in order to promote progressive reconciliation with religious precepts. For one to believe that the other has the right to practice their faith freely, the conviction must begin from the firm morality of respecting human dignity and beliefs. Religious issues in a plural society such as Malaysia must also be open to debates by all sections of the community. Sensitivities can only be resolved through civilized deliberation and decisions motivated by consensus and compromise. While concerns of social stability are understandable, actions must not compromise human dignity.

With the increasing human rights consciousness and growing number of progressives among both the Malay-Muslim majority and other minorities, we can hope for a shift in mentality and a more civilized rights discourse in Malaysia.

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DOES POST-SOEHARTO INDONESIAN LAW SYSTEM GUARANTEE FREEDOM OF THE PRESS?

R. Herlambang Perdana Wiratraman

In the early years of the post-Soeharto era, press freedom in Indonesia was at its peak. It was deemed progressive, especially after the adoption of human rights and guaranteed freedom of expression into the amendment of the 1945 Constitution (during 1999-2002). In 1999, articles against revocation of press permits, press censorship and press banning were adopted by the new Press Law.

This article analyzes press freedom during the post-Soeharto era using the rule of law point of view. It aims to questions whether these changes really guarantee freedom of press in reality. Also analyzed is whether changes in governance and judiciary system can effectively realize the freedom of the press, especially in relation to democratization and human rights protection. This article, however, assumes that the law system and law enforcement are not really effective. Therefore, it simply inquiries whether freedom of press in Indonesia during the post-Soeharto era has really brought about a better and freer environment than that of the Suharto era.

This paper begins with a short overview on freedom of press in the early parts of the independence time (1945-1949), during Soekarno's regime (1949-1967), and during Soeharto rule (1967-1998). Then, this paper continues to analyze freedom of press during the post-Soeharto era.

1. Introduction

Since the fall of former President Soeharto in 1998, Indonesia has been deemed as an emerging democratic State that promotes human rights and freedom of the press. Several indicators appear to this claim, such as the adoption of human rights into the amendment of the 1945 Constitution (during 1999-2002), the formulation 'human rights-friendly' legislations, decentralization of governance, freer election system, and the explicit guarantee for the freedom of expression. Freedom of press has been strengthened by two legislations (the Press Law of 1999 and the Access to Public Information Law of 2008). These legislations stipulate protection of journalists and press freedom through the abolishment of censorship, bans and official permits to establish media personalities and activities. These legislations also promote and strengthen public participation in a more democratic manner. They also promote accountability in governance. Not surprisingly, these laws have influenced the decentralization processes and the economic-political democratization at the local levels.

Nevertheless, the *realpolitik* of decentralization during the post-Soeharto era has fundamentally changed the local political configuration in Indonesia. Many new press companies appeared along with the wider freedom for the media. Facing an apparently progressive development, this article explores whether the proliferation of press companies really represents a better situation for press freedom as well as for democratization and human rights protection in Indonesia.

This article inquires whether the law system actually guarantees adequately the freedom of press, through the governance and judiciary point of views. Moreover, it assumes that the law system and the law enforcement have not been effective. To answer this question, this article employs field research in seven provinces in Indonesia (performed in 2009 and 2010). Data from this research was used to analyze the application of press law and its roles to represent the public or society in criticizing government policies at the local level.

This article begins with a short overview on the freedom of press in the early independence (1945-1949), during Soekarno's rule (1949-1967) and Soeharto's regime (1967-1998). It continues by analyzing the freedom of the press post Soeharto period, especially understanding press freedom from governance and judiciary point of view.

2. Freedom of the Press during the early parts of Independence (1945-1949) and the Soekarno Period

Freedom of press in Indonesia was heavily regulated in a number of legal documents during the early parts of its independence. The government adopted the laws of the former *Netherlands East Indies*. This continuation of law was clearly stated in Article II of the Transitional Rule of UUD 1945, which stated that "All the existing state institutions

and regulations persist, as long as the new ones have not been established according to this Constitution." This provision was slightly changed by Presidential Decree (*Maklumat President*) No. 2 of 1945 (10 October 1945), which stated that "All the state institutions and regulations are still applicable as long as they do not contradict the Constitution." This transitional provision was also adopted into the Article 192 RIS Constitution and Article 142 UUDS 1950 (both "temporary" Constitutions).

Such transitional provision became a legal basis to retain all existing State institutions and laws during the Dutch administration, including numerous legislations related to the press such as the criminal code (*Wetboek van Strafrecht*, amended in Law No. 1 of 1946) that had a number of articles pertaining to press regulation and the curtailment of freedom of expression.

During this period, the visions of the national leaders to free the new republic from colonial law and customs were not easily feasible. The modern system of law, such as administration, organs, procedures, doctrines, principles, and the legal enforcement process, has been adopted as a legacy from the Netherlands Indies administration which was hard to uproot within a short period of time.

According to Lev (1985: 57) and Benda (1966), the new government could not wipe out the past legacies. Wignyosoebroto (1994: 187) believed that it was almost impossible to develop a set of national laws from scratch because this new configuration still needed to undergo trials and errors. Meanwhile, the educated people who learned Dutch law would be likely to think and act based on this European tradition or school of thought. Therefore, Wignyosoebroto (1994: 188-9) explained that these strata preferred to push the type of positive law system as the Netherlands Indies legacy, as supported by the 1945 Constitution's transitional provisions.

This situation worsened during the Soekarno's administration, especially when the Government enacted the Anti-Subversion Law. This law discouraged critical or different views on the government and its policies. A more serious event arose when Soekarno enacted the Emergency Law in March 1957 (a Martial Law, or termed as the State of War and Siege). This law was later revoked by the Government Regulation No. 23 of 1959. These Anti-Subversion and State of Emergency Laws had undermined freedom of press and democracy in Indonesia because they favoured the ruler over the public's critical opinion.

During the parliamentary years, the press enjoyed a rather liberal situation, especially during 1950 to 1959. Most newspapers in Indonesia echoed the voices of political parties or organizations. The newspapers that time represented the political parties' position and views which aimed at "solving" societal problems in Indonesia. This liberal situation was evident from the news, editorials, and political caricatures. Among these newspapers, some (*Harian Merdeka and Indonesia Raja*) were even able to develop an independent

publication system (or without the supports of political parties). According to Said (1988: 94), aside from the newspapers based in Jakarta, the general press condition was very poor.

The situation worsened during the guided democracy which began in 1959. In the end of 1960, the Government strongly required the journalists to sign a *"dokumen kesetiaan"* (loyalty statement), which contained 19 articles. The statement provided only two choices for the journalists, i.e. to sign or to stop their publication.

A journalist's signing of this statement indicated a vow to actively support government policies and programs (Smith 1983: 10). Rosihan Anwar, the well-known chief editor of *Pedoman*, signed this agreement. He argued to the journalists association (IPI) that in the transitional state into democracy, the implementation of freedom of the press was understandably difficult. In that transitional context, the main task of media was to publish and to survive. Some other journalists like Tasrif from Abadi and Mochtar Lubis from Indonesia Raya refused to sign this agreement. Mochtar Lubis pointed to Rosihan Anwar's "mistake" to sign the loyalty statement because the signatories were chained under the government's control. Eventually Rosihan Anwar was temporarily banned from the journalist association's (IPI) membership (Smith 1983: 10).

Soekarno always claimed the connection between the press and its commitment to the struggles as an important tool of the revolution. Soekarno said in front of the *ANTARA* (National News Authority) staff in Jakarta (14 October 1962) that "many journalists argued that the press are able to provide all the ways of thinking, although these would contradict the revolutionary spirit." On another occasion, Soekarno complained, "[Journalists] argued that this is a press democracy. I don't want to see ANTARA to become such an institution.

Thus, *ANTARA* should be a revolutionary tool that refuses all counter-revolutionary thoughts" (Indonesian Observer, 15 October 1962, p. 1, in Smith 1983: 12). He repeated a similar statement when he inaugurated the Monitor Agency of ANTARA News in the Presidential Palace on 18 December 1962. He said, "Objective reporting during the time of revolution is impossible." The President saw that the liberal journalists argued that the news should be objective. "I don't want the news (press) to be objective but it has to be committed to our revolution and to be instrumental to the fight against the enemies of the revolution" (Indonesian Observer, 19 December 1962, p.1, in Smith 1983: 12).

By setting his thought on the so-called 'revolutionary press', Soekarno arbitrarily threatened journalists, especially those who criticized him, his administration, or his leadership. In February and March 1965, 29 newspapers were forcibly closed down due to their support for an anti-Communist bloc (necessarily anti-Soekarno as stated by Soekarno's opponents). It was the worst year for freedom of the press. Following this series of banishments by Soekarno, after the political chaos after 1 October 1965,

banishment of press became a common method. Shortly after October 1965, 46 out of the 163 remaining newspapers were banned indefinitely by the post-Soekarno government because of their presumed association with, or sympathy for, the Indonesian Communist Party (PKI) or its allies (Hill 1995: 19).

3. Freedom of Press during Soeharto Era

A rather similar pattern of press control with a slight deviation appeared after the Soeharto rule formally began in 1967. Soeharto paid some attention to the limitation of or control over the press under his administration. Besides the use of the Dutch Penal Code's hatzaai *artikelen* (hatred article) to limit freedom of the press and access to information, his government produced numerous draconian policies against the press.

Despite an existing press law, i.e., Law No. 11 of 1966, Soeharto's New Order reduced freedom of the press, particularly through numerous security restrictions and suppressive provisions. It was true that in paper the press law assures that 'No censorship or bridling shall be applied to the National Press' (Article 4), 'Freedom of press is guaranteed in accordance with the fundamental rights of citizens' (Article 5.1), and 'No publication permit is needed' (Article 8.2). In fact, this press law was passed by the 4th General Session of MPRS in 1966, especially through its decision of No. XXXII/MPRS/1966 concerning the Press Assistance. The MPRS Sessions in 1966 stated that expressing opinion and thought through press media was a citizen's right. The People Representative Board's willingness to have legislation for the press, implicitly containing recognition for freedom of press, however, had its limits. The press, in turn, were expected to be responsible to the Almighty God, people's interests and State safety, and the revolutionary spirits. In this spirit, the press were set to achieve the three pillars of revolutionary purposes, moral and social norms, and national identity.

During the early years of the Soeharto's New Order, the term 'press responsibility' was conceptualized. It meant that the press was accountable for those considerations. The press was no longer deemed as the 'mover of the masses' but the 'mover of national development'; no longer as a 'guardian of the revolution' but a 'guardian of the *Pancasila* ideology';no longer a '*Pancasila* Socialist Press' but simply a '*Pancasila* Press' (Hill 1995: 62).

This press law also was ambiguous and has mocked the principles of a free press. The rule for 'transitional period' (Article 20.1.a), for example, demanded two interrelated permits to be secured by the media publishers: 'Permit to Publish' (*Surat Ijin Terbit/SIT*) from the Department of Information and 'Permit to Print' (*Surat Ijin Cetak/SIC*) from the Military Command for Security and Order (*Kopkamtib*). A publication is not allowed to be disseminated and printed legally without both of these permits. Practically, these permits had effectively legitimated the New Order regime's controlling of media publications.

This constraining 1966 law was later amended by the Law No. 4 of 1967. To discipline the journalists further, the Department of Information's Ministerial Decree No. 02/PER/MENPEN/1969 had also forbidden journalists to establish any organizations. As described in the Article 3(1), 'Indonesian journalists are obliged to become members of an Indonesian Journalists Organization which is recognized by the Government'. Purposively, there was only one organization recognized by the government, which was the Indonesian Journalists Association (PWI or *Persatuan Wartawan Indonesia*).

The Law No. 21 of 1982 concerning Amendment of Law No. 11 of 1966 was the primary legislation governing the Indonesian press during the 1980s and 1990s. The differences between the earlier 1966 pre-New Order law and the new 1982 law were mainly shifts in terminologies. The term "active", often pertaining to partisan press of the early years of independence was turned into the "moderate" media under the New Order. If in 1966 the National Press was obliged to 'struggle for honesty and justice upon the basis of press freedom', in the 1980s it was tamed to be 'responsible press freedom'. The previous obligation to be a 'channel for constructive and revolutionary and progressive public opinion' was replaced by a 'positive interaction between the government, press and society', aiming at 'broadening communication and community participation and implementing constructive control by society' (Article 1.6 Law No. 21 of 1982).

The press industry generally accepted the new legislation with discontent. On top of this struggle, the controversial Minister of Information's Regulation of 1984 (known also as *Peraturan Menpen*, No. 1 Tahun 1984) was then enforced. This regulation demanded for the implementation of the Act, specifically regulations referring to the revocation of the SIUPP (Permission Letter for Press Publication). This regulation gave the Minister the power to revoke the given Permission Letter for Press Publication or *SIUPP* and thus banned any "transgression" publication, without recourse to trial or public defence. Hill said that this SIUPP-revocation legislation was apparently the brainchild of the former Minister of Information and the New Order intelligence officer, who was a civilian whose appointment was widely regarded as lacking any justification (Hill 1995: 49-50).

The Minister of Information's Regulation of 1984 was challenged by Surya Paloh, who wrote an open letter to the Parliaments (DPR and MPR) demanding for a Supreme Court judicial review over the possibilities of the Ministerial regulation's contradicting the Laws No. 11 of 1966 and No. 21 of 1982. The Supreme Court apparently agreed to consider the issue but stalled the process until the March 1993 session of the MPR (People Representative Board/Upper House), which was assigned to appoint the President and Vice President.

The Supreme Court responded eventually in June 1993 only to reject Surya Paloh's request to challenge the Ministerial regulation on the basis of "no known formal procedure for such judicial review". This demand by Suryo Paloh was the first of such request in the

Indonesian legal history, although no such procedure had been settled down afterward. Amidst its failure, it became the precedent to the future demands for judicial reviews not only for the regulations on Press and SIUPP, but also for other legislations (see Supreme Court Decision Regulation No. 1 of 1993).

The most controversial ban against the media took place in 1994, when the magazines *Tempo, Editor and Detik* were purged by the Ministry of Information. A repressive method was applied by the Government in "disciplining" the press and limiting the public from other access to information. In these cases, government policies and regulations were heavy-handedly interpreted as the upholder of the roles of the press and the guardians of Pancasila and the 1945 Constitution, as well as the gatekeepers of 'responsible freedom of press'.

Pancasila as the ideology of the press was vaguely defined. It was an enigmatic discourse because the government had steered the media as an agent of political stability (McCargo, 2003: 77-99). This move was played through numerous arbitrary policies rather than through parliamentarian legislations.

The Government called those involved in the press industry to serve for 'national development' through a discursive practice of "responsible freedom of the press" in Indonesia for more than three decades of the New Order in power. What we could learn from the New Order's legislations was the praise of Pancasila as a legitimate political support for the maintenance of Soeharto's authoritarian regime. It was heavily manifested through a series of systematic and structural means which had led to the purging of the freedom of press.

4. The Freedom of Press during the Post-Soeharto Era

In order to understand the current situation of Indonesian press, this part starts by questioning what we have learned from the Soekarno and Soeharto eras in relation to the struggles of the press and what have changed after those regimes.

Under the quasi-dictatorial presidency, the freedom of expression and press were gagged by numerous draconian regulations. These regulations allowed press banning, press censorship and press publication permit. The implementation of those regulations was done through a coercive structure of governance, with the involvement of the military, to limit the press and media ownership. In terms of the judicial system, its processes had been run by the police and State prosecutors. The courts seemed to have served the regime's interest rather than to realize press freedom.

This interest was served through the ideological setting from the jargon of 'revolutionary press' to '*Pancasila* press' which had tremendously manipulated public opinion. Press life had been predominantly controlled by the anti-democratic regimes.

This situation was generally changed into the better one after 1998. After Soeharto stepped down in 21 May 1998, the euphoria of liberation for rights and reforms in various levels of social and political life came into reality. In the early years of the so-called "Reformation Era", a number of new laws was formulated and enacted. These included several human rights laws, either as proposed by civil society or ratified from the international human rights law instruments. During this period, Freedom of the press was deemed to have reached its golden age, especially after President Abdurrahman Wahid (or known as Gus Dur) dissolved the Department of Information and stopped the practice of sending journalists into gaols. Gus Dur said that "… information is a business for society, which is inappropriately done if the government interferes."

New legislations on human rights appeared in the form of Law No. 9 of 1998 concerning the Freedom of Expression in Public Sphere, Law No. 39 of 1999 concerning Human Rights Laws, or Law No. 26 of 2000 concerning Human Rights Courts. The Government also passed legislations through the ratification of international treaties, such as Law No. 5 of 1998 concerning Convention against Torture and other Cruel, Inhuman, or Degrading Treatments or Punishments, Law No. 29 of 1999 about Racial Discrimination Convention, Law No. 11 of 2005 about Economic, Social and Cultural Rights Convention, and Law No. 12 of 2005 concerning Civil and Political Rights Convention. By pursuing these legislations, the Indonesian government appeared to be taking the great responsibility in promoting, protecting and fulfilling human rights. These are indeed "progressive" legal developments in the context of transition into a more democratic society.

During the early years after 1998, the Indonesian government passed a new legislation concerning the press, which was Law No. 40 of 1999. This law actually promoted the protection of journalists and press workers. The boosting spirit for freedom of the press was reflected by this law that disallowed revocation of press permit (*Surat Izin Penerbitan Pers*), censorship practice, and press banishment (Dutch: *persbreidel*). This law was seemed to be supported by the enactment of Law No. 14 of 2008 concerning Public Information Openness. This newer law clearly guaranteed people's access to public information as mandated by the Article 28F of the 1945 Constitution. This law guaranteed the government could no longer withhold an 'official or state secret document' if it was categorized as a public document. From this set of facts, it seemed that press freedom gained more protection and guarantee by the legal system.

Nevertheless, at the same time, the government and parliament also passed numerous legislations that tremendously threatened freedom of the press, especially by setting heavy criminal sanctions against "defamation" by press workers. Ironically, these legislations were not directly interrelated to the media law. These legislations included the following: the Law No. 10 of 2008 (General Election of Parliament), the Law No. 42 of 2008 (Presidential Election), the Law No. 44 of 2008 (Pornography), and the Law No. 11 of 2008 (Electronic Information and Transaction).

These laws, unfortunately, were the carbon copies of the Dutch's Criminal Code that are still being used until today. From 2003 until 2008, State prosecutors filed 59 cases related to "defamation", which were charged against the press workers through the Criminal Code rather than through the real press law (Margiyono 2009: 16-17). The ancient "defamation article," for instance, was still applied to charge journalists such as in the case of Tomy Winata versus the Chief Editor of Tempo Magazine and Tempo journalists. This case was charged against *Tempo* Magazine's news about a fire accident in a factory allegedly set by Tomy Winata in Tanah Abang, Jakarta. Although the journalists lost in the verdict by Jakarta District Court, they were acquitted by the Supreme Court.

General election laws like the Law No. 10 of 2008 were also potentially threatening the media and press workers. This law prohibited election-related reports and publication during the pre-election 'quiet days' (*hari tenang*) and allowed press banishment if the press violated these rules. It was eventually repealed by a Constitutional Court decision on 24 February 2009 (See Constitutional Court Decision No. 32/PUU-VI/2008).

The Pornography Law (Law No. 44 of 2008) also contravened the press law. This law potentially threatened press workers in reporting news related to pornography, whose terms were not so sufficiently explained. The issue of pornography was actually regulated through the Law No. 40 of 1999 (see Articles 5.1 and 13), and it was thus considered as a '*lex specialis*' (specific, higher law) of pornography regulation in the media publication. Also, this regulation was adopted into the Article 4 of the Journalist Ethics Code.

The possible charge of "criminal defamation" offence against journalists was also provided by the Law No. 11 of 2008 concerning Electronic Information and Transaction (EIT), especially in Articles 27 and 28. This law adopted a cyber defamation offence that charged offending journalists with six years of imprisonment for "offensive" online media. Because the criminal charge was more than five years of imprisonment, the State apparatus could immediately detain the suspects, a practice of which would pose serious threats to journalists. The Pornography Law and EIT Law have been challenged by journalists and civil society groups because both were deemed contradictory to the 1945 Constitution's freedom of expression and the guarantee of Press Law. Nevertheless, the Constitutional Court deferred a decision on this issue and also on the General Election Law case. The Pornography Law and EIT Law were later considered by the Constitutional Court as important legislations to protect public interest. Both laws are still applicable until the present, and journalists felt that these laws could be potentially used against them.

These facts stood as clear messages for press workers that they could be legally restricted by numerous legislations outside the media or press laws. This expansive legislation became a new trend in the context of ten years of reformation after the fall down of Soeharto that sadly did not bring this trend to an end. Aside from these working legislations, there were other several drafts of law or revised drafts that might also threaten freedom of the

press and freedom of expression such as the draft for the State secrecy law, the revised draft for the criminal code, and the press law.

The draft for the State secrecy law claimed a kind of wide-ranging secrecy because Article 6 of this draft determined a very wide and flexible range of definitions for "State secrecy". The term "State secrecy" covered not only information on defence, intelligence, foreign relations, and diplomatic function but also institutional secrecy such as bureaucracy secrecy, official secrecy, and other secrecies that had actually been defined by other legislations. This draft was equally unclear about the limitation on the authorized officials who would be responsible to close or disclose information. The jail term charged by this draft was also quite serious (six to twenty years or maximum imprisonment term). Although the draft of the state secrecy law was finally cancelled, the government started to propose a new draft of national security law which also contained the possible attack against the press freedom.

Although the level of Press Law (Law No. 40 of 1999) was similar in legal hierarchy with the EIT Law, Anti-Pornography Law, and also General Election Law, but these anti-press freedom laws could be arbitrarily misused by the judicial system to suppress the press, especially by denying the Press Law. These anti-press freedom laws could be repealed or reviewed only by the Constitutional Court. The other lower laws below the "Law" status, such as Presidential Decree, Government Regulation, and Regional Regulation could be reviewed by the Supreme Court. In spite of the mechanism of judicial review provided by Indonesian legal system, the anti-press freedom legislations were perceived as 'a legalized repression' against the journalists and other press workers. The press activities could be easily restricted through various policies and decisions as formulated and applied by the government, parliament, or even the district courts as if the anti-press freedom legislations still exist.

From the judiciary system point of view, this paper has examined the freedom of press through several legal cases, administrative laws, criminal laws and private laws, which portray the freedom of press situation in post-Soeharto Indonesia. The case of administrative law was represented the Government's (through KPI or Indonesia Broadcasting Commission) banning Radio *Era Baru* FM, a radio station based in Batam Island. The station had been broadcasting since 2005 before the radio was forcibly closed down in 2007. KPI and Minister of Communication and Information stopped the radio's broadcasting without any clear reason when the Frequency Monitor Section in Batam released a final letter to call off the broadcasting on 21 October 2008. The pressure to close down this radio broadcasting was originally initiated by the Chinese government towards the Indonesian government through the KPI and the local Batam authorities. The 'language matter' as a reason to close down was proposed by the KPI. Raymond Tan and Gatot Supriyanto (Directors of *Radio Era* Baru) explained that some Chinese officials visited the KPI in 2007, asking the Indonesian government to shut down the radio station because it had been airing criticisms of Beijing's human rights records,

including the news about the suppression of the Tibetans, Uyghurs, and Falun Gong practitioners. The letters were sent by the Chinese officials to the Ministry of Foreign Affairs, the Ministry of Internal Affairs, the Department of Espionage, the Department of Communication and Information, and the KPI. Raymond Tan showed the letters from the Chinese Embassy and the news of Chinese officials' visit to the KPI, as well as the letter dated 8 March from the KPI that demanded the radio station to shut down (personal communication with Raymond Tan and Gatot Supriyanto in Jakarta, 22/10/2010).

The station contested these letters in front of the administrative court. However, *Radio Era Baru* was defeated in administrative and appeal court decision. The Supreme Court eventually overturned the decision to favor *Radio Era Baru* (see Administrative Court decision No. 166/G/2008/PTUN-JKT, 14 April 2009). This decision was given on 5 October 2010, and it ended after three years of legal battle between the station versus the KPI and the Minister of Communication and Information. *Radio Era Baru* regained the broadcast license and could freely broadcast in Indonesia. In this case, the Broadcasting Law was indeed produced during Megawati's presidency, although its implementation had been done some time after the end of her term.

Nevertheless, the threats against freedom of the press also occurred during the Megawati administration, most notably the two cases regarding the case of criminalization of *Rakyat Merdeka* newspapers and Tommy Winata's charge against *Tempo* magazine. Both cases were related to the issue of the Penal Code application against the freedom of press in 2003. Karim Paputungan, chief editor of *Rakyat Merdeka*, was sentenced with 10 months imprisonment by Central Jakarta District Court for insulting Chairman of DPR, Akbar Tandjung. Another editor, Supratman, was also sentenced with six months imprisonment and 12 months of suspension because of an offending article against President Megawati. In the case of Megawati's hatred article, the newspaper's editor was convicted as a violator of the defamation law because of its "offensive" articles concerning President Megawati's policies (like "*Mulut Mega Bau Solar*" of Mega's Mouth Smells like Diesel Oil on 6 January 2003), "*Mega Lebih Kejam dari Sumanto*" (Mega Crueler than Sumanto—a convicted cannibal), "*Mega Lintah Darat*" (Mega Loan Shark) and "*Mega Sekelas Bupati*" (Mega Act [lowly like] District Head). The illustrations of the news also showed resident Megawati and her 'ugly' policy in oil price hikes. President Megawati was very upset and then charged the newspapers with defamation articles to District Courts. In the streets, pro-Megawati mobs publicly threatened the journalists working in *Rakyat Merdeka* newspaper.

Another criminalization was thrown through Courts against Tempo magazine after its reporting of the notorious "Tanah Abang fire". Business magnate Tommy Winata has filed at least seven lawsuits against Tempo, mostly based on the articles appeared which on pages 30 and 31 of Tempo Magazine in its 3-9 March 2003 edition (with headline *"Ada Tommy di Tenabang?"* or Tommy Mastermind of Tanah Abang [Fire]?). The Central

Jakarta District Court ordered Tempo to compensate IDR 500 million for damages to Tommy Winata. Soenaryo, one of judges in the court, said that, "We sentence the defendant to pay IDR 500 million in damages for the material losses and forfeiture of future profit that the plaintiff has suffered. The money shall be taken from the assets of PT. *Tempo Inti Media* (Tempo's Publishing Company)" (*LKBN Antara*, 18 March 2004). The criminal proceeding was also ordered by the state prosecutor. Prosecutor Bastian Hutabarat used Article XIV section 2 of Law No. 1 of 1946 *juncto* Article 55 section (1)-1e of the Penal Code to charge Bambang Harymurti with nine years of imprisonment. *Tempo* was accused of spreading 'libelous' reports and intentionally initiated a chaotic situation in society. By using the Penal Code, Central Jakarta District Court sentenced a year of prison term for Bambang Harymurti (16 September 2004).

Then on 14 April 2005, Jakarta High Court supported the previous decision of the District Court. Surprisingly, on 9 February 2006, the Supreme Court overturned the lower courts' decisions by using the Press Law of 1999, stating that Editor Chief Bambang Harymurti was not guilty based on his report, *"Ada Tomy in Tenabang."*

The interesting part of this case was the verdict consideration of the Supreme Court. The Supreme Court offered two considerations. First, since protection of freedom of the press was not an impossible purpose, the courts need to improve law enforcement in press offenses through jurisprudence that could accommodate and respect the Press Law as a *lex specialist*. Second, since the freedom of press is a *conditio* sine qua non (a condition without which something cannot exist) in a democratic state and the rule of law, the court action on the freedom of the press shall not be harmful to the pillars of democracy and the rule of law as parts of efforts in establishing such pillars.

Although *Tempo* magazine was acquitted, the lawsuits and criminal proceedings were still deluging against the freedom of press. *Tempo* and its employees, for instance, had been confronted by at least nine legal suits, and none was settled under the Press Law of 1999. Those cases, surely, would be influential to the journalists and would later affect the practice of freedom of the press in Indonesia. Moreover, violations against journalists' and media's freedom had often occurred without serious protection by the law enforcement agencies such as the Police.

A very clear case took place when Tommy's henchmen brutally attacked *Tempo* journalists and their employees at *Tempo* office on 17 May 2004 (*Tempo Interaktif*, 17 May 2004). This attack happened while Megawati was the President, and yet she failed to take serious steps or responses to such dire threats against the freedom of press and journalists.

Unfortunately, the criminalization against the press without the guidance of the Press Law had continued during Susilo Bambang Yudhoyono's administration with the cases of *Rakyat Merdeka Online* and *Playboy Magazine*. Editor Chief of *Rakyat Merdeka Online*, Teguh Santosa, was indicted as to have breached Article 156a of the Penal Code concerning

contempt against religions. However, South Jakarta District's judges decided the indictment was unacceptable (in Dutch, *Niet ontvankelijk verklaard*). Also, Erwin Armada, Editor Chief of *Playboy Magazine* was prosecuted by the use of Article 282 section (3) of the Penal Code, concerning crimes of "indecency." The Supreme Court decision No. 972K/Pid/2008 sentenced Erwin with two years imprisonment (*Primair Online*, 6 September 2010).

The judicial process through the court system had shown a trend of restrictions against freedom of the press in Indonesia. The trends appeared not only through the habitual usage of the archaic Penal Code but also through the civil lawsuits that burdened journalists or media publication with unreasonably disproportional fines. The case of *Radio Era Baru* radio station was an example by which a radio station had to deal with judicial processes for license both in the administrative court as well as with the Telecommunication Law against its director with a severe imprisonment of up to 6 years. The other cases in 2007 were the legal charges by *Riau Andalan Pulp and Paper* (RAPP) against *Tempo* newspapers (using civil lawsuit) and criminal prosecution against Bersihar Lubis (using criminal law).

The Constitutional Court decision concerning the repeal of *haatzaai artikelen* (hatred article, No. 6/PUU-V/2007, 17 July 2007) and the Supreme Court decision on Time Magazine versus Soeharto (Decision No. 3215K/Pdt/2001, adjudicated on 28 August 2007) were two interesting cases in 2007. The Constitutional Court decided that Articles 154 and 155 of the Penal Code were contradictory to the spirit of 1945 Constitution of the Republic of Indonesia and therefore those articles had lost their legal value. More than 90 years since the enactment of *Wetboek van Strafrecht voor Nederlandsche Indies* (the Penal Code of Netherlands Indie) in 1914, this decision of the constitutional court ended the history of suppression against freedom of expression and press in Indonesia. Undoubtedly, this decision also had become an important move to protect journalists, editors, and media owners from criminalization.

The criminal case against Erwin Armada (Chief Editor of *Playboy Indonesia*) is a good example. After he was charged with the Penal Code (Article 282 section 3) concerning crimes against public "indecency", the Press Council had blatantly stated that *Playboy Indonesia* was not a pornographic magazine (according to the Press Law). Notwithstanding this good argument, the Penal Code was still applied to send Erwin Armada into jail in 2010 (*Kompas*, 9 October 2010). Since the Anti-Pornography Law had provided similar loopholes as seen in the Penal Code, these gaps allowed the law enforcement agencies to prosecute a journalist.

Beside the issuance of suppressive laws, there were also several legal cases that had severely damaged the freedom of the press such as the civil cases against *Tempo Magazine* by Asian Agri-Corporation and *Tempo Newspapers* by Munarman (Coordinator of Islam Defender Front or FPI), or the criminal cases against journalists (Upi Asmaradhana, filed by South Sulawesi Police Chief Insp. Gen. Sisno Adiwinoto; *Tempo* journalists/editors Irvansyah and Sunudyantoro, filed by Munarman; and also Kwee Meng Luan and Khoe Seng-Seng (senders of readers' mails) convicted for their readers' mails (*Surat Pembaca*) in newspapers).

In 2008, the use of the Court became as a habitual mechanism to threaten the freedom of journalists and press workers. The journalists and media owners, as the result, were concentrating more to respond to a flood of legal cases rather than focusing on delivering fair information to the public. Moreover, the judges or other legal enforcement agencies refused to apply the Press Law of 1999 as a legal basis to resolve the civil or criminal charges.

Unsurprisingly "Reporters without Borders" ranked Freedom of The Press in Indonesia lower in 2008 (rank 111) than its rank in 2007 (100). This reduced ranking showed that freedom of that press in 2008 had been damaged since many suppressive laws and anti-media cases were brought into the courts.

Later in the same year, the Supreme Court released an important letter on 30 December 2008. The states the selection of the Press Council as an appropriate institution to be the referee in media cases in the Courts (Supreme Court Circulation Letter No. 14/ Bua.6/Hs/SP/XII/2008 concerning Asking Information of Expert Witness). This letter supported freedom of the press because it considers the Press Law of 1999 as the *lex specialis* (specifically, higher law).

Nevertheless, this Supreme Court letter did not mean automatic protection for journalists and media. From time to time, journalists have been repeatedly harassed by various actors. Acts of harassments included destruction of cameras and other journalistic tools and maiming or even murdering journalist like in the case of Radar Bali's journalist Anak Agung Narendra Gede Prabangsa (well known as the Prabangsa Case). Prabangsa was killed because his news report exposed corruptions in Bangli's Educational District Office.

The situation of freedom of the press worsened during 2009-2010 after the anti-media legal cases (civil law suits and criminal charges), beating, torture and murders against journalists had risen in number with higher variety in the types of perpetrators. In 2010, sensational stories of suppression against the freedom of press heightened with the maiming of *Harian Aceh*'s journalist, Ahmadi, in Simeulue (18 May 2010), Ardiansyah Matrais in Merauke, Papua (30 July 2010) and also the murder of Ridwan Salamun in Tual, Maluku (21 August 2010). These atrocities became more ironic and serious since the law enforcement system had failed to bring full justice, manifested in the lack of proper punishment or failures to prosecute the violators.

Many field journalists revealed that freedom of the press in Indonesia was facing a perilous situation. Moreover, media owners or journalist associations had dropped some legal cases in order to reach a simpler route to solve conflicts. The case of *Pertamina* (state oil company) officer versus journalists in Mataram was an example of such intervention. Four local journalists from Lombok Post, *Suara NTB, NTB Post* and *Radio Global* who attended a press conference regarding fuel scarcity in West Nusa Tenggara were

intimidated by Sadikun Syahroni (Head of *Pertamina* in Ampenan) with pistol and sickle during the press conference in Ampenan on 18 July 2007. The intimidation case was reported to the police, but there was no further prosecution against Sadikun Syahroni. A journalist said that the role of PWI (Indonesian Journalists Association) in lobbying for the immature closing of this case was the main reason for the failure of the judicial process (Personal communication with two journalists [anonym], and interview with them in Mataram, 24/06/2010).

A similar outrageous story happened in Adam Malik Hospital in Medan after the hospital's doctors, paramedics, and security guards attacked and confined five TV journalists into a room (7 February 2010). The doctor, who was also a navy personnel, locked the door when the journalists were trying to get interviews concerning medical malpractice in the hospital. Security guards and other paramedics also intimidated the purged journalists. This case was reported to the police, but this case ended by an agreement among those concerned. Some other journalists and also press associations claimed that the pressure from the media owners to forge a 'win-win solution' came as a shock. It was because the attack against the journalists usually ended in a compromising manner. This has indeed undermined the law and degraded the protection of freedom of the press (personal communication with a journalist, anonym, in Medan on 29 June 2010).

The reality of freedom of the press during Susilo Bambang Yudhoyono's (SBY) presidency had provided vivid pictures on the depressing context of the press in recent years. Journalists without Border ranked Indonesia at 117 in 2010, which was also the State's ranking in 2004. Nevertheless, despite the real situation and adverse international assessment on Indonesia's position on the freedom of press, SBY had offered an anomalous proposition,

> "We fully support the freedom of press. The freedom of press is important for democracy…. Before the reformation, freedom of the press had been fettered, or deficit. But now after the reformation has been running for some time, freedom of the press is working well, even surplus…." (*Detik News*, 3 June 2010).

5. Conclusion

During the authoritarian rule of President Soeharto, laws had been abused to curtail freedom of the press. These pressures manifested in various ways. First, banning of the media and criminalizing the journalists and editors were commonly used. Second, the martial law had been arbitrarily imposed in emergency situations without even considering higher laws, human rights principles, or the Press Law. Third, the law was also designed to create a hegemonic rule through various discursive propaganda moves such as 'development press', '*Pancasila* Press' and 'press with social responsibility'.

This creation had similarities with President Soekarno's 'enigmatic' discourse on press, such as 'revolutionary press'. These discursive practices were simply serving the interest of political regime rather than protecting the rights and freedom of the press or journalists. In short, such discursive practices had been predominantly arranged and interpreted by the regimes. At the end of the day, these only revealed hypocrite policies.

In the early years of the post-Soeharto era, freedom of the press was claimed to have reached its peak. President Gus Dur dissolved the oppressive Department of Information, and no journalists were sent to gaol. In this context, Gus Dur's idea to dissolve the Department of Information was really close to Keane's proposition (1991: 176) that democracy could only be nurtured when the people enjoyed equal and open access to diverse sources of opinion. In this context, the Press Law of 1999 became an effective means to liberate freedom of the press after 32 years of dire situation.

Nevertheless, such freer situation had disappeared since President Megawati leadership was negatively confronted by the media. She accused of being 'un-nationalistic', 'un-patriotic', *'njomplang'* (unbalanced), *'njlimet'* (complex), and *'ruwet'* (complicated). Megawati charged *Rakyat Merdeka* Daily because she felt offended by the paper's cartoon sketch.

Indonesia's 1945 Constitution guaranteed the freedom of expression, and stronger provisions after its amendment in 1999-2002 and the Press Laws from 1966 to 1999 declared that the press was not subject to 'censorship or ban' and 'freedom of the press is guaranteed in accordance with the fundamental rights of citizens'.

The extrajudicial media gag during Soekarno's Guided Democracy, the requirement for publication permits and the ministerial unlimited authority during Soekarno's New Order regime, and spreading criminal charges against the freedom of press through both non-media or media laws had been a perennial feature in the set of processes to undermine these constitutional rights.

Unsurprisingly, the lower level of regulations and laws also contributed to the lack of practice of freedom of expression in Indonesia. This was not only about the flaws of technical legislation but also about the ideological influences of the rulers. The view of *legisprudence* on the press law had clearly showed that behind the rules there had been vested interests represented by the regime's ideology. This was the reason for the reoccurrence of the hypocrite media policies by the governments.

The situation grew worse since many criminal charges and lawsuits were thrown onto the media and journalists. Moreover, law enforcement agencies often applied the Penal Code instead of the newer and more detailed Press Law to prosecute the journalists. The judicial processes had been misused to paralyze freedom of the press by imposing unreasonable fines against the journalists and sending them to gaol. Human rights violation also deluged the media and journalists, and these violators were not only the

state but also paramilitary (*preman*) or social groups. Sadly, the criminals who assaulted the journalists seemed to be immune from justice's hands.

These facts were potential disturbances to the democratization process and were sources of escalation of repression against public spheres.

Since SBY became President in 2004, freedom of the press had worsened compared to the situation in the previous regime. First, suppressive legislations had potentially posed threats against the press. Such legislations were reminiscent of the trauma of gross censorship which took place during President Suharto's authoritarian regime. Second, human rights violations happened repeatedly. These were manifested in beating, destructing, torturing and even assassination against journalists and editor. Third, the lack of enforcement of rule of law created futility against the protection for the journalists at work.

There are also apparent differences in the contexts of freedom of the press during the Soeharto and Post-Soeharto eras. During Soeharto's rule, the laws and regulations were clearly set to limit freedom of the press. In the post-Soeharto regimes, especially during the SBY administration, restrictive or suppressive laws were more deliberately scattered into various non-media laws rather than in specific laws on the press or media.

In this regard, this article would offer two lines of argument. First, the challenges for strengthening the freedom of press in Indonesia during the post-Soeharto era were similarly as complex as the situation during the Soekarno and Soeharto regimes. Freedom of the press in the post-Soeharto was crippled by the reproduction of draconian legislations, widespread criminal charges, lack of political commitment, and the growing number of violence by non-state actors going against the press workers.

Secondly, the freedom of press in Indonesia during the post-Soeharto was not considered as free as the previous regimes, especially by the adverse situation that had been worsened by the government not willing to protect journalists and the press, and to remedy the absence of law enforcements.

This article ends with a quotation from a Papuan Indigenous Council (DAP) chairman, Forkorius Yaboisembut. He stated that "…without journalist, democracy in Papua will die. The press workers are important tool to monitor democracy system in a country." This statement is supported by Bagir Manan, head of the Indonesian Press Council, "there is no democracy without press freedom!"

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3

THE NEXUS OF HUMAN RIGHTS AND PEACE

TORTURE, POLITICAL PRISONERS AND THE UN-RULE OF LAW: CHALLENGES TO PEACE, SECURITY AND HUMAN RIGHTS IN BURMA

Bo Kyi and Hannah Scott

Despite the fact that torture constitutes one of the most brutal attacks on human dignity, and not withstanding the absolute prohibition of torture under any circumstances, almost no society is immune from torture. In many societies, it is practiced systematically. Burma is one such country. In addition, conditions of detention, in Burma, are appalling and arguably qualify as cruel, inhuman and degrading, amounting to torture. This paper explores the nature of torture in Burma's interrogation centers and prisons. Evidence suggests the practice of torture, in Burma, serves the purpose of extracting confessions and information; extracting money; as a punishment; and perhaps, most dangerously, of silencing dissent. The victims, in Burma, are often activists with different agendas, and include members of the political opposition, ethnic groups, labour activists and human rights defenders. The State Peace and Development Council (SPDC) continues to deny the existence of political prisoners, arguing that 'there are only criminals in Burma's prisons' and refutes claims of torture and ill-treatment. However, the deplorable conditions in these places of detention are well documented. The Assistance Association for Political Prisoners (AAPP) has systematically documented hundreds of cases of torture experienced by political prisoners, dating back to 1988 and as recent as 2010. Through interviews, former political prisoners recount the torture and ill-treatment, which they suffered, as well as that which they have witnessed.

The research reveals that torture is not limited to isolated cases but inflicted in a routine, if not, systematic manner. The same methods of torture have been practiced over the past twenty-two years on political prisoners. The prevalence of specific torture methods in prisons all over the country suggests that some form of 'torture training' has been provided. Under some circumstances, torture can amount to a war crime or a crime against humanity. This paper raises the question of whether the torture of Burma's political activists could constitute such a crime against humanity. It will explore whether the torture is widespread, systematic and premeditated. While, around the world, the past decade has seen a strengthening of legal measures to bring torturers to justice, in Burma, after nearly 50 years of successive military rule and the absence of the rule of law, impunity and a pervasive culture of fear prevail. The State security apparatus, rather than protecting the people, punishes them. The policies of the state and the actions of law enforcement officials are at complete odds with international human rights standards.

Internationally, there is an increasing interest in and a growing campaign for, a Commission of Inquiry into crimes against humanity in Burma. Such an inquiry raises the possibility of the potential prosecution of the instigators and perpetrators of torture.

The long-term goal of research and documentation on torture and ill-treatment, by AAPP, is to develop an accurate historical record that can be used in any transitional justice process, or independent investigation, in a future democratic Burma.

The degree of civilization in a society can be judged by entering its prisons.
- Fyodor Dostoyevsky, Russian novelist (1821-1881)

1. Introduction

Nothing is more revealing about the situation of human rights in a country than the existence of political prisoners. They embody the denial of the most basic freedoms essential to humankind such as freedom of expression, assembly and association. The State Peace and Development Council (SPDC) repeatedly denies the existence of political prisoners arguing that there are only criminals in Burma's prisons. In reality, there are more than 2,000 people behind bars, without access to the guarantees of due process, for exercising their basic civil and political rights. The judicial system, far from affording individuals basic standards of justice, is used by the regime as an instrument of repression to silence dissent. Not only is there an absence of the rule of law, but in Burma, the legal system is used against the people.

Not only do the SPDC deny the existence of political prisoners but it refutes claims of torture and ill-treatment in places of detention. There are 42 prisons in Burma, 109 labour camps and an unknown number of interrogation centres[1]. The deplorable conditions in these places are well-documented: incommunicado detention, poor diet, and denial of adequate medical attention and torture. The conditions of detention, in Burma, are appalling and arguably qualify as cruel, inhumane and degrading, amounting to torture.

Despite the fact that torture constitutes one of the most brutal attacks on human dignity, and not withstanding the absolute prohibition of torture under any circumstances, almost no society is immune from torture. The problem of torture resurfaced recently in the contexts of the war in Iraq and Afghanistan, concerning the situation of detainees in Abu Ghraib and Guantanamo Bay, and attempts to extradite persons considered to be 'threats to national security' to states where they may be at risk of torture.

The abuse of Iraqi prisoners in Abu Ghraib by US soldiers came to light in 2004 and placed torture firmly on the international agenda (Kelman, 2005, p. 24). Unfortunately, the abuse that took place in the interrogation centers of Abu Ghraib is nothing extraordinary. To the contrary, torture is widely practiced in many parts of the world. In many countries it is practiced systematically and torture is an ongoing threat to civilians, ensuring populations live in fear, thereby preventing any politically critical activities. Burma is one such country.

This paper explores the nature of torture in Burma's interrogation centres and prisons. Evidence suggests that in Burma the practice of torture, serves the purpose of extracting confessions and information; extracting money; as a punishment; and perhaps, most dangerously, of silencing dissent.

The victims are often activists from different backgrounds, and include members of the political opposition, ethnic groups, human rights defenders and aid wokers. The Assistance Association for Political Prisoners (AAPP)[2] has documented hundreds of cases of torture experienced by political prisoners, dating back to 1988 and as recent as 2010.[3]

The research reveals that torture is not limited to isolated cases but inflicted in a routine, if not, systematic manner.

2. Definition of Key Concepts and Terms

It is important to explore exactly what the term "political prisoner" means. Anyone imprisoned for peacefully speaking out against their government, for practicing their religion, or for their culture, race or gender can be considered a political prisoner, a term often used interchangeably with prisoner of conscience, which is a designation used by Amnesty International and sometimes the United Nations. According to Amnesty International prisoners of conscience are imprisoned solely for the peaceful expression of their beliefs or because of their race, gender or other personal characteristics.[4] It is a principle of Amnesty International to offer help only to political prisoners who have not used violence or force, regardless of their motivation, to protest. This is a contentious point as some believe that a political protester has a right to answer a violent government with violence. According to AAPP, a political prisoner is a person arrested because of his or her active involvement in political movements with peaceful or resistance means (AAPP, 2010a, p.35).

To understand what it means to be a political prisoner in Burma we need to understand what it means to be a political activist or a dissident. The term "political activist" or "dissident" lumps together a diverse range of people, as though they were a single, unified, political group. They are not. They do not share a single political ideology. Rather, the dissident community is made up of a variety of people, scattered across the entire country, and more across its borders, some of whom belong to large political parties like the recently disbanded National League for Democracy, some to smaller groups, like Generation Wave an underground youth culture network, and others who work alone. A dissident may be someone who writes an article critical of the government, a monk who overturns their alms bowl at the military's economic mismanagement, or someone writing a poem about poverty or oppression. What ties these people together is that they engage in activities that the Burmese Junta considers contrary to its policies, and therefore 'anti-government', 'a security threat', or even 'terrorism'. In Burma, it does not take much to be 'political' or considered a 'security threat'. Owning a copy of the Universal Declaration of Human Rights can land you with a 5 year prison sentence, as can handing out leaflets for an independent student union. Some political prisoners were not directly involved in politics before their arrest. One former political prisoner reveals

the effects of his imprisonment: *"I never considered myself political before my arrest, but now the regime has made me political through my imprisonment."* (AAPP, interview, August 2005).

Mere association with members, rather than actual membership, of an outlawed group can land someone in considerable trouble. By 1990, there were 93 groups declared unlawful by the State Law and Order Council.

Since 1990, four more groups were added to the list: Karen National Union, Democratic Party for a New Society, All Burma Students Democratic Front and most recently the Burma Lawyers' Council. What defines association with an organisation is subjective and routinely used by the authorities in an arbitrary manner.

An editorialist for the New Light of Myanmar, the regime's newspaper, claimed that there are no political prisoners in Burma, because there are no political offences in the country's criminal code (The New Light of Myanmar, 2009). This is grossly inaccurate - in Burma there are a number of laws that criminalize peaceful dissent and suppress human rights. People who are detained or sentenced for the following offences can be considered political prisoners in Burma:

Law	Section	Offences	Maximum Tern
Penal Code	121,122(1) 122(2)	Definition of high treason; punishment of high treason.	Death or life imprisonment
	124, 124(A) and 124(B)	Misprision of high treason; sedition; advocating overthrow of an organ of the Union or of its constituent units by force.	Seven years; life imprisonment; three years
	143 - 146	Unlawful assembly	Two years
	295, 295(A)	Insulting religion	Two years
	505(B)	Making a statement or rumour conducive to public mischief	Two years
Unlawful Association Act (1908)	17/1 & 17/2	Membership of an unlawful association; management or promotion (or assisting) of an unlawful association.	Three years; Five years
State Protetion Law (1975)	10(a) & 10(B)	Detention of a citizen who is endangering State sovereignty of the Union or the restoration of law and order.	Seven years
Emergency Provisions Act (1950)	5(d), 5(e), 5(j)	Causing public alarm; spreading false new; undermining the security without charge or trial; house arrest.	Five years, renewable by an additional year
Electronic Transactions Law (2004)	33(a), 33(b) & 38	Using electronic transactions technology to commit any act detrimental to the security of the State; sending or receiving information relating to secrets of the security of the State; attempting, conspiring or abetting.	Fifteen years
6/88	5, 6, 7	Prohibition of forming organizations that are not permitted to register under the Political Parties Registration Law 1988; organizations that attempt to incite unrest; membership thereof or aiding and abetting.	Five years

Law	Section	Offences	Maximum Tern
6/96	3, 4, 5, 6	'The Law protection the peaceful and systematic transfer of state responsibility and the successful performance of the functions of the National Convention against disturbances and oppositions'.	Twenty years
Printers & Publishers Act (1962)	17/20	All printed material must be submitted to the Press Secrutiny Board for vetting prior publication.	Seven years
Official Secrets Act (1923)	3	Any person who communicates information calculated to be, directly or indirectly, useful to an enemy.	Fourteen years
Television And Video Law (1996)	32(B)	Copying, distributing, hiring or exhibiting etc a video that has not passed censorship.	Three years

The extreme nature of criminalising peaceful dissent is illustrated by the case of independent activist U Ohn Than.

3. Case study: U Ohn Than – the individual activist[5]

"I believe that I represent myself and the true will of the people. I have never joined any political party or organization… I took a big risk demonstrating, in order to expose the real political situation, out of loyalty to the people of Burma," (U Ohn Than, 2008).

Well-known for his solo protests, U Ohn Than is a political prisoner who has spent at least 18 years in Burma's prisons. He received a life sentence, in April 2008, for a peaceful protest he staged outside the US embassy in Rangoon.

On 15 August 2007, the Burmese regime dramatically increased the cost of fuel prompting a series of protests that swelled to the nationwide monk-led demonstrations of September, known as the 'Saffron Revolution.' On August 23, 60-year-old U Ohn Than stood outside the then US embassy in Rangoon and held a poster with a series of points written on each side. The points included a call for the UN Secretary General to intervene and for soldiers to protect and respect the ordinary people. He was taken away shortly after in a vehicle by men in plain clothes.

This was not the first time U Ohn Than had been arrested. He was imprisoned for the first time in 1988 for his involvement in the pro-democracy demonstrations. He was released in 1995 but re-arrested and sentenced to seven years in 1996 for writing and distributing material considered 'anti-government'. After his release in 2003, he staged a solo protest outside the UN office in Rangoon in 2004 and received another two years in prison (AAPP, 2009c).

For his 2007 protest, he was sentenced to life imprisonment for sedition, under the Criminal Procedure Code Article 124 (A). Like other political cases, there were a number of serious violations of Ohn Than's right to a fair trial. From his arrest, he was held incommunicado for four months, in a special military interrogation camp until his case was finally brought to a court. He was not tried in an open court but in a special court inside a prison. He did not have access to a lawyer and had to represent himself.

During the trial, Ohn Than was not allowed to call any witnesses for his defence, though nine witnesses appeared for the prosecution, and none were independent. Seven were police and local officials. The other two identified themselves as Swan Arr Shin, an SPDC supported organization set up to do the 'dirty work' of security agencies. Finally, the judge concluded that standing alone outside a foreign embassy with a placard amounted to an act of sedition and sentenced Ohn Than to life imprisonment.

4. Torture

Under international human rights law, prisoners retain their human rights and fundamental freedoms, except for such restrictions on their rights required by the fact of incarceration; the conditions of detention should not aggravate the suffering inherent in imprisonment. The most fundamental protection for prisoners is the absolute prohibition on torture. The prohibition is a matter of *jus cogens*, a peremptory norm of customary international law binding on all states. There are no circumstances under which torture can be justified: not in a time of war; when facing internal instability; or a state of emergency. The prohibition of torture is absolute.

The most widely accepted definition of torture is set out in Article 1 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[6] (CAT):

> ... 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1 sets out four elements required to meet the threshold of torture: severe pain and suffering, physical or mental; intent; purpose; and state involvement. Quiroga and

Jaranson, note "the most important criteria in the definition of torture are the intention and purpose, not the severity of the pain" (2008, pp. 654-657). These two criteria are most important in determining responsibility and the degree of state involvement. It is important to note that torture can also be through omission, such as the deprivation of food leading to severe pain.

The definition of torture outlined above, while comprehensive, only mentions the immediate reasons for inflicting torture and not the underlying purpose, which is to effectively destroy the soul of a human being. Torture is designed to break down the identity of a strong man or woman, turning a politician, a union leader, or a leader of an ethnic minority group into a nonentity with no connection to the world outside of their torture chamber (Bo Kyi, 2000).

What makes torture so repugnant to our human instincts is that it is about stripping away the dignity of one human being by another. It is about asserting power and control and inflicting pain and despair. What makes torture so devastating is that it is carried out by the very people who are supposed to be protecting us: the State apparatus, the police, the military, the security and intelligence service.

As Kelman asserts, torture " is not an ordinary crime, but a crime of obedience: a crime that takes place not in opposition to the authorities, but under explicit instructions from the authorities to engage in acts of torture, or in an environment in which such acts are implicitly sponsored, expected or at least tolerated by the authorities"(2005, pp. 125-126). Survivors consequently have nowhere to turn.

Wider society is damaged both through the trauma inflicted on its members but also through an instilled awareness that basic human rights are neither guaranteed nor respected. The use of torture sends a strong warning not only to those within a political, social, or religious group, but to all citizens, that they do not live in a free or safe society.

If torture is a crime of obedience, as Kelman suggests, this leads to an important question: who are the perpetrators obeying? Crimes of obedience invariably accompany crimes of authority. "For every subordinate who commits acts of torture under official orders there is a superior – or typically an entire hierarchy of superiors – who issue the orders and who formulate the policies"(Kelman, p.126).

5. A brief history of political prisoners and torture in Burma

This paper focuses on the political prisoner situation in Burma, since 1988. Following the pro-democracy demonstrations of 1988 and the ensuing crack-down at least three thousand people were killed and thousands of people were arbitrarily arrested and detained for their involvement in the protests or perceived opposition to the regime. By 1990, there was an estimated 3,000 political prisoners. In the period directly before

the 1988 demonstrations, there were about 40 political prisoners in Burma. These were mostly ethnic related political activists largely from Arakan or Karen state[7].

The practice of torture is not new to the post-1988 period. The use of torture as a method of extracting information and punishing political prisoners and criminals occurred prior to 1988. A former political prisoner described his ordeal at the hands of Military Intelligence personnel when he was arrested in 1976, as reported by Amnesty International:

> "He was interrogated for an entire night, with shifting MI personnel questioning him. In order to force him to reveal information, he was tied up by his hands, suspended from the ceiling and spun around, known as the "helicopter". He was also forced to assume a half-crouching position, while standing on the tips of his toes, known as "the motorcycle" (Amnesty International, 2000).

The methods of torture employed by Military Intelligence after the 1988 pro-democracy movement are the same techniques described above. However, with the increase in the number of political prisoners in the last 22 years there has been a concomitant increase in torture and ill-treatment.

When the AAPP was first founded in 2000, there were approximately 2,500 political prisoners. This figure dropped to 1,100 in 2005/2006 and then doubled again after 2007. The number of political prisoners in Burma in September 2008 was over 2123. Among these political prisoners, about 700-900 were arrested during and in the aftermath of the peaceful protests led by the 88 Generation Students group in August and peaceful marches led by Buddhist Monks in September 2007 (AAPP, 2009b and 2010a). The figure has increased throughout 2009 and 2010 and AAPP now documents 2193 political prisoners. (AAPP, 2010f).

As well as being a well-established norm of international law, the prohibition of torture is also reflected in Burmese domestic law. The Burmese Penal Code prohibits 'hurt and grievous hurt' during interrogation[8] and outlaws the injury of anyone by a public servant. Though such provisions indicate a prohibition of torture, the failure to explicitly define and designate torture as a grave crime, in Burmese law, allows torture to take place more easily.

This paper will first discuss the nature of torture in Burma's places of detention: who are the victims, what methods are used and what is the purpose of torture, then explore to what extent torture is systematic and state policy in Burma.

6. The victims

Nobody can be considered immune from torture, in Burma, although those individuals considered dissidents, or in opposition to the regime are more likely to be targeted. Frequent victims include politicians, union leaders, journalists, human rights defenders and members of ethnic minorities. It is important to note that ordinary civilians with no political or ethnic affiliations are also subjected to torture in normal criminal investigations (AAPP, 2011, pp. 6-7).

Torture and cruel and degrading treatment is meted out to all of the prison population, without distinction to age, health, and the special needs of women, children and those with disabilities. In Burma, victims of torture have included children as well as adults. Contrary to international standards and to Burma's own Jail Manual[9], children are not separated from adult prisoners and are equally subject to the prisons' grossly inadequate conditions children are equally subject to the prisons' grossly inadequate conditions. AAPP has documented cases of children as young as 12 years of age being imprisoned and tortured due to their political beliefs.

Former child political prisoners report being tortured until they confessed, "*I was beaten at every question, I got kicked and punched especially when they thought I was lying. I had to cooperate in the end. I couldn't resist anymore*," one recalls (AAPP, interview, March 2011). Former political prisoner, Ko Soe Lwin, was arrested and interrogated twice when he was a child. The first time he was arrested he was 12 years of age and was held incommunicado for over 2 months. Both his mother and father were former political prisoners, and it appears he was targeted because of his parent's political activities.

7. Torture Methods in interrogation centres and prisons

This section details the methods of torture sanctioned by the SPDC and used in Burma's interrogation centres and prisons as reported to AAPP by current and former political prisoners and their families. The torture documented occurred between 1988 and 2010.

Many torture survivors and their families, are unable to speak out about torture for fear of repercussions, especially for those who remain in Burma. Therefore, research by AAPP is in no way exhaustive.

These are not isolated cases but are emblematic of a wider problem. Worth noting is the bravery of those who speak out against these crimes, at the risk of further torture and persecution.

Individuals in the first phase of arrest and detention, before they have access to a lawyer, are at greatest risk of torture and other forms of ill-treatment. Incommunicado and secret detention are a common practice in Burma and often lasts until a confession is obtained,

which can take months and occasionally years. It can cause untold mental suffering for the detainee, as well as their family, and in this respect is a form of psychological torture.

In Burma, not all interrogation centers have been identified and several secret centers exist. Many political prisoners are kept in government 'guest houses' or on military bases which prohibit access to civilians. Both are used, along with torture and other ill-treatment, to extract confessions from detainees, to punish them or to force them to make undertakings to not criticize the government.

Incommunicado and secret detention are noted precursors to torture, as no one can be held accountable. The UN General Assembly declared that "prolonged incommunicado detention" and "detention in secret places" (General Assembly, 2007: para. 12), facilitates the perpetration of torture and other ill-treatment and can in itself constitute a form of such treatment.

Almost all political prisoners are beaten during interrogation. Some are subject to extreme physical assaults resulting in internal bleeding, unconsciousness and sometimes death. Beatings include being punched in the face, kicked in the head, beaten with rifles, sticks and iron bars.

A political prisoner, 13 years of age at the time of interrogation was subjected to severe physical torture: "*I was boxed repeatedly in the ears, until blood was flowing from my nose. I am now deaf in one ear, at the time I was only 13 years of age. My friend was subjected to the same treatment; he lost his hearing in both ears. After about 10 days, they beat me so hard two of my ribs were broken and I was unconscious... Sometimes they burnt plastic and dropped the hot liquid on my calf and legs. The plastic would stick to my skin and peeled off my flesh. They stuck needles under my finger nails and my toe nails. This was the worst torture I suffered*" (AAPP, interview, March 2011).

Since 1988, 146 political activists have died during incarceration as a direct result of severe torture or from the denial of food and medical treatment. Many die from curable diseases such as tuberculosis or Malaria. In May 2010, human rights defender Kyaw Soe, age 39, died in Myingyan prison due to prolonged ill-treatment and the denial of treatment for respiratory problems (AAPP, 2010c). Others, like Buddhist monk U Thilavantha, and NLD member Aung Hlaing Win, died from injuries sustained from torture (AAPP, 2006a).

8. Case study: the torture and death of Aung Hlaing Win

Aung Hlaing Win, aged 30, was tortured to death in an interrogation centre. He was an active member of the NLD. On 1 May 2005 he was accosted at Lucky restaurant in Rangoon by an unknown group of men believed to be soldiers. Ten days later, his family was informed by Lt. Col. Min Hlaing that he had died at an interrogation centre on 7 May.

Aung Hlaing Win, like most political prisoners, was arrested without warrant and taken to a Military Security Affairs Unit interrogation centre, where he was held incommunicado for one week. He was subsequently, tortured to death and his family was not informed of his arrest or whereabouts until three days after his death. The authorities claimed his death was a result of pneumonia and a heart attack. The forensic doctor who examined the body, testified that there were 24 external and internal wounds on his body. The injuries he sustained, during the seven days of interrogation include three fractured ribs, a fourth rib that was broken and pierced his heart, and bruising and abrasions over most of his body, including his throat, cheekbones, lips, shoulders, forearms, chest, knees, thighs and calves.

The authorities cremated the body of Aung Hlaing Win without the family's consent, before they could see it or have a proper burial. They tried to bribe his family into keeping silent, and while the authorities responsible for Aung Hlaing Win's death have been identified, no action has been taken to hold those responsible accountable. The families of political prisoners who have died while in custody frequently report being offered money to remain silent to the cause of death[10].

Those who survive the beatings are often left permanently maimed. Injuries sustained from torture include paralysis, partial and full hearing loss, fractures, and brain damage.

Some prisoners are forced to wear shackles for periods as long as one year: *"the shackle stayed on for more than one year, and when it finally came off I was suffering from partial paralysis. I was not able to walk because my shackled legs had been held in an awkward position for so long"* (AAPP, interview, 2004).

Deprivation of food, water and sleep is common during interrogation or as a punishment. There is no set time for how long these deprivations last, and may only end when the prisoner is perceived to be nearly unconscious or dead. Deprivation causes the prisoner to lose all track of time, leading to disorientation, weakening the detainee both physically and psychologically. Political prisoners report being made to stand or remain hooded for days at a time. The practice of blindfolding and hooding, ensures that the victim can

not recognize their torturers rendering victims incapable of identifying the perpetrators (AAPP, interviews).

Solitary confinement is routine, and the practice is not motivated by legitimate penological concerns but a political will to demoralize, punish and marginalize political prisoners. The most notable case of solitary confinement is Min Ko Naing, kept in solitary for nearly 16 years in Sittwe Prison[11]. In Burma, prisoners placed in isolation benefit from no special conditions intended to alleviate the hardship of being isolated; on the contrary, the restrictions they confront while segregated are often arbitrary and designed to heighten their isolation. In the opinion of the Special Rapporteur for Torture, the prolonged solitary confinement may amount to torture (Nowak, General Assembly, 2008).[12]

Other reported torture methods include: electric shock; burning; the "iron road", rolling an iron rod up and down the shins until the skin peels off; "the helicopter", being suspended from the ceiling by the arms and spun around while beaten (AAPP, 2006).

Political prisoners report the practice of being forced to witness the torture of their friends and colleagues. One notes: *"I was then made to strip naked and watch the interrogation of others for an hour. I saw several people lying on the floor, bloody and unconscious" (AAPP, interview, July 2005). Other psychological torture methods include death threats and verbal abuse. "I was punched, kicked and beaten by four men, while they cursed at me: 'Mother fucking Muslim', 'we'll kill you', I believe that they treated me particularly badly because of my religion"* (AAPP, interview, July 2005).

Another explains, *"they held a gun to my head and threatened to kill me if I didn't give the right answers to their questions. [They said] 'We'll take you to the side of a stream and kill you there, and then throw your body in."*

A distinct category of torture is sexual violence. As the Special Rapporteur on Torture explains: "[r]ape and other sexual forms of abuse are intended to violate the dignity of the victim in a very specific manner. Beyond the actual physical pain, sexual violence results in severe psychological suffering" (Nowak, 2010, p. 18). Sexual abuse has been reported by both male and female political prisoners, including harassment and molestation, beating or burning of the genitals, threats of rape, and rape. There is one documented case of sexual abuse of a male political prisoner where prison guards forced a dog to penetrate him. This survivor said "*I can forgive my torturers everything but the sexual abuse. No religion permits such an act. It has destroyed my self esteem, my dignity"* (AAPP, interview, July 2005). In another case a journal editor, arrested on October 16, 2009, was sexually violated by the interrogators who shoved a police truncheon into his anus. He sustained serious internal injuries from the abuse and remains partially paralysed.[13]

9. Conditions of detention amounting to torture

In Burma, torture is not limited to physical assaults and psychological abuse, but further, prison authorities routinely and deliberately aggravate prison conditions and deny medical care to political prisoners, causing a level of suffering, amounting to torture. Malnutrition, poor sanitation and unclean water are serious problems throughout the prison system, posing a major health risk. According to testimonies, political prisoners continue to receive very low quality food from prison authorities; often the food is rotten, half cooked, with stones and insects, resulting in food poisoning and gastric ailments.[14] Many prisoners face starvation.

Since November 2008, at least 275 political prisoners have been transferred to remote prisons, in malarial zones, with extreme weather conditions, where there are no prison doctors.[15] Political prisoners are not given preventative medicines, allowed mosquito coils or mosquito nets. Medical supplies in prisons are inadequate, and often only obtained through bribes to prison officials. It is left to the families to provide medicines and food, but prison transfers prohibit this. Often prisons are hundreds of miles from the political prisoner's hometown, and the public transport system poor and the travel costs too high. Sometimes the authorities may decide for 'security' reasons, to forbid all family contact (AAPP, 2010d).

Tuberculosis, Malaria and HIV are a constant and serious threat in Burma's prisons, due to overcrowding, lack of hygiene, lack of adequate medical care and exposure to extreme climates. Insein Prison houses about 9,000 to 10,000 inmates but its capacity is about 6,000. Sick and healthy prisoners are routinely mixed together. Inmates rely on shared razor blades, which promotes the transmission of Hepatitis and HIV. Re-using needles is commonplace, with medical staff using the same needle on a number of different prisoners (AAPP, 2010d and 2006b, p. 71).

Regardless of their illness, prisoners report receiving the same medication, and are given low grade or sometimes the wrong medication. Prison officials take common criminals to the local hospital for treatment, but are required to seek authorization before allowing political prisoners to seek medical assistance outside the prison, which can result in their waiting for weeks or months to receive treatment for life-threatening problems.

As of September 2010, there were at least 141 political prisoners in poor health; an estimated 19 require urgent medical treatment (AAPP, 2010e). It is evident that untreated injuries from torture, long-term imprisonment, transfers to remote prisons and denial of medical treatment is a taking a toll on political prisoners' health.

10. The purpose of torture in Burma

Torture is routinely used to force confessions and the evidence obtained by torture is used in court to sentence individuals. The repeated use of torture to force confessions, along with other breaches of fair trial standards, in political prisoner cases, indicate an absence of the rule of law, or what Pinheiro, former UN Special Rapporteur for Burma, termed the 'un-rule of law' (Pinheiro, 2001, p.3).

Military Intelligence search, arrest and interrogate without warrant anyone deemed political, despite provisions in the Burmese Criminal Procedure Code for judicial oversight of arrests and detentions. All former political prisoners interviewed by AAPP were held longer than 48 hours without warrant and without being brought before a judicial authority. Basic rights of due process, including the right to a public trial and to be represented by a defense lawyer, are denied in political cases. In many cases, the accused are kept ignorant of the section of law under which they are charged. There are reported instances where Military Intelligence has passed sentences orally at the time of arrest, before any trial had taken place.

The State Protection Law allows for detention without charge or trial for up to five years[16] and is frequently used to extend an already arbitrary and unjust detention[17]. The judicial system is controlled by the SPDC without judicial oversight, transparency or independence. Courts and other legal institutions exist to protect and promote the SPDC, not to provide justice to victims or fairly arbitrate disputes. One of the many examples is Bo Min Yu Ko, sentenced to 104 years imprisonment at the age of twenty one, while denied the right to any legal representation (AAPP, 2009a). Such harsh and cruel sentencing and the lack of due process is illustrative of the unlawful nature of the judicial system in Burma.

In Burma, there is a well-established pattern of wrongful imprisonment of those who speak out against the regime, with the SPDC blaming political dissidents and democracy activists for crimes they did not commit. This scape-goating amounts to a serious abuse of the criminal justice system. It prevents a proper investigation and ensures the real perpetrators are not brought to justice. Following bombings, such as those in 2010, 2005, 1996 and 1989, political activists have been falsely accused, tortured and unlawfully imprisoned for these crimes, in an attempt by the regime to damage the reputation of opposition groups (Wai Moe, 2010 and AAPP, 2010b).

The case of Thant Zaw and Nyi Nyi Oo, two NLD members wrongfully convicted of bombing a petroleum factory in July 1989, illustrates this. In the absence of any evidence of involvement in the bombing, confessions were extracted under repeated and brutal torture and the two were sentenced to death for high treason and murder. A man confessed to the bombing and received a 10 year sentence. Despite his confession,

sentencing and statement saying that the NLD members did not take part in the incident, Thant Zaw and Nyi Nyi Oo were never released (AAPP, 2010b).

Torture is also used as a form of initiation into prison, as one former political prisoner remembers: *"However, the authorities continued to torture political prisoners as they entered the prison. As we walked in they all beat us. This is the "fee" for entering prison"* (AAPP, interview, March, 2010).

Torture is usually less common in regular prisons once a prisoner has been convicted as the investigation process has been completed but in Burma torture is used to punish political prisoners once they have been sentenced and imprisoned.

One political prisoner recalls: *"My prison sentence was almost finished at this time, which I reminded them of, saying that they should avoid harming me. This only further angered them. Sein Maung Win [jailer] continued beating me until I fell to the floor, and then proceeded to jump up and down on the iron rod between my legs until I fell unconscious"* (AAPP, 2006b, p. 32).

11. State Responsibility for Torture in Burma

There is a clear chain of command leading from the perpetrators of torture to the highest offices of the SPDC. Torture during interrogation is committed primarily by the Military Intelligence Service under the Directorate of Defense Services. Interrogations are also conducted by the Bureau of Special Investigations (BSI) and the Myanmar Police Force, one branch of which is the Special Information Force ('Special Branch'). The BSI and the Myanmar Police Force are accountable to the Minister of Home Affairs (AAPP, 2006b: 24).

The abuses carried out in detention facilities, in Burma, are part of a systematic process where torture is not only accepted but also encouraged. Evidence suggests it has become a cultural norm amongst the military, police and security officials for extracting false confessions, creating a climate of fear and as a punishment. The same methods of torture have been practiced over the past twenty-two years on political prisoners. The prevalence of specific torture methods in prisons all over the country suggests that some form of "torture training" has been provided.

Under some circumstances torture can amount to a war crime or a crime against humanity. The Rome Statute of the International Criminal Court, Article 7 (f), defines torture as a crime against humanity when it is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The following section raises the question of whether torture of Burma's political activists could constitute a crime against humanity.

12. Widespread Attack

Since March 1988, approximately 7,000 people have been held as political prisoners. However, this figure only reflects those cases that can be adequately verified. The actual number is likely to be much higher. The figures do not take into account the number of ethnic persons in Burma's rural areas who are frequently detained and tortured in unknown or inaccessible locations, separate from Burma's 42 prisons and various interrogation centers. AAPP does not have a comprehensive record of torture in ethnic areas, though, this has been documented to some extent by other organisations.[18]

Countless people have been detained for short periods of time and tortured. Those who are only detained and interrogated, and not imprisoned are not included in the estimate of former political prisoners.

These short, arbitrary detentions instill a deep fear into the civilian population as a whole, as they reinforce that anyone can be arrested at any time. Widespread attack is defined as "on a large scale, meaning that the acts are directed against a multiplicity of victims." The number of persons detained and tortured in Burma arguably constitutes a widespread attack.

13. Systematic Attack

A systematic act is defined as one which occurs following a "pre-conceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts." [19] In order for an attack to be systematic, it does not have to be formally stated as state policy - government action or inaction can demonstrate the policy. In Burma, the SPDC systematically arrests, detains and imprisons civilians for their political affiliations with the intention to torture to eliminate any opposition to the regime.

A statement by a senior Burmese diplomat, Aung Lynn Htut, who defected and sought asylum in the United States, revealed the SPDC intended a "complete routing" of NLD members and their families by 2006 (Aung Lynn Htutt, 2005).

Non governmental organisations documenting human rights violations in Burma, as well as the UN Special Rapporteur and the US State Department, have recorded evidence of the authorities committing politically motivated murder with complete impunity. The arbitrary and illegal deprivation of life is a grave human rights violation, and can constitute crimes against humanity, regardless of whether the death is from illegal execution, torture, excessive force or from life threatening conditions during detention.

The Ad Hoc Commission on the Depayin Massacre (Burma), compiled evidence to indicate that the events of 30 May 2003 in which 70 people were killed in an attack by SPDC affiliated forces on a NLD convoy carrying Daw Aung San Suu Kyi, could qualify as a crime against humanity. It was also indicative of a renewed effort on the part of the SPDC to systematically attack civilians with particular political affiliations.No action was ever taken by the regime to investigate the attack.

The regime also took no action to investigate or punish those responsible for the extrajudicial killings of at least 31 people during the regime's violent suppression of peaceful pro-democracy demonstrations in 2007, including Buddhist monk U Thilavantha and Japanese photojournalist Kenji Nagai (US Department of State, 2009 and Quintana, 2010).

These incidents of state sanctioned murder of NLD members and other political activists indicate that the current arrests, detention and torture of civilians who voice opposition to the regime are part of wider and systematic plan to maintain power and silence dissent.

14. Admission of Guilt and Premeditation

During the torture of some former political prisoners, the authorities have boasted about torturing other political prisoners to death (Tun Phone Myint, 1998, p.16).[20] Some cases of torture have been coldly premeditated by the authorities. Premeditation was made clear during the 1990 Hunger Strike, in Insein Prison, when the authorities set up speakers around the prison and then blared military music while carrying out one of the worse incidents of torture yet documented. Over 40 prisoners required hospitalization as a consequence of this episode (Amnesty International, 2000).

In response to the 1990 strike against hard labour, by political prisoners, in Thawaddy Prison more than 90 political prisoners were severely tortured for days on end twenty two seriously injured and 16 hospitalised. The torturers told the prisoners they could beat to death one in ten political prisoners and that they had been commanded to do this (AAPP interview, May 2010). The authorities savagely beat pigs nearby as political prisoners were being tortured. The squeals of the pigs were intended to cover the screams they knew would come from the tortured political prisoners. Pigs were also beaten for the same reason during another incident in 1992 (AAPP, 2006b, p. 27 and Amnesty International, 2000). The use of loud music and pigs to drown out the cries of political prisoners reveals the authorities had a plan for the torture they were about to inflict.

15. Conclusion

In Burma's detention facilities torture is widespread and systematic. The authorities intentionally inflict severe physical and mental pain and suffering on those deemed in

opposition to the regime. A number of political prisoners have died from such torture, many more have been tortured to the point of death only to somehow survive. When torture or ill-treatment results in death, the deceased person is used as a warning, silencing many.

The state security apparatus, rather than protecting the people, punishes them. The policies of state authorities and the actions of law enforcement officials are at complete odds with international human rights standards and pose a significant threat to the peace and security of the people of Burma.

The research reveals that torture is not limited to isolated cases but pervasive and practiced throughout the entire custodial system.

While the past decade has seen a strengthening of legal measures to bring torturers to justice, in Burma, after nearly 50 years of successive military rule, the un-rule of law, impunity and a pervasive culture of fear prevail. Torture remains a tolerated practice in Burma's places of detention because mechanisms to hold accountable those responsible for torture and ill-treatment are insufficient to provide redress to victims or to deter perpetrators. Torturers are rarely ever prosecuted; nor are they publicly named and shamed.

Argentinean anti-torture campaigner, Ariel Dorfman, once said: "Nobody tortures if they think they will be caught, if they think they will be exposed to public scrutiny. Nobody tortures if they know they will be laid out naked for everyone to see and judge, if they are sure that they will face in a court of law the men and women they stripped naked in some faraway, hidden room"(2009). As long as torturers are safe from justice, and can live, forever, in the timelessness of impunity, torture will continue in Burma.

Internationally, there is an increasing interest in, and a growing campaign for, a commission of inquiry into crimes against humanity in Burma. In some cases torture can constitute crimes against humanity or war crimes. A future commission of inquiry or independent investigation into violations of international law, in Burma, raises the possibility of the potential prosecution of the instigators and perpetrators of torture.

Though this paper exposes a dark side of humanity, we would also like to think that it serves as a testament to the human spirit, for the story of political prisoners in Burma is the story of survival and of courage. It is ultimately an account of men and women who have refused to be overcome by the darkness.

ENDNOTES

[1] Director General of the Prisons Department, Zaw Win, reported in The Irrawaddy, http://www.irrawaddy.org/article.php?art_id=17493

[2] AAPP is a human rights organization founded by former political prisoners based on the Thai/Burma border, which works for the release of political prisoners in Burma and ex poses human rights abuses occurring in Burma, with a focus on torture and the denial of civil and political rights.

[3] AAPP have, on file, interviews with former political prisoners. These interviews were conducted between 2000 and 2011 and form the basis of much of the papers research. AAPP also collects testimony from the family members of current and former political prisoners. AAPP Monthly Chronologies; media releases, other documentation, and thematic reports were also used in the research and can be found on the AAPP website: http://www.aappb.org/

[4] On 28 May 1961, the article Forgotten Prisoners launched the campaign 'Appeal for Amnesty' and first defined a 'prisoner of conscience'.

[5] The information on U Ohn Than is from an unofficial translation of the Court Report from his trial at the Western Rangoon District Court, Criminal Trial 12, 2008.

[6] The CAT definition has been universally accepted by the 146 countries that are party to the Convention.

[7] A number of people were arrested for opposition to the regime after General Ne Win overthrew the democratically-elected government in a coup d'etat in 1962 and formed the Burmese Socialist Program Party. There was a surge of politically motivated arrests following the student led demonstrations in 1974. All political prisoners from this period, were released under an amnesty in 1981 and those living in exile allowed to safely return.

[8] Articles 330 and 331 of Burmese Penal Code

[9] CRC art. 37(a) (b) and (c); and Jail Manual, Part One, Section XIII - Juvenile Prisoners; and 1984 Prisons Act, section 27. The Prison Acts specifies that male prisoners under the age of 21 should be kept separate from adult prisoners, and of these, those who have not arrived at puberty should be separated from those that have.

[10] The information in this case study was obtained by AAPP from Aung Hlaing Win's family.

[11] Min Ko Naing, after his sentencing in 2008, for his role in the August 2007 demonstrations, was transferred to Kengtung prison in Shan State, where he remains, in solitary confinement, at the time of reporting.

[12] Nowak emphasized that as "solitary confinement places individuals very far out of sight of justice. This can cause problems even in societies traditionally based on the rule of law. The history of solitary confinement is rich in examples of abusive practices evolving in such settings".

[13] Information obtained by AAPP from the family members of the torture victim and submitted to the UN Special Rapporteur for Burma, Tomas Quintana.

[14] Interviews with former political prisoners on file with AAPP, 2000 – to date.
[15] According to the World Health Organisation, morbidity rates for malaria in Burma are highest in Arakan, Karen and Kayah states, and Sagaing and Tenasserim Divisions, where high profile political prisoners were transferred.
[16] section 10 A of the State Protection Law
[17] section 10 B of the State Protection Law
[18] Amnesty International and Karen Human Rights Group are two examples, see Amnesty International's report: Crimes against humanity in Eastern Myanmar, published 2008.
[19] Draft Code of the International Law Commission, Offence against International Peace and Security, Article 18, Commentary (3) .
[20] Tun Phone Myint, 'No Escape', Tortured Voices: Personal Accounts of Burma's Interrogation Centres. All Burma Students' Democratic Front, 1998. p.16

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DEFINING THE BANGSAMORO RIGHT TO SELF DETERMINATION IN THE MILF PEACE PROCESS

Ayesah Abubakar and Kamarulzaman Askandar

The Right to Self Determination (RSD) struggle of the Bangsamoro of Mindanao, Philippines has been internationalised since its first peace process in the 1970s with third party actors being involved. However, it is in the recent Government of the Republic of the Philippines and the Moro Islamic Liberation Front (GRP-MILF) peace process that the idea of RSD is well articulated in several ways. An example of this is in defining development in terms of RSD.

In a usual peace process, development is often introduced in the post-conflict phase soon after a peace agreement had been signed. However, in the context of the GRP-MILF Peace Talks, a new approach of starting reconstruction, rehabilitation, and development efforts in the conflict affected areas is being undertaken as part of a confidence building measure during the peace process itself. This new phase can be seen in the creation of the Bangsamoro Development Agency (BDA).

This research will present its findings on how the Bangsamoro articulate their concepts of development and Right to Self Determination. Mainly, it discusses the creation of the Bangsamoro Development Agency (BDA) and the worldview of MILF communities.

1. Introduction

The core of the conflict in Mindanao, Philippines is identity-based leading to a right to self-determination struggle. The Bangsamoro of Mindanao maintains that it is a sovereign nation and it wants to assert its freedom from the Philippine nation-state.[1] Mindanao is the historical ancestral domain of the 13 ethno-linguistic tribes forming the Bangsamoro group and other Indigenous Peoples. While the Bangsamoro are divided among these distinct tribes, it is Islam and their shared history that binds them together.

Mindanao is the second largest group of islands in the Philippines. It is divided politically into 25 Provinces, 27 cities and 408 municipalities.[2] Within these groupings, there are 5 provinces, 1 city, and 101 municipalities that form part of an (ARMM).[3]

In 1987, under the leadership of then Philippine President Corazon Aquino, the Autonomous Region in Muslim Mindanao (ARMM) was established to satisfy the perceived aspirations for autonomy of the Bangsamoro people.[4]

At present, this ARMM structure of governance continues to operate but is confronted with many problems. In spite of the ARMM project, however, the grievances of the Bangsamoro and their aspirations to a right to self-determination remain very high. Primary to these grievances are: (1) the disenfranchisement of the people in their ancestral domain as a result of the systematic migration programs from the North (to Mindanao) during the American period and that continued in the succeeding Filipino government, (2) lack of development in their areas, (3) their lack of representation and influence in the local and national politics, (4) prevailing discrimination towards them, and (5) the continued human rights violations and poor access to the justice system among others. Not only do the Moro communities feel that they are being treated as second class citizens under the Philippine state, but they have found themselves to have been marginalised in their own land.

The existence of two revolutionary movements and their local support is a testament to the Bangsamoro struggle for freedom. While the Moro National Liberation Front (MNLF) led by Chair Nur Misuari signed a Final Peace Agreement in 1996 with then Philippine President Fidel Ramos' administration leading to the strengthening of the ARMM, they, however, insists that the implementation of this agreement had failed. To this day, the MNLF is still pursuing a review of the agreement as facilitated by the Organization of Islamic Countries (OIC). On the other hand, the second peace process with the Moro Islamic Liberation Front (MILF), formerly led by the late Chair Hashim Salamat, and currently by Chair Murad Ibrahim, is recently taking the forefront in undertaking another negotiated political settlement with the Philippine government. This Government of the Republic of the Philippines-Moro Islamic Liberation Front (GRP-MILF) peace talks is being facilitated by the Malaysian Government since 2001.[5]

Generally, the entrance of government-initiated development programs in Mindanao has been negatively viewed by the Bangsamoro communities. These programs are not only perceived as biased towards the welfare of the Christian settlers but are also looked at as cheap bribes to some traditional Moro politicians who have been corrupted by the Government as part of a divide and rule system. At worse, the Government has been able to capitalise on the ongoing conflict as a compelling issue for international agencies to pour in financial support in the name of development funding. Thus, with the increasing interests and presence of the international community in Mindanao, the Bangsamoro civil society groups have emerged.[6] In this process, these groups are also re-framing their notions of Right to Self Determination (RSD) not only through the revolutionary struggle but also including the pursuit of development in their areas. The creation of the Bangsamoro Development Agency (BDA), as the MILF development arm is a good example of this ownership dynamics in this development process. At the grassroots level, it is important to find out how ordinary Moros actually perceive development as part of their RSD struggle. This is illustrated in a case study of two conflict communities in this paper.

2. The Development Problem

When the Americans finally turned over the ruling of the Philippine government to the Filipinos in 1946, the new Government was formed by predominantly *Tagalogs* and Christians from Luzon.[7] In spite of firm resistance from the Bangsamoro in Mindanao, the Philippine government continued with its policy of integration and assimilation. It also carried on with its various development projects making Mindanao as its major source for food, timber, agricultural produce, power and other natural resources. In turn, Mindanao became the recipient of the Government's installation of public institutions and services that should help develop the people. On the other hand, the people remained suspicious of aims to integrate them as part of the new Filipino society.[8] Borne out of the Government's centrist approach and political assertions on developing Mindanao is the consequential marginalization of the Bangsamoro in their own lands (Mastura, 1988) (Gutierrez and Borras, Jr., 2004). Hence, this marginalization together with various incidences of human rights violations and atrocities has fuelled the strong support for the revolutionary groups, namely the Moro National Liberation Front (MNLF), and later on, the Moro Islamic Liberation Front (MILF).[9]

The Mindanao armed conflict that intensified in early 1970s became a major obstacle in the development of Mindanao and in turn created a burden on the government's resources (World Bank, 1976). The Philippine government attempts to solve the conflict included formal negotiations with the Moro National Liberation Front (MNLF) in 1973 coupled with introduction of various programs that could deliver better economic opportunities to the people (World Bank, 1976). The goal of developing Mindanao has become a frequent program for the government in Manila. Yet, with many of its attempts, the Bangsamoro areas remain to be the poorest of the poor and sorely lacking of access

to human development services. In the Philippine Human Development Report of 2005, the five ARMM provinces belong to the lowest Human Development Index (HDI) ranking.[10]

This situation is further compounded with the very real human security problems brought about by a mixture of the armed conflict, an environment of impunity among powerful politicians and security officials, high militarization in the area, the presence of clan wars or "rido" among families, and the general lack of justice and rule of law in the area.

3. The Struggle for RSD and the MILF

The Mindanao conflict has had one of the longest histories that started with the Moro-Spanish wars in 1578 (Jubair, 2007). But it was in the 1970s that the right to self determination struggle was borne with the emergence of the Bangsamoro liberation groups. Since then, the Bangsamoro struggle has been internationalised with the intervention of groups like the OIC that first brokered the peace negotiations between the Philippine government and the Moro National Liberation Front (MNLF). At that time, disturbing reports of mass atrocities against the Bangsamoro communities attracted attention and sympathy from the OIC member countries.

Some of these incidents include the Manili Massacre, the Ilaga attacks, and the penultimate Jabidah Massacre.[11] These turn of events not only gained patronage from other Muslim countries but also have placed the Bangsamoro problem in the realm of the OIC. Through diplomatic efforts, the MNLF became successful in gaining an observer status within the OIC as representing the Bangsamoro people. The plight of the Bangsamoro, as a minority in a Christian country, the Philippines, has gained international recognition as a distinct group of people who are fighting for their right to self determination. In the succeeding years, the MNLF came to sign the 1996 Final Peace Agreement (FPA). While this agreement remains to be contested by the MNLF and the Philippine government under the purview of the OIC, another revolutionary group continued with this quest for freedom—the Moro Islamic Liberation Front (MILF).

The GRP-MILF peace process formally commenced in 1997 and started using direct negotiations up until year 2000.[12] However, this mode of negotiations proved to be unsustainable when the MILF completely lost its trust on the government. At the height of their negotiations, the government, then led by President Joseph Estrada, decided to attack the MILF camps and made full use of its military strength in resolving the conflict. Year 2000 saw the "all-out-war" against the MILF and further escalated the conflict. As soon as then Vice President Gloria Macapagal Arroyo took over the leadership post from President Estrada, she invited Malaysia to be the third party facilitator in an attempt to save the peace talks. Since 2001, Malaysia serves as a third party facilitator and host to the GRP-MILF peace process. As a separate and distinct peace track, this peace process has shown many innovations. The peace process has not only limited itself to the peace talks

but extended its activities to the implementation of the ceasefire through the deployment of an International Monitoring Team (IMT) in Mindanao since 2004. In assessing the ongoing peace process, this paper identifies two relevant areas to the idea of building a philosophy and strategy for development as part of their RSD aspiration, namely: the creation of the Bangsamoro Development Agency (BDA) as the MILF development arm; and the perspectives of local communities on how they define the concepts of Right to Self Determination and development in their context. These two areas will be elaborated in the succeeding sections.

The MILF's RSD philosophy hinges on its historical narrative that the Bangsamoro people were never part of the controlled areas under the Spanish colonial government and even up until the American government when the latter took over the Philippines. Therefore, the annexation of Mindanao was done illegally without the plebiscitary consent of the people who continue to maintain their own form of government, and a well defined territory, under the sultanate and datuship system. Subsequently as an outcome of the Philippine government's integration and assimilation policy, and eventual marginalisation of the people, this situation of injustice has manifested in various forms as enumerated by Archbishop Orlando Quevedo, (1) injustice to the Moro identity, (2) injustice to Moro political sovereignty, and (3) injustice to Moro integral development.[13] Thus, the MILF puts the onus on the Philippine State, as having a democratic form of government and pronouncing its own obligations towards the right to self determination to its indigenous peoples in its constitution, and in agreement with the many relevant international human rights standards (in relation to indigenous peoples), to accommodate the Bangsamoro aspirations for Right to Self Determination in a process of a negotiated political settlement. At one point, the spirit of unity of mind among the GRP-MILF peace panels in tackling the Right to Self Determination can be best understood in the statement of former GRP Peace Panel Chair, Secretary Silvestre Afable, Jr. wherein he mentions of "...the existence of 'shared sovereignties or nations within nations' which have been long accepted in the realm of conflict resolution."[14]

The concept of the Right to Self Determination can be found in the International Human Rights Declaration and Covenants. It is stated:

> *Article 1. (1) All peoples have the right to self determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of self determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'.*[15]

Apart from the MILF argument of Mindanao's historical realities and the need to correct this injustice, it also pursues the concept of right to self determination using what is being espoused by the International Human Rights Covenants and other instruments as part of its language. In a significant development in the GRP-MILF peace process, the crafting of a Memorandum on The Ancestral Domain Aspect (MOA-AD) that was supposedly signed last August 5, 2008 in Putrajaya, Malaysia holds to be an important document. The MOA-AD distinctly identifies its claim for ancestral domain and its vision towards defining the issues of territory, resources and governance elements. However, due to an application for a temporary restraining order by some opposing leaders in Manila and in Mindanao, the Supreme Court, consequently, barred the Philippine government from signing this agreement on the basis of its unconstitutional provisions. This unconstitutionality, however, does not close the doors to options of pursuing a peace agreement.[16]

As of present, the GRP-MILF peace talks have yet to fully resume its formal peace talks and tackle how it will concretely overcome the MOA-AD issue. However, the content of the MOA-AD is worth visiting specifically on how it articulates the Bangsamoro aspiration for Right to Self-Determination. First, under the MOA-AD Terms of Reference, the following are used:

> *"ILO Convention No. 169, in correlation to the UN Declaration on the Rights of the Indigenous Peoples, and Republic Act No. 8371 otherwise known as the Indigenous People's Rights Act of 1997, the UN Charter, the UN Universal Declaration on Human Rights, International Humanitarian Law (IHL), and internationally recognized human rights instruments; and compact rights entrenchment emanating from the regime of dar-ulmua'hada (or territory under compact) and dar-ul-suhl (or territory under peace agreement that partakes the nature of a treaty device."*

It is notable that the agreement makes use of the customary laws, national laws and international law standards including the UDHR. The Philippines is a signatory to many of these international human rights standards. Therefore, the right to self-determination of the indigenous peoples, like the Bangsamoro, finds justifications using the same universal and inalienable rights to groups.

Second, in the Concepts and Principles, the following items can be noted:

No. 1: Referring to the birthright identity of all Moros and other Indigenous Peoples of Mindanao and are fully asserted. This also includes the important clause of freedom of choice for the Indigenous Peoples that shall be respected. This concept holds much importance as it invokes the identity of the people including the culture, language, ancestral domain, religion, and other social facets that constitute the Bangsamoro identity.

No. 4: Acknowledgment that the right to self-governance is rooted on the ancestral territoriality originally including the sultanate areas. It also emphasizes that the

> *"…ultimate objective of entrenching the Bangsamoro homeland as a territorial space is to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people."*

This statement is reiterated under the Governance section No. 2. It lays foundation to the Right to Self Determination argument of the MILF. It can be inferred that the governance issue would also include the pursuit of development amongst the Bangsamoro communities. Therefore, emphasizing that any form of governance, and development, should also effectively respond to the aspirations of the people, again, emphasizing the pursuit of preserving and developing their identity as a distinct group of people.

Lastly, under the Governance section, No. 8, the MOA-AD states that the envisioned Bangsamoro Juridical Entity (BJE), or territory, shall be empowered to build, develop, and maintain their own institutions in various aspects (e.g. education, judicial system, financial and banking, etc.), all of which that are needed to develop a "progressive Bangsamoro society."

Hannum Hurst argues that there is no right to secession under the present international law. The Right to Self Determination as part of human rights is criticised as a weak basis for groups like the MILF to use as a tool for its secessionist inclinations within existing sovereign territories. Although there is an attempt of "creating a new right in international law- the right of every people defined ethnically, culturally, or religiously to have its own independent state", this has yet to be supported by international law.[17] In response to the claims for RSD, he suggests two human rights aspects which can be pursued: (1) the protection of cultural, religious, linguistic, and ethnic identity of individuals and groups, and (2) the right of individuals and groups to participate effectively in economic and the political life of the country.[18]

By using these two lenses, it can be rightly said that both the GRP and MILF panels are very much aware of this limitation, thus, the concepts and principles used under the MOA-AD clearly bears the abovementioned human rights instead of an absolute idea for independence or secession. In this regard, it is then important to note that RSD is a very dynamic concept that is continuously being defined. Whether this definition of RSD, short of secession or independence, is acceptable to groups like the MILF and the Bangsamoro at large, it is only them who can fully appreciate its meaning and relevance to their own aspirations as a distinct people who wants to be ensured of a future.

The definition of the Right to Self Determination found on the GRP-MILF peace agreements, based on universally accepted human rights standards, is further realised in the peace process through the accommodation of the Bangsamoro's development

philosophy. Therefore, this paper elaborates on the rationale behind the Bangsamoro Development Agency (BDA) and the actual perspectives of MILF communities. The ideas on RSD are further explored on how the people actually articulate it in terms of their development aspirations as well.

4. The BDA and its Development Philosophy

In 2001, the GRP-MILF peace process introduced the conceptualisation and establishment of the BDA that was tasked to "determine, lead and manage relief, rehabilitation and development in the conflict affected areas of Mindanao."[19] In spite of the context of BDA's birth that mainly came about as part of the confidence-building mechanism of the peace process to allow the MILF to have a free hand in undertaking development programs in the conflict affected areas, the BDA has also taken the longer view challenge of building its development philosophy and program in anticipation of a post-conflict development in Mindanao.[20] The BDA envisions a Bangsamoro community that upholds a sustainable development for their people. The vision is stated as follows:

> *"An enlightened, progressive, self-sustaining and healthy Bangsamoro community living in harmony, dignity, security and peace."* [21]

The existence of the BDA, and its activities, is very significant in this peace process for two important reasons: (1) the dynamics of post-conflict development has taken a much earlier time frame in Mindanao even before a peace agreement is signed, and (2) BDA is the development arm of the MILF and therefore it is where it presents its ideas and methods on how they envision development for the greater Bangsamoro constituency. While the BDA's mandate was formalized in 2001, it was only in 2003 that the organization started to exist and operate. An important reason to this is the scepticism towards this new and unique institution that was borne out of an incremental agreement from a peace process that has not yet fully completed. Thus, it is but natural that donor agencies and other organizations were less willing to work with BDA. It made things more difficult that BDA is also not a duly registered organization under Philippine laws since the MILF assumes a non-state characteristic and do not uphold national legislations.[22]

As an emerging development organization, the BDA, is a learning-in-progress type of project. It recruits volunteers from the young and old in the communities which the MILF identifies being part of the would-be Bangsamoro Juridical Entity (BJE).[23] BDA have since undertaken various small community-based projects as part of its capacity building phase. Two of the biggest funders of BDA activities are the World Bank (WB) and the Japan International Cooperation Agency (JICA). But what is more important in its history is BDA's way of doing things. All BDA volunteers and staff undergo a Values Transformation Training (VTT) Program. It is here that BDA hopes to make a big difference by emphasizing the need to have a new mindset in working for development. The VTT does not only focus on the skill-set areas of development workers but it

drives the point of personal integrity as a crucial asset for BDA. In the VTT Program, BDA volunteers unlearn many of the negative notions towards work and in developing themselves and their communities. It is also here that they renew their religious beliefs, cultural identity, and social relationships as part of one community. As a result of the VTT, the volunteers and their communities are expected to carry the VTT values that are imparted. Thus, the completion of projects with the World Bank and JICA has not only demonstrated strong community participation but most especially, it has shown that there is a strong community ethic towards work. This also explains why BDA have accepted projects from both donor agencies in a way that will help them build their capacity first, before more donor funding is poured in. Dr. Abas Candao, the former BDA Chair, further explains that, "no amount of dollars can bring development to the Bangsamoro areas if we cannot change the attitude of the people first." [24] Therefore, he upholds that it is only through BDA's VTT that they can be successful in showing to the people the possibilities of true development in their communities. He adds, that "the Bangsamoro have grown tired and weary in a harsh environment of conflict and violence in Mindanao, thus, there has to be a values transformation that must occur first in order for them to start believing and taking the path towards their BDA vision of development." [25]

The BDA approach of institutionalizing its VTT Program may yet be another social preparation strategy that is becoming a norm in development implementation. However, what is notable is that this initiative is something that bears indigenous creativity and content. The program itself is a demonstration of the Bangsamoro Right to Self Determination—in charting their own means to development, and starting with the community's education on planning and doing development projects. The effectiveness of this approach is recognized in the success rate of the many projects that BDA has implemented. There is a high accountability among the community members as stakeholders to the projects. And that they are able to show the donors how it is possible to implement a project with 100% efficiency rate as to the use of funds.[26]

5. MILF Communities and Their Perceptions

While there continues to be an unclear reference to the term "peoples" identified in the Right to Self Determination concept under the international human rights covenants, it is however, with clarity, that the Bangsamoro people having their own unique identity and historical territory, belong to the Indigenous Peoples that are recognized (in the human rights) as having the collective cultural rights. And based on the latter, "there is a trend in the international law that does recognize people's cultural rights."[27] Given the context of arguments in the MOA-AD of attributing the rights of Indigenous Peoples, including cultural rights and others, to the Bangsamoro Right to Self Determination framework, it is imperative that the Bangsamoro communities are provided the avenues to articulate these aspirations. As such, this research selected two conflict affected communities located in the Maguindanao Province in order to determine the perceptions of the Bangsamoro people with regards to the idea of right to self determination and development in general.

In this case, a participatory method is used to ensure that community members and respondents fully articulate their ideas in their own language. In a series of workshops organized in May to June 2010, the communities have undergone a participatory rural appraisal (PRA) and participatory learning and action (PLA) in which the community members identified all their development needs.

The first community is Baranggay Labungan located in the highland areas of a mountain known as Upi. This area covers 1,341 hectares of flat land, 3,950 of forest cover, and another 4,575 hectares of land that are earmarked for resettlement program of the government. The native inhabitants of Labungan are composed of Indigenous Peoples, namely, the Tedurays. Many of them are Muslims, while some are Christians. While the Tedurays are the majority group, there are also some Maguindanao and Bisaya who have migrated into the area. The people are also known to be supporters of the Moro Islamic Liberation Front (MILF). Although the *barangay* and its local leaders are active participants in local governance and politics—political patronage through the local mayor, nonetheless, it has limitedly benefitted from the usual government services. An example is that they have an "Annex High School" but the building was solely built by the community. They have a multi-purpose hall (room) built by the local government but with no other facilities or equipment. This is the same building used as a health center, meeting hall (room), *barangay* justice hall, and day care center for children.

Many of the constituents are traditional farmers. Some of the youth seek blue collar employment in the nearby city. The area has an abundant of natural resource. It has fertile farmlands, but with no irrigation facility. It has also unexploited sources of sulphur, gold, and petrol.

It is only in 2008 that the barangay finally was able to build a Level 1 water supply station. This was a project undertaken with the Bangsamoro Development Agency (BDA) and the Japan International Cooperation Agency (JICA). Also, by 2010, a national road that passes this area was recently completed. From discussions with the constituents who are mostly parents, they identified educational facilities as importantly lacking for their children.

The second community is called *Barangay* Dalgan located in the middle of the Liguasan Marsh. It covers at least 11, 266 hectares. This area is hardly accessible and the only means of transportation is through the use of small motorboats. The people living in Dalgan are of the Maguindanao-ethnic group. Their population is estimated to be at least 7,000 with many of them of adult age. Although the whole area is part of this vast marshland, it has grown patches of land as part of the effects of siltation from the nearby development of Maridagao-Malitubog Irrigation system that traverses this region. As a boon and bane, the inhabitants have built their houses on land and planted their agricultural livelihoods as well.[28] The marshland is their primary source of water and marine life. Considering that this natural resource is still limitedly exploited, it is

facing threats due to (1) degradation of the natural environment with a weak government conservation efforts, (2) potentials of natural gas and petrol source and the consequential political interests at play, (3) it is included as part of the Maguindanao's ancestral domain claim, and (4) it has become one of the occasional battlegrounds between the government and MILF forces in times of armed conflicts. Although there is no clear study of this petrol source and its exact location, the people in Dalgan strongly believe that their area carries much natural resource wealth.[29] Because of this, the MILF has strongly guarded this area from outsiders and even from the intrusion of development activities—from government or non-government agencies. As a result, the only semblance of government services in the community is the presence of a four classroom primary school building. But even this, is unusable because it has been submerged in mud due to regular flooding in the area. Instead, the community took the initiative of installing a temporary structure that is being used as a school. This primary education facility is operated by two teachers who only come to the community twice in a week.

Based on the community discussion, the people demonstrate a strong comprehension of the various challenges that they face, e.g. issue of human security, environmental degradation—climate change, and dynamics of local and national politics and governance. While it may be perceived that they do not welcome the government and non-government organizations (NGOs) in bringing development interventions in their communities, they contend that they are for development. However, due to their past experiences, it cannot be helped that they have become very cautious towards development interventions that do not benefit them but instead tend to exploit their communities.

As Muslims and Moros, they carry with them a strong value system with the belief that their ancestral domain is an *"amanah"* or heritage to them and is part of their collective property. Thus, they take this obligation very seriously. During the workshops, the participants were also asked to discuss what does the right to self-determination or RSD means to them. To this, RSD definition included the enumeration of various facets of the first and second generation human rights, and consequently leading to answers that pertain to solidarity rights, mainly, their right to peace—and for them "there will be peace if they achieve independence from the government."

For the purpose of this study, the idea of sustainable human development was introduced to them as a possible strategy in achieving their right to self determination. Sustainable human development (SHD) is defined as:

> *"The basic purpose of development is to enlarge people's choices. In principle, these choices can be infinite and can change over time. People often value achievements that do not show up at all, or not immediately, in income or growth figures: greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and sense of participation in community activities. The objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives."*[30]

Under the SHD framework, it is not only the basic needs and human security that are emphasized but most especially, the idea of achieving freedom so that individuals and communities can have the needed capabilities to achieve a better well being. Therefore, it is proposed to the communities that SHD is a development paradigm that strongly values freedom as both an ends and means to human development. In spite of these explanations, the communities insist that development, whatever paradigm it carries, will not be successful unless their Right to Self Determination is addressed first. It cannot be argued that many of the deprivations in development experienced in the conflict communities are very much entrenched in the institutional structures of the Philippine State—political, social, cultural, economic and markets, etc. Therefore, they understand that the only viable way out of it is to create a new social order that can deliver the development that will respond to their needs. Again, this is where their argument for independence or secession re-starts. Although vague and uncertain, their ideas of means of development are deeply rooted on their aspirations to build a Bangsamoro Nation.

6. Conclusion

Over the years, the idea of the right to self determination has become very powerful as a burning hope for many indigenous peoples around the world. Some may look at it merely as a principle or rhetoric, while others may strongly believe to be very much a natural right, especially for communities who have become marginalised in the process of a postcolonial world. Such a case is that of the Bangsamoro of Mindanao who assert their freedom from a historical past of conflict and struggle. In as much as the Right to Self Determination, to mean secession or independence, does not find any legal support in the realm of international law, it is something that can find realization in the creativity of leaders and communities. As for the Bangsamoro, the MILF pursues this RSD aspiration through the relevant human rights that protect the survival of indigenous peoples and cultures around the world; and through the BDA, it is defining the Right to Self Determination according to its own process of development interventions in the name of the values transformation training (VTT) program. Most importantly, at the community level, there is a strong affirmation of how this concept has effectively delivered great mass support to a revolutionary movement like the MILF. There is then a very real danger and potential, at the same time, on how the MILF can carefully translate this concept and manage expectations. How much of this RSD struggle will result in Sustainable Human Development, and eventually, sustainable peace in Mindanao?

While the GRP-MILF peace process has yet to resume and complete the task of charting a new peace agreement and framework, it presents much room for peace and human rights scholars and advocates to show the way to both conflict actors and parties that solidarity rights (e.g. right to peace, right to development, or right to self determination) are crucial part of nation building, and in the event of conflict resolution. In effect, instituting reforms of social justice is what will bring about the needed legitimacy of the state as the very institution empowered and as a primary protector of the rights of its peoples.[31] The Right to Self Determination cannot be limitedly defined as having the potential threat of creating another independent state within a state, but most importantly, it should mean as the expansion of freedoms that communities must enjoy in order for them to fully participate in their development and future—for it is these that hold most value among peoples.

The reasons for the pursuit of protecting indigenous peoples, whether in the language of Right to Self Determination or cultural rights, or others, holds similarities with the pursuit of Sustainable Human Development as envisioned by its architects.[32] Both actually promote a development where there is social justice and that the focus of development rests upon the people and not on mere technological advances or economic growth. While it is development, or Sustainable Human Development, that which a society seeks, Human Rights, including the Right to Self Determination, are the pillars of this process. It is these universal principles and standards that give due respect to our humanity.

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ENDNOTES

[1] The terms Bangsamoro or Moro are used interchangeably in this paper. Both terms are used to identify the same group of people belonging to the 13 ethno-linguistic groupings who are all native inhabitants of Mindanao.

[2] See Department of Interior and Local Government website, www.dilg.org.ph.

[3] The provinces include Maguindanao, Lanao del Sur, Basilan, Tawi-Tawi, and Marawi City.

[4] This was a project of President Corazon Aquino. Although her administration re-started the peace talks with Chair Nur Misuari of the MNLF, the establishment of ARMM was a unilateral decision by the government and without consensus or any input from the MNLF.

[5] The GRP-MILF peace process started in 1997 during the time of President Fidel Ramos using a direct negotiations mode and where there were no third party intervenors and facilitators. By the late 2010, the GRP-MILF peace process has been renamed GPH-MILF peace process to refer to the Government of the Philippines (GPH) following ISO standards.

[6] The Bangsamoro remained to hold on to their traditional leadership and means of community organization up until they started to be threatened by the pervasive NGO culture in Mindanao and which was mostly dominated by Christian groups.

[7] The Tagalogs are a distinct ethno-linguistic grouping found in the northern part of the country called as the Luzon group of islands. They speak the Tagalog language and most of them, if not all, are Roman Catholics and Christian by religion.

[8] See page xii in the Foreword by Alejandro Melchor in Cesar Majul's Book, Muslims in the Philippines, 1999 (Third Edition) (Quezon City: University of the Philippines Press) where he clearly states the aims of the Philippine government to develop the tribal peoples by integrating them into the new political system. To quote, "One of the happy effects of martial law was to begin the process of breaking down the many tribalistic enclaves into which the Filipinos had come to enfold themselves, and merging all of them as so many cooperating units into one single unitary system." Also, see page 102 in an article by R. de los Santos, Jr. entitled "Reflections on the Moro Wars and the New Filipino" where he explains the campaign for "Filipinization" by the Filipino politicians in the 1920's, source: by Peter Gowing (ed) in Understanding Islam and the Muslims in the Philippines, 1988 (Quezon City: New Day Publishers).

[9] For more explanations on the events that trigged the emergence of the revolutionary armed struggle of the Bangsamoro, see the article by Cesar Majul in "A Case Study in the Role of International Islamic Institutions: Arbitration and Mediation in the Philippine Case" in Islamic and Conflict Resolution, Theories and Practices, 1998 (Maryland: University Press of America).

[10] In the HDI Rank in 2000, Lanao del Sur is no. 72, Basilan no. 74, Tawi-Tawi is no. 76, Maguindanao no. 75, Sulu no. 77; in HDR Rank in 2003 Lanao del Sur is no. 68, Basilan no. 74, Tawi Tawi no. 75, Maguindanao no. 76, and Sulu no. 77. The highest HDI rank is 1 with the lowest of 77—out of the 77 total number of provinces in the Philippines.

[11] For more explanations to these incidents, please see the book by Salah Jubair, "Bangsamoro: A Nation Under Endless Tyranny", 1999 (Kuala Lumpur: IQ Marine Sdn. Bhd.)

[12] Informal talks were started between President Corazon Aquino and her government, and the MILF's Ustadz Salam Hashim in 1987. But the formal talks began during the term of President Fidel Ramos in 1997 soon after the MNLF Final Peace Agreement was signed in 1996.

[13] As cited by Salah Jubair in The Long Road to Peace: Inside the GRP-MILF Peace Process, 2007 (Cotabato City: Institute of Bangsamoro Studies)

[14] See page viii, Foreword in The Long Road to Peace: Inside the GRP-MILF Peace Process.

[15] See Art. 1 ICCPR/ ICESCR and Art. 1 (2) UN Charter. See also Art. 20 (1) ACHPR.

[16] For arguments on this, see article by Sedfrey Candelaria in "Postcript to the Supreme Court MOA-AD judgment: No other way but to move forward" in Peace for Mindanao, 2009 (Penang:SEACSN).

[17] See page 242-244 in Hurst Hannum, "The Right to Self Determination in the Twenty First Century" in Human Rights in the World Community, Issues and Action, by Richard Peirre Claude and Burns H. Weston (ed.), Third Edition, 2006 (Philadelphia: University of Penn sylvania Press).

[18] See Ibid., p. 242-244.

[19] Presentation by Dr. Danda Juanday in the "Mindanao Educators Peace Summit: Transforming the Conflict in Mindanao Through Peace Education and Quality Higher Education", January 11-16, USM Penang, Malaysia.

[20] The postconflict phase referring to the aftermath of signing a peace agreement.

[21] Interview with Dr. Abas Candao, September 2-6, 2007, Penang, Malaysia.

[22] See article by Ayesah Abubakar in "Challenges of Peacebuilding in the GRP-MILF Peace Process" in Building Peace:Reflections from Southeast Asia, 2007 (Penang: SEACSN). Also from interviews with BDA Chair and Executive Director, from the periods of 2004-2010 in Cotabato City and Penang.

[23] This includes the ARMM areas and other contiguous and non-contiguous areas but all forming part of the being claimed ancestral domain territory. See the MOA-AD document in www.morosetudies.org.

[24] Interview with Dr. Abas Candao during the Consolidation for Peace Seminar 2 held at USM Penang, Malaysia, September 2-6, 2007.

[25] Ibid.

[26] Article by Artha Kira Isabel R. Paredes, in "Spirituality and Reality Do Co-Exist" in Yes, Pigs Can Fly, Facing the Challenges of Fighting Corruption in Procurement, 2008 (Pasig City: Procurement Watch, Inc.)

[27] See page 110, Federico Lenzerini in "Indigenous People's Cultural Rights and the Contro versy over the Commercial Use of Their Traditional Knowledge" in Cultural Human Rights, by Francesco Francioni and Martin Scheinin (eds.), 2008 (Leiden: Martinus Nijhoff Publishers and VSP).

[28] The people survive by susbsistence farming.

[29] See article by Janet and Mary Ann Arnado, "Casualties of Globalization: Economic Interest, War, and Displacement Along Ligawasan Marsh", November 15, 2004 (Manila: Social Science Research Council).

[30] See Human Development Report Website of the United Nations Development Program, http://hdr.undp.org/en/humandev/origins/. Also, see page 14 of Mahbub Ul Haq's Reflections on Human Development, 1995 (New York: Oxford University Press).

[31] The state being referred in this case is the Philippine government, but this should also include the new state institution which non-state actors like the MILF hopes to set up as part of a desired new political arrangement and governance system.

[32] Both Mahbub Ul Haq and Amartya Sen pursues a line of thinking that there has to be social justice in advancing the aims of development around the world. Also, the idea behind sustainable human development as a new development paradigm is hinged on the shift towards creating a human face to development

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ACHIEVING PEACE WITH HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW AT THE FOREFRONT: A LOOK AT THE PHILIPPINES' COMPREHENSIVE AGREEMENT ON RESPECT FOR HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW (CARHRIHL)

Jaime Crispin Nuval Arroyo

Two bloody world wars compelled nations to take stock of the human cost of war. Spurred by a genuine desire to curb, if not eliminate, collateral loss during wartime, the international community developed the concept of international humanitarian law (IHL), and has endeavored to incorporate its principles into constantly-evolving rules of engagement. Since its formal introduction at the end of the Second World War, States have attempted to practice IHL when engaging in armed conflict, whether international or domestic.

Rare is the domestic conflict in which the non-state aggressor is willing to be bound by the principles of IHL. But over 12 years ago in the Philippines, the government, locked in a protracted armed struggle with the insurgent National Democratic Front of the Philippines (NDFP), entered into the first agreement of its kind expressing a mutual commitment to respect, in the course of their operations, Human Rights and International Humanitarian Law. The CARHRIHL, or Comprehensive Agreement for the Respect of Human Rights and International Humanitarian Law, has endured, even as the armed conflict between the Philippine government and the NDFP continues.

In this discourse, the origins of the CARHRIHL is examined, its implications for both parties to the agreement and on the application of IHL on domestic conflicts. The first of several agreements toward a lasting, peaceful resolution to the communist insurgency, CARHRIHL is a landmark instrument in the application of IHL and could have paradigm-altering implications on creating peaceful solutions to drawn-out conflicts within nation states.

1. How International Humanitarian Law Changed the Face of Warfare

Two bloody world wars have, after centuries of conflict, compelled various peoples to take stock of the human cost of war, which often outstrips the military losses suffered by either side. Spurred by a genuine desire to curb, if not eliminate, collateral loss during wartime, the international community developed the concept of International Humanitarian Law (IHL), and has endeavored, in the last two centuries, to incorporate its principles, as well as the age-old concept of human rights, into constantly-evolving rules of engagement. Since its formal introduction at the end of the Second World War, States have, in varying degrees, attempted to practice IHL when engaging in armed conflict, whether international or domestic.

1.1 The International Red Cross as a Precursor to the International Humanitarian Law

When Swiss businessman Henri Dunant, as a result of his horror at the carnage of the Battle of Solferino, wrote his seminal book *A Memory of Solferino* (1862, 1986), he was not the first person in human history to comment on the brutality of war, and he would certainly not be the last. In sharing his experience, however, he effectively transported his readers onto the battlefield, with its lakes of blood and mountains of battered and broken human bodies, and expressed ideals that would prove pivotal to the way nations approached armed conflict. This led to the birth of the International Committee of the Red Cross (ICRC), and eventually to the creation of International Humanitarian Law (IHL).

1.2 The Birth of the International Humanitarian Law

After the excesses of World War II, the international community was more or less in agreement as to what needed to be done about the brutality of war, and as a result IHL, as embodied by the Geneva Conventions and Hague Declarations, was born.

International Humanitarian Law (IHL), applies solely in armed conflict situations, and its first rule is very emphatic: "The parties to the conflict *must at all times* [1] distinguish between civilians and combatants. Attacks may only be directed at combatants. Attacks must not be directed against civilians (Henckaerts and Doswald-Beck, 2009, p.3)." Also, IHL prohibited several types of combat tactics and practices with the goal in mind of, curbing if not completely eradicating such weapons and tactics which cause indiscriminate damage or unnecessary suffering.

The scope of IHL also applies to domestic conflicts between states and non-state actors thanks to Additional Protocol II to the 1949 Geneva Conventions (1977). IHL, therefore, applies to the Philippines, which is embroiled in a number of its own domestic conflicts.

2. The Philippines' History of Violence

The Philippines is no stranger to conflict, having been occupied by the Spanish, Americans and Japanese over a four-hundred year period, more often than not with varying levels of armed force involved.

2.1 Colonial History

After Spain colonized the Philippines in the 16th century, its rule lasted for over three (3) centuries of Spanish Rule, and was often characterized by an iron fist. Organized attempts to repel the Spanish colonists were few and far between, and often dealt with swiftly and brutally (Constantino, 1969, pp. 13-23). The American rule that followed only lasted a fraction of the time, (1899 to 1946) but it was, in the beginning at least, just as brutal. Indeed, the American troops, in their conquest of the Filipino Muslims in Mindanao, even murdered women and children (Bacevich, 2006).

2.2 World War II

Although the Japanese occupation marked the shortest period in which a foreign power colonized the Philippines, it marked one of the most brutal periods in the country's history. From the actual invasion of the country by the Japanese to the infamous Death March, the Japanese occupation, which was marred by incidents of murder, plunder, torture and rape, scarred the Filipino people like nothing ever had before. Not only that, but even in the course of their liberation from the Japanese, the Filipino people were brutally bombed and shelled by their very saviors in their attempts to drive the Japanese out of Manila (Aluit 1994).

With such a troubled, violent history, it was therefore inevitable that the Philippines would, along with most of the global community, embrace IHL.

2.3 The New People's Army

The Philippines has not had any meaningful involvement in any international conflict since World War II, but it is currently involved in a number of domestic conflicts, including one with a group of Maoist rebels currently known as the Communist Party of the Philippines (CPP). The Partidong Komunista ng Pilipinas (Communist Party of the Philippines in Filipino or PKP) was first formed in 1930 (Saulo, 1990, pp.2-3), but it was from this movement that the eventual founders of the CPP, Jose Ma. Sison, would come (Saulo, 1990, pp.79-83). In 1969, the Communist Party of the Philippines (CPP) was reborn in the form of the New People's Army (NPA), and its civilian front the National Democratic Front (NDF). The Movement (CNN for short) as well as its precursor were formed to fight social injustice, a struggle that involved a considerable amount of violence and therefore conflict with the Philippine government, in particular

with the administration of former President Ferdinand Marcos, who was in power for over 21 years, the last fourteen of which were characterized by rampant suppression and often complete disregard for basic human rights (Chapman, 1987, p.24).

On February 25, 1986, Marcos was ousted by a popular, bloodless revolution, the first and as yet the only one of its kind which, actually originated as an attempted *coup d'etat* by the very officers he had trained to be his attack dogs.

3. The Long Road to the CARHRIHL

With the sudden ascension to power of Corazon Aquino on the wings of people power came an equally new development in the Communists' struggle with the government: a formal peace process. While the talks initiated by Mrs. Aquino with the CPP-NPA ultimately failed to bring about an end to the hostilities by the end of her term, they helped lay the groundwork for some very important strides by her successors in pursuing peace.

3.1 The People Power Revolution

In 1986, for the first time in the then 17-year history of the CNN, the Philippine government was willing to sit down and talk. However, having come from a long, protracted struggle with a ruthless adversary who knew virtually no compunction and who had managed to perpetuate both his rule and his excesses for nearly two decades, the CNN inevitably approached the peace process with the newly-installed government under President Corazon Aquino with trepidation. William Chapman (1987, p. 21) quotes Satur Ocampo as having said that he did not expect peace negotiations with President Aquino to succeed, as in fact they did not.

Although the country's Chief Executive had changed, many of the key persons around her had been retained from the previous administration. Secondly, despite changes in the country's leadership, many of the same inequities persisted.

Perhaps worst of all, however, was the fact that the very same military that had hounded, tortured and summarily killed many of the CNN and their supporters was still very much in the picture, up and down the ranks. (McCoy, 1999)

3.2 Office of the Peace Commissioner

With the military that had long persecuted them looming in the background, the CNN, negotiating through the NDF, wanted human rights to serve as the starting point for the peace negotiations, as opposed to the Aquino government's desire to focus on socio-economic programs. In 1987, President Aquino created the Office of the Peace Commissioner under Administrative Order No. 30, which would eventually

metamorphose into the Office of the Presidential Adviser on the Peace Process and appointed then-Health Secretary Alfred Bengzon as the Peace Commissioner (Office Of the Presidential Adviser On the Peace Process (OPAPP), 2006, pp. 1-2).

For all her efforts, however, she was unable to make significant headway in the peace process itself in her six-year tenure.

3.3 Hague Joint Declaration and Beyond

Ironically, it was under the Presidency of Aquino's successor, Fidel V. Ramos, who had not too long ago headed the Philippine Constabulary and under whose watch many of the CNN and their supporters had been tortured or killed, that the peace negotiations between the GPH and the NDF began to make some solid gains. The Hague Joint Declaration of September 1, 1992, signed by Congressman Jose Yap on behalf of the GPH and Luis Jalandoni on behalf of the NDF finally laid down a substantive agenda for the peace negotiations. The first agreement to be hammered out would be one on human rights and IHL, the second would deal with socio-economic reforms, the third would deal with political and constitutional reforms, and the final agreement would mark the end of hostilities and the disposition of the forces. (OPAPP, 2006, pp. 50-51)

3.4 The CARHRIHL

The first and only agreement of the planned four-step peace process which the parties have been able to agree upon so far was the one on Human Rights and IHL. As a result, on March 16, 1998, the Comprehensive Agreement on Human Rights and International Humanitarian Law (CARHRIHL) (OPAPP, 2006, pp. 88-98) was signed, and on August 7, 1998, then President Joseph Estrada, issued Memorandum Order No. 9 dated August 7, 1998 which approved the implementation of the Agreement in accordance with the constitution and the legal processes of the Republic of the Philippines.

The CARHRIHL consists of a preamble and six sections: (1) The Declaration of Principles; (2) The Bases, Scope and Applicability; (3) Respect for Human Rights; (4) Respect for International Humanitarian Law; (5) The Joint Monitoring Committee and VI. Final Provisions.

The Preamble of the agreement places emphasis on the importance of the observance of human rights and international humanitarian law even in the midst of the conflict and emphasized the parties' mutual desire to adhere to these principles.

Parts I and II, critically, make repeated reference both to the primordial nature of both human rights and IHL to the success of the peace negotiations as well as to the importance of mutuality and reciprocity in the implementation of the agreement. Part II also makes

mention of mechanisms and measures for monitoring and verifying compliance with the agreement, and of the fact that the CARHRIHL is but the first of several contemplated agreements between the parties.

Parts III and IV contains what one might call the "meat" of the agreement, as they detail the various human rights which the parties agree to uphold as well as acts which constitute violations of HR law and IHL. Part III also contains an expression, phrased somewhat like a reminder of the GPH's commitment to cause the repeal or annulment of what is termed "repressive" legislation and case law, and calls for the application of doctrine that distinguishes acts of rebellion from common crimes.

The human rights enumerated in Part III are basically truncated versions of those found in such instruments as the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. The acts listed in part IV as violations of IHL, however, are not complete, with some arguably very important provisions designed to secure the safety of civilians and non-combatants, such as the prohibitions on hostage-taking and the use of human shields.

Part V contains provisions for the mechanism to be used in the monitoring of compliance with and violations of the CARHRIHL, namely the creation of the Joint Monitoring Committee (JMC), which would, per agreement, comprise an equal number of representatives from each of the parties. Each component of the Monitoring Committee would have three members, two independent observers, and a secretariat. The JMC would receive complaints alleging violation of HR or IHL and, upon consensus that such complaints constituted, per their appreciation, were worth investigating. It would then ask the party concerned to investigate the complaint and would make recommendations. This would prove to be one of the more contentious aspects of the CARHRIHL.

The most notable section of Part VI is Article 3, where it is provided that the agreement does not affect the legal or political status of the parties, and that the agreement shall be further subject to the subsequent agreements on political and constitutional reforms. This represents a compromise on perhaps the single most contentious portion of the entire agreement, which were the proposed political reforms perceived by the government as a derogation of its sovereignty and by the CNN as a necessary step to lasting peace. It was agreed that such questions would be deferred until it was time to implement the agreements on political reform, which may have created problems regarding terms of reference.

Despite the signing and implementation of the agreement, however, the peace process was to hit yet more stumbling blocks. Upon President Estrada's issuance of Memorandum Order No. 9, Senator Franklin Drilon, the co-chair of the GPH Peace Panel at the time, together with the rest of the Panel, sat down with their counterparts from the NDF in October 1998 and attempted to assert the GPH's exclusive right to prosecute, try

and apply sanctions against violators of human rights in the implementation of the CARHRIHL. The NDF rejected the proposition insisting that its own form of judicial process should be allowed to co-exist with that of the GPH, who in turn rejected this proposition as it impinged on the Republic's Constitutional sovereignty and would only institutionalize the divisiveness of the conflict. This was the first impasse. The second occurred when the NPA abducted five members of the Philippine National Police and, in the course of GPH's attempts to negotiate their release, the NDF attempted to gain political leverage, a gambit which ultimately failed, though the hostages were eventually safely released. The third impasse, which would ultimately prove fatal to the national peace process under President Estrada's relatively brief tenure (he resigned from office in January 2001), occurred when the GPH ratified the Visiting Forces Agreement (VFA) with the United States. (OPAPP, 2006, pp. 4-5).

When Gloria Macapagal-Arroyo ascended to what would eventually turn out to be a ten-year presidency in 2001, one of the first things she did was reactivate the peace process. Formal peace negotiations between the parties resumed on April 27-30, 2001 in Oslo, Norway, with the Royal Norwegian Government (RNG) acting as host. The parties discussed confidence building measures and the modality for implementing the CARHRIHL. Over three years after its signing, the Joint Monitoring Committee (JMC) had yet to be created. They also discussed meetings of the RWC on Socio-Economic Reforms (SER) to discuss the mechanics for conducting negotiations on the draft Comprehensive Agreement on SER (CASER). Prospects looked bright for the peace process until just after the second round of talks on June 10-13, 2001, where the GPH took exception to the expression of congratulations by the NDF Panel chairperson to the NPA for the killing of a Congressman, an act which the GPH considered a violation of the confidence-building measures meant to improve the climate of the negotiations. The peace negotiations went on recess, which lasted for three years. During this period, there were a number of developments such as the redeployment of government troops to areas where NPA troops were active, the United States Government's designation of the CPP and NPA as foreign terrorist organizations, and the European Union's declaration that the NPA and Sison were terrorists, but the GPH kept its lines of communication open with the NDF. During this time, informal and back-channel talks between the parties continued, but without any meaningful outcome. Members of the GPH Panel met periodically with their NDF counterparts, in January 2002, February 2003 and in June 2003, proposing at first enhanced processes for reaching a final peace accord and later presenting a draft of a Final Peace Agreement, all of which the NDF rejected (OPAPP, 2006, pp.5-6).

However, in October and November of 2003, the parties held two consecutive rounds of exploratory talks and informal negotiations during which they were able to thresh out several of the more contentious issues that needed to be resolved for the formal talks to resume. The two panel chairpersons signed a Joint Statement on January 13, 2004 agreeing to resume formal talks and on the same day, President Arroyo announced the

resumption of formal peace negotiations. Formal talks resumed in February, April and June 2004, during which much ground was covered including commitments to resume work on addressing social, economic and political reforms, the formation of the Joint Monitoring Committee, and an agreement to conduct another round of talks on August 24-30, 2004 in Oslo. However, this did not push through due to the renewed terrorist listing of the CPP, NPA and Sison by the U.S. government (OPAPP, 2006, p.7). It is worth noting, however, that on February 14, 2004, President Arroyo issued Executive Order No. 404, by virtue of which the GPH-MC, the Government half of the Joint Monitoring Committee, was created (OPAPP, 2006, pp.31-34). The NDF nominated its own half of the JMC.

In February 2005, President Arroyo reorganized the GPH Peace Panel and expressed the hope that this reorganization would help accelerate the peace process. However, in the months that followed a series of events unfolded that would lead to the suspension anew of the peace talks.

In June 2005, potential evidence of massive fraud at the 2004 elections emerged, thereby casting into doubt the results of those elections, under which Gloria Macapagal-Arroyo had been proclaimed president and creating a crisis of legitimacy for the Arroyo government. For at least two years thereafter, there was considerable civil unrest.

As a result of this, the CNN decided to withdraw from the peace process, with its spokesman Roger Rosal questioning the use of "continuing talks with a lame duck regime that will be gone very soon (OPAPP, 2006, p.8)."

The Arroyo government, however, ran its course until her successor, Benigno Simeon Aquino III, was proclaimed the 15th President of the Republic last June 30, 2010.

Because of the indefinite suspension of the peace talks the Joint Monitoring Committee could not function as originally contemplated in the CARHRIHL, as a result of which the Monitoring Committees of the GPH and the NDF have been operating separately for the last five years gathering complaints for violations of the CARHRIHL against the parties and conducting other activities related to the CARHRIHL. There is some level of cooperation between the two MCs; there is a mutual sharing of data for example, as by agreement both Secretariats maintain complete records of all complaints for violation of the CARHRIHL that are filed. There have also been a number of joint activities through the years, mostly discussions and the occasional socials, and a number more are still being planned, but for the most part the two halves of the JMC operate independently of one another.

For its part, the GPH-MC, working through its Secretariat has, for the last five years, been very active in pursuing its mandate. It has, apart from documenting and assessing the complaints for the CARHRIHL violation, conducted Basic Orientation Seminars (BOS)

in the CARHRIHL and its key components, HRL and IHL, for the participants and stakeholders in the armed conflict including members of the security forces and affected communities, and has explored partnerships or similar collaborative arrangements with various government agencies, civil society groups and special interest groups to help improve the scope of its monitoring capability.

4. Catalyst for Change

The CARHRIHL is far from a perfect instrument for a number of reasons, but the significance of its character and implications cannot be overlooked both in terms of what it represented at the time of its conception and birth, and in terms of how it should be assessed today.

To fully appreciate what the CARHRIHL has helped make possible, one must compare the society into which it was introduced with the one that exists 12 years later.

When the CARHRIHL was first signed in 1998, apart from a prohibition in the 1987 Constitution against torture, secret detention places, and solitary or incommunicado confinement (Section 12(2), Article III, 1987 Constitution), there were no specific laws prohibiting, much less penalizing such practices. In 1998, the only remedy for persons whose loved ones and friends were seized by government forces was to file a petition for a writ of habeas corpus with the courts, and in most if not just about all such cases the response of the government forces would be to deny any knowledge of the whereabouts of the person missing, as they were entitled to do under the rules.

According to recorded statistics such as those presented by Alfred McCoy (1999) a year later, human rights violations were rampant, with the Philippine National Police in particular, which at the time was headed by alumni of PMA Batch '71, leading the way in terms of the count of violations, with over 1,074 recorded violations in 1997 (McCoy, 1999), with no signs of slowing down. The Marcos-bred military was comfortably ensconced in the Estrada government, and one of its most prominent officers, Gregorio "Gringo" Honasan had been a senator of the Republic for three years already.

The CARHRIHL, however, represented something new; in the absence of laws clearly binding the state to adhere to HRL and IHL despite the fact that the Philippine government had long been a signatory to most of these conventions and, moreover, by Constitutional fiat, adopted the general principles of international law as part of the law of the land, the CARHRIHL represented a concrete rather than theoretical commitment to be held accountable by a specific standard. While the consequences of any breaches of the CARHRIHL remain vague, the notion of a mutual commitment to somehow be held accountable for one's actions was refreshingly new.

Today, a little more than a decade later, the situation is different in a number of very significant ways. There are now studies, judicial remedies, and even laws in place that strive to address the human rights situation in the Philippines on a scale that has never before been attempted.

In 2007, Australian academic Philip Alston was assigned by the United Nations Human Rights Commission to conduct a study of the reports of widespread extrajudicial killings that had been taking place in the Philippines for the past several years. His findings were grim; over a six-year period, approximately 800 activists and journalists had been killed. He also voiced the opinion, based on his research, that a large number of the killings had been perpetrated by state agents. While he took some encouragement from the efforts of the government to investigate and prosecute such killings, he lamented the government's lack of action on the killings, noting that of the hundreds of killings there had only been six convictions for the killings of journalists, and none for the killing of leftist activists. Alston observed that one of the reasons these killings continued year after year was that their perpetrators realized they could do so with impunity (cited in Ubac, Papa & Dizon, 2007).

Interestingly, in a more recently published report by Human Rights lawyer Al Parreño who prepared the same while working in partnership with the Asia Foundation, the number of extrajudicial killings between 2001 and 2010, an even longer period than that which Alston's report covered, was only at 305, less than half of the number reported by Alston (cited in Calonzo, 2010). In other aspects, however, Parreño's findings were no less damning considering that his data reflects that only a little over half of those killings have been filed as criminal complaints, and of those only four convictions have been secured. (Parreño cited in Calonzo, 2010).

Also in 2007, the Supreme Court of the Philippines held a Human Rights summit to discuss the situation on the ground and possible remedies that could be introduced to improve it. The product of that summit was the introduction of two landmark procedural remedies: the writ of Amparo[2] and the writ of Habeas Data.[3] The writ of Amparo patterned after a similar judicial remedy used in Mexico, entitles the bearer of the writ to protection from abuses by the respondent, while the writ of Habeas Data compels authorities to release the persons they are detaining without a lawful judicial order and entitles the petitioner to all military and police information about "*desaparecidos*."

Most critically, though, both rules specifically bar respondents who are government agents from offering the defense of plain denial, which was the traditional defense employed by state agents when served with a writ of habeas corpus.

The rule, therefore, clearly imposes a considerable responsibility on public officers, who in theory should have access to a wealth of information and resources to be able to

determine the whereabouts of a given person and should be able to tell the court why this person is not in their custody.

The judiciary, therefore, has shown considerable interest in ensuring that human rights are respected, most importantly by the state. This, fortunately, is one of the legacies of the 1987 Constitution which Corazon Aquino's presidency made possible, which was not available at the time most of Marcos government developed its strategy for dealing with dissenters: a judiciary that would not hesitate to check the excesses of the executive branch of government.

The legislature soon followed suit.

In 2009, the Philippine Congress passed Republic Act No. 9745, also known as the Anti-Torture Law, which describes, prohibits and provides severe penalties for several of the torture practices of state authorities which date back to martial law, and which also provides for the protection and extensive compensation of the victims of such torture.

Later in the year, Congress also enacted Republic Act No. 9851, titled the "Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity" which marked a watershed in Philippine Law.

After the adoption by several members of the international community of the Rome Statute of the International Criminal Court back in 1998, created to punish genocide and other crimes against humanity, President Estrada signed the same but, before he was able to transmit it to the Philippine Congress, a prerequisite for ratification by the state of the convention, he was ousted from office. The Arroyo government, in what was perceived to be a gesture of solidarity with the United States government at the time, which refused to ratify the convention as it would have placed them under the jurisdiction under the ICC, withheld the document from the Philippine Congress. Ratifying the document would have meant that the agents of the Philippine state could now be open to prosecution under the Rome Statute for violations of HR. However, Republic Act No. 9851, which reproduces most of the provisions of Customary International Humanitarian Law, makes specific offenses for which parties to armed conflict, both state and non-state actors can be held accountable, and lists, in addition, acts which are described and punished as genocide or as crimes against humanity. It removes from such persons defenses that may have had to do with their capacity as public officers and makes no distinction between state actors and organized non-state actors such as the NDF. It makes specific reference to enforced or involuntary disappearance, but unlike the rules on writ of Amparo and Habeas Data, which are limited by their nature as judicial remedies, it penalizes them.

To be absolutely clear, there is no direct correlation between the existence of the CARHRIHL and the introduction of these reforms. The problem of extrajudicial killing

and abuse of human rights in general is a serious one which would exist whether or not the GPH and the CNN had entered into the CARHRIHL. The topic of EJKs alone requires a lot more discussion that this author can possibly devote to it in a paper primarily about the CARHRIHL, and the history of human rights violations in the Philippines is a concern that spreads well beyond the conflict between the government and communist insurgents.

That said, there is something worth mentioning when looking at all of these concrete indicators that the Philippine state is finally coming to grips with the unfortunate fact that it appears to have a serious problem with human rights violations: the CARHRIHL predates all of these issuances, reports, rules and laws.

The CARHRIHL provided a rallying point for individuals and civil society organizations to rail against the rampant human rights violations that were taking place across the countryside. Considering that several of the victims were either known leftist activists or identified with the left, the CARHRIHL was particularly relevant to their situation. Whether or not the killings were perpetrated in relation to the armed conflict, the point was that efforts by the proponents of the CARHRIHL were able to get these killings the attention they deserved.

Arguably it was the efforts of human rights-oriented civil society organizations like Task Force Detainees of the Philippines, Karapatan, Amnesty International and Sulong CARHRIHL, an organization specifically created for the purpose of advocating the CARHRIHL, as well as several other like-minded individuals and organizations that helped pave the way for these reforms.

The CARHRIHL had another positive effect as well; in spreading awareness of the CARHRIHL among various local communities across the country, the GPH-MC has helped empower some communities caught up in the conflict between the GPH and the NDF, helping their leaders realize that they have the option to declare that enough is enough to both sides. Communities in various parts of Luzon and Visayas, including those with special concerns such as indigenous cultural communities, have started to acquaint themselves with the CARHRIHL and formulate their own solutions to dealing with the situation.

Cognizant as well of the socio-economic factors that often draw the CNN's attention to a given locality, some communities have come to recognize that the key to keeping the conflict away is to address basic issues such as social services and the local economy. One such example is the province of Bohol, whose experience in dealing with the basic societal problems is narrated in a fair amount of detail in a story that was published by the British Broadcasting Corporation's news arm fairly recently and which appears on the website of the United Nations Development Programme (UNDP, 2010).

The CARHRIHL, therefore, has clearly proven its worth as an effective vehicle for the promotion of HRL and the more esoteric concept of IHL and continues to be an effective medium for such education.

Some challenges remain; among the soldiers the GPH-MC has oriented a number of them have propounded the somewhat *non-sequitur* argument that the insurgency problem is one of the Philippine National Police rather than their own, suggesting that the CARHRIHL was irrelevant to them and therefore that they are exempt from the requirement of observing HR and IHL in dealing with the insurgents, but were apparently receptive to the explanation that granting that the conflict should be the concern of the police, this does not relieve them of their obligations to observe HRL, and that the CARHRIHL provides a better framework for them to do so.

Clearly, there remains a bit of work to do, but the existence of the CARHRIHL ensures that the work of promoting HRL and IHL will be considerably easier.

5. Weaknesses of and Challenges Facing the CARHRIHL

As stated, the implementation of the CARHRIHL has been a point of controversy between the parties since the very beginning. The question of how violations of the CARHRIHL will be prosecuted is one which remains unanswered. The GPH has insisted that all offenses be tried within the context of the state's Constitution and laws, including its rules of procedure, while the CNN has insisted that its court system be allowed to co-exist, each party's position completely unacceptable to the other.

The GPH's refusal to accede such status to the CNN is understandable. In 2008, the GPH, in the course of its peace negotiations with the separatist group, the Moro Islamic Liberation Front (MILF), proposed a radical solution to the conflict in the form of Memorandum of Agreement which would effectively cede political and economic control over several locations in Mindanao to the aggregation of Filipino-Muslims the rebels purportedly represented, entitled the Memorandum of Agreement on Ancestral Domain (MOA-AD). Before the parties could sign the Agreement, however, which was to be signed in Kuala Lumpur, it encountered vehement opposition from several sectors including a number of constitutionalists, who took their grievances straight to court. In October of the same year, the Supreme Court rendered a Decision (Sacdalan vs. Garcia, 2008) which struck down the proposed MOA-AD for being unconstitutional and "counter to the national sovereignty and territorial integrity of the Republic."

Even granting that the Philippine government, through the executive, would be willing to cede such power to the NDF and its court system, which has been derisively described by some as a "kangaroo court," the Philippine judiciary, charged with upholding and interpreting the entire body of Philippine law, would, barring any constitutional

amendments that would allow for such a power-sharing arrangement, almost certainly strike such an arrangement down, especially considering that such an agreement would amount a considerable diminution of its own power.

Moreover, there has been little transparency as to how the CNN's "people's court" system works, and there is therefore no real guarantee that those tried under this system will receive the "judicial guarantees" required under International Humanitarian Law before one can be sentenced to death.

Even Philip Alston, whose report to the UNHRC was, by and large, an indictment of the Philippine government's counter-insurgency practice, and which most HR advocates cite in condemning the practices of the military, was quite critical of the CNN's "people's court" in his report, calling it either "flawed" or "a sham" (2007, p.14).

Finally, in 2006, the Philippine Congress abolished the death penalty, thereby removing the state's capacity to impose it (Datinguinoo, 2006). To allow an alleged justice system which still carries the power to impose the death penalty to co-exist with Philippine courts, therefore would, theoretically at least represent a glaring disparity, which would transgress the spirit of parity that the parties have strived to maintain throughout the peace process, especially in the implementation of the CARHRIHL.

On the other hand, there are also a number of reasons for the NDF to refuse to submit to the state's judicial processes. Philippine courts are notorious for the length they take in rendering decisions on most cases, with the average criminal case taking, on the average, two to three years to resolve in the trial court, with the appellate processes adding several more years besides.

There are occasional cases involving public interest which are resolved with reasonable promptness, but these are few and far between, and with the vast majority of persons on trial for criminal offenses having to wait years for a decision on their cases, there is understandable trepidation. Moreover, the Philippine judiciary has also been plagued with corruption throughout its existence, with magistrates at almost all levels having often been susceptible to financial and other considerations at one point or another. In fact, a relatively recent report commissioned by the United States State Department revealed the Philippine Judiciary to be "corrupt and inefficient (Brago, 2009)."

Due to these flaws, there is the not-necessarily-incorrect perception that persons with cases before the courts are not necessarily guaranteed to receive just or prompt decisions.

Each side, therefore, harbors deep and arguably valid concerns about acquiescing to the position of the other, and barring any major institutional changes in the near future these concerns are not likely to diminish any time soon.

Another problematic aspect of the Agreement, the wording of part V of the CARHRIHL, which, like most of the Agreement involving the actions of both parties, calls for consensus, provides both parties with effective mechanisms for creating deadlock and no mechanisms for resolving the same.

This already complicated situation has, of course, been compounded by the fact that the peace talks were suspended for over six years before they recently resumed.

As a result, both halves of the Joint Monitoring Committee have spent the last several years gathering complaints and processing them to the extent that their respective mandates allow, screening and categorizing them according to issues and degree of substantiation, but have been unable to do anything else with them. The JMC, after all, is not a court, nor is it any form of quasi-judicial body.

The biggest problem with the CARHRIHL is that, even though it is purportedly an agreement between the two parties, in several material respects it does not represent what lawyers and jurists would refer to as a meeting of the minds. As a result, whenever there is failure to agree on a given point, there is ample opportunity in its provisions to create a situation of détente.

One could say that the CARHRIHL it is in some respects a political instrument with aspirations of being a legal one, and as a legal instrument it falls noticeably short. It contains a list of violations and a mechanism for reporting the same to the members of the Joint Monitoring Committee, but does not offer any real resolution to such complaints. This has created considerable frustration among those who might otherwise be inclined to file complaints against either side of the GPH-NDF conflict.

In dealing with other Philippine government agencies, this author and the other staff of the GPH-MC Secretariat have been confronted with the potential problem of the GPH-MC's work constituting a duplication of theirs, such as the Commission on Human Rights, which carries the mandate of investigating all forms of human rights violations and not simply those confined to the armed conflict between the GPH and the NDF, and of making recommendations to the appropriate authority. Indeed, even though the GPH-MC, as a creation pursuant to the provisions of the CARHRIHL, is limited to monitoring complaints involving violations of the CARHRIHL, there is still a striking similarity between its functions and those of the CHR. On a practical level, however, it has been observed that it is possible for the GPH-MC and the CHR to work in cooperation, with the GPH-MC's focus on CARHRHL-violations giving it the opportunity to take some work off the hands of the CHR, which in many areas throughout the archipelago is understaffed and not adequately-equipped to properly follow investigations of HR violations.

In addition to the contention that the GPH-MC's work represents an unnecessary replication of the functions of existing state agencies, one must consider the disturbing possibility that in view of the passage into law of Republic Act No. 9745 and, more crucially, Republic Act No. 9851, the CARHRIHL is now obsolete.

It is worth going over the distinct advantages Republic Act No. 9851, on paper at least, has over the CARHRIHL. Both documents, after all are derived from international law, with R.A. No. 9851 being in many instances a veritable word-for-word replication of several of the provisions of Customary IHL.

The CARHRIHL, as stated, is a political instrument, while the Republic Act No. 9851 is a legal one. In its current incarnation, the CARHRIHL provides only for the monitoring and investigation into complaints of its violation, whereas R.A. No. 9851 provides for the prosecution of these offenses. The CARHRIHL affords no protection measures for those who would have the courage to report violations by either side; in fact the author has knowledge of at least one complainant who was forced to flee her home upon filing a complaint with the GPH-MC, and another, who because she filed a complaint, was subject to even more harassment by the respondent against whom she leveled her complaint. R.A. No. 9851, in contrast, contains provisions for the protection of witnesses. Of course, whether or not these will be implemented is down to the state's ability to institute adequate protection mechanisms. Finally, unlike the CARHRIHL, R.A. No. 9851 does not contain provisions which would enable a deadlock in the prosecution of offenses under its provisions. The only problem, of course, with R.A. No. 9851 is that, it being a law promulgated by the state, there is no guarantee that the CNN will recognize it, thereby making its applicability to the peace process questionable.

Considering the problems besetting the CARHRIHL, however, and the fact that they stem from the text of the document itself, both the GPH and the NDF might want to consider how they can possibly synthesize R.A. No. 9851 and its provisions into the CARHRIHL. For years, the CARHRIHL carried the distinction of being the only instrument prepared by Filipinos (as opposed to the Geneva Conventions, which were not) bearing the categorical promise of the Philippine government to specifically observe the provisions of HRL and IHL and to take action against those who would violate it, however vague that action was. As a compact and reasonably easy to explain document, it was a very effective mode of explaining the concept of HRL and even IHL to those who would otherwise struggle with concepts which may tend to sound technical and legalistic in other contexts. It has helped empower those who would otherwise feel helpless to stop the inexorability of armed conflict from infringing on their lives and their basic rights. As a document which truly affords legal remedy, however, it still falls short.

6. Postscript and Conclusion

As of writing, the peace process between the GPH and the NDF has resumed, marking the first time in over six years that the two sides engaged in formal peace negotiations (OPAPP, 2011). While the protagonists are hard at work on all aspects of the peace process, the CARHRIHL, being so far the most significant substantive agreement between them, remains at the forefront of the process. As the peace process is more political than legal in nature, it is not at all certain that discussions on the legal and practical difficulties that saddle the implementation of the CARHRIHL mentioned here will be of high priority, although the parties will most likely be aware of them. Thus far, fortunately, nothing has emerged from the negotiations that have sparked the outcry that almost immediately followed the government's attempt to divide up Mindanao with the MILF. At the end of the day, if the peace process yields a lasting solution, the CARHRIHL, legal gray areas and all, will have served its purpose as a stepping stone to something more significant and enduring than itself, and for so long as the human rights of all Filipinos on both sides of the ideological coin are respected, it will be a success.

In fact, given the visible improvements in the human rights landscape in the Philippines, in terms of remedies, laws and even general awareness of human rights as a concept in the thirteen years that have passed since it was first signed, it may reasonably be argued that the CARHRIHL already is.

ENDNOTES

[1] Italics provided
[2] Administrative Matter No. 07-9-12-SC, September 25, 2007
[3] Administrative Matter No. 08-1-16-SC, January 22, 2008

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4

HUMAN RIGHTS IN DIFFERENT ASPECTS

LESSONS LEARNED FROM CARDIZ STREET: STRENGTHENING THE RIGHT TO HOUSING THROUGH METALEGAL STRATEGIES

Patricia Blardony Miranda

The benefits of a property rights system founded on what Peruvian economist Hernando De Soto identifies as a "strong, well-integrated social contract" can hardly be argued against when transplanted in the Philippine setting. In Metro Manila, the urban poor have been steadily carving out a sizable niche for themselves within the margins of the formal economy, straddling the line between legal and extralegal notions of property, and generally going about the business of living under the ambivalently watchful eye of the government. While property ownership, as it is generally defined by statutes and special laws, conveys a tenor of predictability and regularity, the rise in the informal acquisition of urban housing – be it a cardboard box or a sturdier structure made of wood and cement – is redefining traditional, even feudal, concepts of property by the introduction of the right to housing as a collective human right. This paper begins with the question "what is housing?" to better locate the concept of "squatting" – specifically, spontaneous urban settlement – within the context of informal economies. By examining (a) an actual scenario of slum dwelling in the Philippines; (b) applicable laws; and (c) related jurisprudence, this paper attempts to provide new insights on how to better improve the conditions of the country's urban poor, such as the creative use of metalegal strategies to "fill in the gaps" where the law and the government agencies tasked with the promotion of development policies fall disappointingly short.

Resolving the needs of low-income groups for shelter will not be an easy task. The problems, essentially institutional, are rooted in long-entrenched traditions, prejudices and practices, and to overcome them will require a sustained effort. Reform will be hastened, however, by the changes that are taking place rapidly in the cities themselves, producing both stresses and strains in the social fabric and a growing willingness to experiment with new solutions.

Anthony Churchill and Margarette Lycette (1980)

There are millions upon millions of Filipinos who have individually or exclusively held residential lands on which they have lived and raised their families. Many more have tilled and made productive idle lands of the State with their hands. They have been regarded for generation by their families and their communities as common law owners.

(Heirs of Malabanan v. Republic of the Philippines [2009] G.R. No. 179987)

1. Introduction

A closer scrutiny of the space between the law *as it should be* and the law *as it really is* reveals unfortunate matters of fact about the role informal settlers play in the nation's bigger concerns. Much of the rising number of informal settlements remain *invisible* – unrecorded in censuses, out of reach from NGOs, and ignored by the local government when it comes to the delivery of basic services, yet coddled and wooed by *politicos* during the election season to garner more votes. Despite their legal or formal invisibility, the presence of informal settlers is impossible to overlook. Against the backdrop of regulations and development policies which subliminally represent informal settlers as either petty nuisances that should be hidden away from visiting foreign dignitaries to a national problem that must be controlled no matter what the cost, the bleak picture of life in slum settlements is both familiar and unfamiliar.

These stories are familiar to Filipinos because we have no doubt passed by these settlements on the way to school and work, viewed depictions of informal dwellings in literature and films, or have dealt with informal settlers in our everyday lives – our co-workers, family members or close friends. Yet these stories are also unfamiliar when informal settlers are "Othered" – that is, when they are subjected to impersonal scrutiny from a decidedly safe distance or when there is an instinctive focus on their "difference" as if in assurance of our proper place in society, our status and social standing. Consequently, these commonplace considerations invariably find their way into the Philippine legal system. Indeed, the concept of the right to housing as a basic human right poses practical difficulties for policymakers. After all, to what extent should informal settlers be accommodated so that the gap between the *"processes that allow the freedom of actions and decisions"* and the *"opportunities… given their personal and social circumstances"* may be minimized, if not eliminated entirely? (Sen, 2000: 17) Even the most cursory look at the numbers is daunting.

The Philippine population is 51 percent urban with one of the highest rates of urban growth in the developing world at 5.1 percent over the past four decades. (Constantino-David, 2001: 234) In Metro Manila, the state capital and the most highly urbanized city in the Philippines, immense poverty has become a distinguishing characteristic with most of the city's urban poor residing in environments not fit for human habitation by international standards. The urban poor who, by some estimates, account for 40 percent (Santos, 2010) of the total population in Metro Manila, live in blighted informal communities – along railroad tracks, riverbanks and other waterways, under bridges, beside hazardous gas wells, on public and privately-owned lands – and are faced with the constant threat of punitive actions such as evictions and distant relocations.

This paper focuses on the experiences of a particular informal settlement, that of the Cardiz Neighborhood Association (CNA) in Tatalon Estate, Quezon City, to better shed light on the issue of *"squatting"* against the existing framework of regulatory housing laws. The term *"squatters"* – often used alternately with *"slum dwellers"*, *"unlawful tenants"*, *"illegal residents"*, or the politically correct and less condemnatory, *"informal settlers"* – refer to persons or households that neither own nor rent the land on which they live. (Jimenez, 1994: 556) Squatting, therefore, signifies the act of inhabiting an abandoned or unoccupied parcel of land (Stone, 1984) without any legal authority to do so or without first acquiring a legal title, by landless and homeless persons (Buenavente v. Melchor [1979] 89 SCRA 222). It is of note that squatting is no longer considered a crime in the Philippines with the passage of Republic Act 8368, the law which has repealed the Marcos-era Presidential Decree 772 that punishes squatting and other similar acts. Nevertheless, the penalties for *"professional squatting"* and *"squatting syndicates"* have been retained.

For purposes of this paper, *"informal settlers"* shall be used to refer to individuals or groups of people who settle on public or private land without the express consent of the landowner and who have insufficient income for legitimate housing. (1) This also distances itself from whatever pejorative social and psychological connotations associated with the signifier *"squatter."* Furthermore, as previously mentioned, squatting has been decriminalized in the Philippines; hence, to summarily categorize all the activities of informal settlers, specifically those relating to spontaneous urban settling illegal would be grossly inaccurate. As such, the term *"extralegal,"* in the spirit of De Soto's concept of dual economies, shall be employed to better describe those activities, which are neither formal nor illegal, made in connection with urban settling.

1.1 Property Rights vis-à-vis Housing Rights

Once viewed only as an input in the production of food and fiber (Johnston and Swallow, 2003: vi), land is now considered a key element in combating poverty in developing countries, an economic idea popularized by the Peruvian economist Hernando de Soto in *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

It was more than a decade ago when De Soto emphatically called attention to the fact that an estimated 4 billion people around the world lack the legal instruments necessary to participate in modern market economies.

He proposed that legal reform should provide the poor with the proper title to the assets that they hold to enable them to enter the formal economy and unleash a vast store of *"dead capital."* The theory is that assets that are merely held but not owned are useful only in its physical form but are impotent as a means of legally accessing the market economy. Hence, pulling the extralegal practices of the poor into the legal system will unleash this capital which is worth much more than what poor countries have been lent or given by developed nations or multilateral agencies. While the numbers of people who live in informal settlements have undoubtedly increased significantly since De Soto conducted his study, his analysis still maintains its relevance. In a 2009 case decided *en banc*, the Philippine Supreme Court quoted passages from De Soto's work to emphasize *"the disconnect between a legal system and the reality on the ground"* when it comes to the plight of informal settlers. (Heirs of Malabanan v. Republic of the Philippines [2009] G.R. No. 179987)

While property ownership, as it is generally defined by special laws and statutes, conveys a tenor of predictability and regularity, the rise in the informal acquisition of urban housing, be it a cardboard box or a sturdier structure made of wood and cement, is redefining traditional, even feudal, concepts of housing rights. Hence, the concept of human rights enters the picture by serving as a foundation of a life of dignity.

They are a set of guarantees that are universal, inalienable and indivisible. The significance of human rights in crafting development policies is rooted in the interrelated and interdependent nature of rights which has the capacity to enhance, supplement and reinforce one another. (Sen, 2000: 40) Hence, it is said that the enjoyment or fulfillment of human development is often dependent on the linkages between other rights – thus, when the right to housing is violated, more often than not other related rights are violated.

2. A Historical Backdrop of Property Rights in the Philippines

The Philippine story of property rights, defined as "the juridical tie by virtue of which a person has the exclusive power to obtain all the benefits from a thing, except those prohibited or restricted by law or by the rights of others" (Tolentino, 1991: 1) is intimately linked with the story of the Filipino's bloody struggle for freedom that was withheld for centuries. (Agoncillo, 1977; Murphy, 2000) From the enforced tenancy regimes in Spanish-owned *haciendas*, to the granting of homestead free patents under American rule that resulted in the displacement of indigenous communities from their ancestral lands in Mindanao, the State was vested with powers that greatly overshadowed individual rights and freedoms. With socioeconomic structures characterized by unpredictability and the systematic asset-stripping common to all colonial projects, the fusion of government

bureaucracy and the landed elites further cemented the social disparities pervasive in a property system that is largely borrowed.

Landownership patterns suffered from the legacy of a Spanish legal system. Hardoy and Satterwhaite (1981) have even suggested that the *"worst features of capitalism"* were appended to then existing laws upon the legalization of feuding landholding patterns of the country's more powerful families by the Americans. Thus, according to Casanova (1974: 361; cited in Hardoy and Satterwhaite, 1981: 85-86):

> Land based wealth became the chief source of economic power which, in turn, became a source of political power… for obvious reasons, political power has held private property rights so sacrosanct that *jus abutendi* has come to mean in this country the right of the owner to exercise absolute and unlimited power over the thing owed, even to the extent of destroying it by any means, however inconvenient and prejudicial to the public interest or to the rights of others it may be.

Nevertheless, there were key reforms made under the American administration to strengthen property rights through land redistribution, improved titling and registration. While it was not as successful in practice as it was originally conceived, such attempts at land reform managed to provide substantial flesh to the bare bones of the previous Spanish system. Land titling under the Torrens system, (2) as provided for by the Land Registration Act of 1903, as well as other special laws, has led to substantial welfare-enhancing effects by *inter alia* substituting insecurity with security, reducing the costs of conveyances, affording greater protection against fraud and basically simplifying the everyday transactions of the ordinary property owner. (Grey Alba v. de la Cruz [1910] 17 SCRA 49)

3. The Social and Economic Character of Housing in Urban Areas

Many of those who are forced by poverty to live in urban informal settlements continue to do so, despite possible legal, social and physical health hazards, to grasp at opportunities otherwise not available to them in rural areas. This has led to the democratization of the city streets, where both rich and poor live side by side – albeit, not always by personal choice. The issue of the right to adequate housing involves more than an analysis of a population's access to structures of a permanent nature, to be used as a dwelling space, place of residence, or shelter. At its most basic, yet undeniably significant level, housing provides a source of refuge for the basic family unit and has become a symbol of security, safety and wealth. Beyer (1965) has described housing as a *"highly complex product"* because of the role it plays in efficient urban planning and its capability of becoming the cornerstone of social order. In this manner, housing becomes both an *"economic and social process"* and, thus, its importance in a country's overall development cannot be stressed enough. (Beyer, 1965: 3)

Over the past decades, many advances have been made with regards to the promotion and development of housing rights. It has been introduced as a collective human right since it forms part of the standards comprising what is considered an adequate standard of living. Access to proper housing provides increased access to livelihoods, public utilities and basic services. A house, by virtue of its accompanying address, becomes a means of identification in both public and private documents. It creates a reasonable expectation of privacy, at least insofar as in the eyes of the law. (3) A house, then, becomes representative of one's sense of self and status since a person may be defined by the type of dwelling he lives in.

The emergence of housing as a compelling field of inquiry demands that the economic factors affecting the urban housing situation should be given serious attention. The World Bank (1975) has identified these factors as: *income levels*, *city characteristics*, *rate of city growth* and *housing policy*. First, at the household level, the aggregate amount of money received, either as payment for work or as profit on capital, becomes an indicator of what a household can generally afford. In macroeconomic terms, *income* at the national level reflects a country's capacity for housing its population at standards that will not distort other investment allocations. (World Bank, 1975: 12) In the Philippines, like most developing countries, income in urban areas is much higher than in rural areas, drawing a constant influx of migrants. According to Wegelin (1983: 107), migrant workers make up the majority of the urban poor and while an overwhelming majority may have houses to come home to after a day of labor (except, arguably, for vagrants and street dwellers), it is often at unreasonably low standards and on land owned by someone else.

Second, the biggest and most urbanized cities confront the gravest problems because it is here where spatial imbalances between people and jobs are at its most evident. The scarcity of land coupled with the need for better access to employment opportunities in metropolitan centers remains a dominant feature of the housing problem and, as such, *city characteristics* must be taken into consideration when forming housing policies specifically tailored for a particular urban area.

The availability of adequate and suitable land becomes of paramount importance to the success of housing policies since many settlers, after being relocated to far-flung areas, return to their former homes to squat due to employment reasons. As suggested by Wegelin (1983: 107), it seems that where there is a choice between cheap land and high commuting costs, on one hand, and expensive land but low commuting costs, the first alternative may be seen as the less viable option. Thus, the problem with relocation sites placed on the fringes of the city is that while people can build houses on these lands, the environment may remain substandard without access to basic infrastructure, social services, medical services, education and community development. (Tordecilla, 2005: 25)

Third, *population* or city growth rate is another factor to consider in light of the rapid rates of household formation and increases in housing demands. (World Bank, 1975:

14) In the Philippines, approximately ten million of the country's urban population live in Metro Manila, which has an annual growth rate of 3.3 percent. (Constantino-David, 2001: 234) This has been largely due to factors such as a high birth rate of approximately 2.3 per cent per annum, rural-to-urban migration, and the reclassification of rural areas as urban due to their increasing population densities. (Constantino-David, 2001: 234) Migration is an obvious testimony to the continuing poverty in the countryside that forces the poor to seek their survival in the cities.

Fourth, the *housing policy* of a particular State, comprised of laws, statutes and the administrative strategies, affects the housing situation by, ideally, providing some standard of security of tenure. While such security might manifest itself via a combination of different legal forms, the minimum sufficient security must at least contain safeguards against unjust expropriation and summary demolitions. (World Bank, 1975: 15) Furthermore, an effective policy should not look at the housing problem merely in terms of *"household deficits"* since this may lead to conceptual difficulties usually associated with what it means to have *"appropriate housing,"* and estimates based on these misconceptions may lead to a cycle of demolishing makeshift, informal houses to make use of the land in other ways. (World Bank, 1975: 15) Likewise, prohibitive building codes, costly land acquisition procedures and similar barriers, while put in place with the intention of regulating housing, may instead marginalize its beneficiaries and result in policy failure. (World Bank, 1975: 15) The shifting nature of housing policies – punitive during one administration and then restorative the next – has led them to reinforce their dwelling with hollow cement blocks and mortar. The reason is not difficult to surmise: a house built with strong materials is harder to dismantle during eviction and it would take a lot more resources to demolish. For many informal settlers who resort to such tactic, they do this in the hope that it dissuades the property owner from ordering a demolition and, instead, facilitate an amicable settlement with the end goal that the property is sold to the informal residents.

4. A Legal Overview of Informal Settling

The Philippines is a State Party to a number of human rights instruments, many of which recognize and affirm the right to housing, and its Constitution contains provisions on "Urban Land Reform and Housing". Below is a legal overview of the laws, instruments and standards which shape development policy, as well as the problems besetting state compliance with such.

4.1 International Standards, Rules and Guidelines

The Universal Declaration of Human Rights (UDHR) which was adopted on December 10, 1948 emphasizes in its Preamble that the *"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."* It is this concept of the promotion of human dignity and the equal

and inalienable rights of every person that has become an aspirational goal of a world community in which a *"democratic distribution of values"* is sought. (Shaw, 2008: 265) Hence, the weighing of the legitimate rights of the state, groups and individuals has been subject of intense debate. Specifically, while there is a prevalent acceptance of the importance of human rights, the precise definition and manner of implementation of these rights may vary, depending on who is doing the analysis and why.

Furthermore, the question of what is meant by a *"right"* may be a subject of controversy since some *"rights"*, for example, are intended as immediately enforceable binding commitments, others merely as specifying a possible future pattern of behavior. (Shaw, 2008: 265) As such, is the right to housing one of these enforceable rights? The answer is an unqualified yes as evidenced by the wealth of human rights instruments affirming such.

However, the right to housing may be ignored, looked at with *"disdain"* (Gutierrez, 2008: 448) or treated like the *"poorer relation"* (Oloka-Onyango, 2010) to its more commonly known civil and political counterparts – rights to free expression, political and civic association, and freedom from torture, cruel, inhuman and degrading treatment. By contrast, economic, social and cultural rights are much less well known, and only rarely do they form the subject of concerted political action, media campaigns or critical reportage. Nevertheless, according to Ibarra Gutierrez in *Housing Rights in the Philippines: Recognition, Protection and Promotion* (2008), there has been an increased strengthening of the position of housing rights in international law and within domestic legal systems because there is the growing recognition of economic, social and cultural rights or *"second generation"* rights.

In the UDHR and in subsequent international instruments, the two abovementioned categories of rights are placed on equal footing, with an emphasis on their indivisibility, interconnection and interrelationship. (Oloka-Onyango, 2010) It was first recognized by the UN GA in 1948 through Art. 25(1) of UDHR as part of the recognition of the right to an adequate standard of living. This provision, and consequently, the right to housing itself, was enshrined in the ICESCR when it was drafted in 1966 as part of the right to an adequate standard of living. (Gutierrez, 2008: 449) In fact, the ICESCR has identified seven facets that required for the full enjoyment of the right to housing.

Thus, shelter security has come to mean: *legal security of tenure*, *availability of services and infrastructure*, *affordability*, *habitability*, *access and location* and *cultural adequacy*. (Social Protection In Asia, 2009: 1) The first factor, security of tenure, is said to be particularly significant because it relates to another important aspect of State obligations with respect to the right to housing – protection from forcible eviction. (Gutierrez, 2008: 449)

4.2 Philippine Laws and Policies

In the Philippines, apart from its commitment to the right to housing as a state party to the ICESCR, there are organic laws in place, foremost is the Philippine Constitution. Two constitutional provisions highlight the commitment of the state to undertake a continuing program of urban land reform and housing reform for the underprivileged and to protect poor from forcible evictions. It is provided, however, that while evictions and demolitions is allowed as long as it is done within the confines of the law, law enforcement agents should treat urban or rural poor dwellers, regardless of the validity of their property claims, in a just and humane manner. It is of note that while the related provisos do not expressly recognize a right to housing, it still represents a broader commitment to recognize such a right. (Gutierrez, 2008: 449) To wit:

> **Section 9.** The State shall, by law, and for the common good, undertake, in cooperation with the private sector, a continuing program of urban land reform and housing which will make available at affordable cost, decent housing and basic services to under-privileged and homeless citizens in urban centers and resettlement areas. It shall also promote adequate employment opportunities to such citizens. In the implementation of such program the State shall respect the rights of small property owners.
>
> **Section 10.** Urban or rural poor dwellers shall not be evicted nor their dwelling demolished, except in accordance with law and in a just and humane manner.
>
> No resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated.

In the Philippines, squatting is no longer considered a crime upon the passage of Republic Act 8368, or the "Anti-Squatting Law Repeal Act of 1997", which repealed the Marcos-era Presidential Decree 772 that penalizes squatting and other similar acts. R.A. 8368, which took effect on 27 December 1997, was enacted solely for the purpose of *expressly* repealing the old governing law on squatting and, moreover, Section 3 thereof specifically provides that *"all pending cases under the provisions of Presidential Decree No. 772 shall be dismissed upon the effectivity of this Act."* (De Castro Homesite Inc. v. Leachon [2005] G.R. No. 124856) Necessarily, the legal effect of this declaration by a co-equal branch of government renders superfluous further disquisition of the cases at hand. However, the repeal of PD 772 did not nullify, eliminate or diminish in any way Article VII, Section 27 of Republic Act No. 7279, otherwise known as the *"Urban Development and Housing Act of 1992"*, or any of its provisions relative to sanctions against *"professional squatters"* and *"squatting syndicates"*. According to Article I (Definition of Terms) of RA 7279:

> m. "Professional Squatters" refers to individuals or groups who occupy lands without the express consent of the landowner and who has a sufficient income for legitimate housing. The term shall also apply to individuals who have been previously awarded housing units or home lots award by the government but who

> sold, leased or transferred the same to settle illegally in the same area or in another urban areas, and non-bonafide occupants and intruders of land for socialized housing. The term shall not apply to individuals or groups who simply rent lands and housing from professional squatters and squatting syndicates.
>
> n. "Squatting Syndicates" refers to groups of persons engaged in the business of squatter housing for profit or gain.

After the repeal of Presidential Decree No. 772, RA 7279 became the governing law with respect to the subject matter of *"squatting"*. In effect, RA 7279 became the enabling law of the Constitutional mandate towards urban development and the State's treatment of its urban poor. According to the Housing and Development Council of the Philippines (2010), the goal of such law is to enable the equitable utilization of residential lands in urbanizable areas with particular attention to the needs of the underprivileged and homeless and not merely on the basis of market forces. Furthermore, punitive action against professional squatters and syndicates has been emphasized under Article VII, Section 27 of RA 7279:

> **Section 27.** Action Against Professional Squatters and Squatting Syndicates.
>
> Any person or group identified as [professional squatters] such shall be summarily evicted and their dwellings or structures demolished, and shall be disqualified to avail of the benefits of the Program. A public official who tolerates or abets the commission of the abovementioned acts shall be dealt with in accordance with existing laws.

Informal settlements may still be abated as *nuisance per se* through demolition and eviction. The logic behind the eradication policy is that physical removal of informal settlements would reduce their numbers in urban areas. (Lim, 1995: 521) The pertinent portion of Section 28 provides:

> **Section 28. Eviction and Demolition. —** Eviction or demolition as a practice shall be discouraged. Eviction or demolition, however, may be allowed under the following situations:
>
> (a) When persons or entities occupy danger areas such as esteros, railroad tracks, garbage dumps, riverbanks, shorelines, waterways, and other public places such as sidewalks, roads, parks, and playgrounds.

RA 7279 likewise provides for resettlement. Thus, granting for the sake of argument that the local government may effect summary eviction, it has a positive duty under the law to provide relocation or resettlement with livelihood opportunities for these informal settlers. LGUs should not just evict these informal settlers without observing its corresponding obligation under the law. This is found on Section 29:

> **Section 29. Resettlement. —** Within two (2) years from the effectivity of this Act, the local government units, in coordination with the National Housing Authority, shall implement the relocation and resettlement of persons living in danger areas such as esteros, railroad tracks, garbage dumps, riverbanks, shorelines, waterways, and in other public places as sidewalks, roads, parks, and playgrounds. The local government unit, in coordination with the National Housing Authority, shall provide relocation or resettlement sites with basic services and facilities and access to employment and livelihood opportunities sufficient to meet the basic needs of the affected families.

In addition, the policy and intent of RA 7279 is to render justice and equity to informal settlers may be gleaned from Section 28 (c) (8):

> **Section 28. Eviction and Demolition. —** Eviction or demolition as a practice shall be discouraged. Eviction or demolition, however, may be allowed under the following situations:
>
> (c) When there is a court order for eviction and demolition.
>
> (8) Adequate relocation, whether temporary or permanent: Provided, however, That in cases of eviction and demolition pursuant to a court order involving underprivileged and homeless citizens, relocation shall be undertaken by the local government unit concerned and the National Housing Authority with the assistance of other government agencies within forty-five (45) days from service of notice of final judgment by the court, after which period the said order shall be executed: Provided, further, That should relocation not be possible within the said period, financial assistance in the amount equivalent to the prevailing minimum daily wage multiplied by sixty (60) days shall be extended to the affected families by the local government unit concerned.

Section 28 (c) applies to cases where there is a court order for eviction and demolition while Section 29 applies to summary eviction. In either case, the humane policy of the law is clear: provide resettlement or relocation options that allow displaced individuals sufficient access to livelihood, basic services and facilities.

A recently enacted law, the Magna Carta of Women (Republic Act 9710), which took effect on 15 September 2009, also has a specific provision on the right to housing. RA 9710 is a comprehensive women's human rights law that seeks to eliminate discrimination against women by recognizing, protecting, fulfilling and promoting the rights of Filipino women, especially those in the marginalized sectors. This law affirms that women in marginalized sectors are hereby guaranteed all civil, political, social, and economic rights recognized, promoted, and protected under existing laws.

Section 21 specifically makes mention of the right to housing, showing how the law has come so far in addressing this collective right; to wit:

> **Section 21. Right to Housing. —** The State shall develop housing programs for women that are localized, simple, accessible, with potable water, and electricity, secure, with viable employment opportunities and affordable amortization. In this regard, the State shall consult women and involve them in community planning and development, especially in matters pertaining to land use, zoning, and relocation.

4.3 Problems Besetting State Compliance

According to the United Nations Centre for Human Settlements (1981), there are three broad groups of government policies with respect to informal settlements: laissez-faire policies; restrictive or preventive policies; and supportive policies. *"Laissez-faire"* is simply the descriptive term applied to the practice of some governments of officially ignoring the existence of slum areas and allocating public resources to other development sectors. This built-in resistance is compounded by the fact that effective policies in housing invariably affect many government departments, often with overlapping areas of jurisdiction and conflicting objectives. This involves the reduction of power of certain individuals enjoyed under previous policy especially where the government situation is unstable. (Wegelin, 1983: 112)

Restrictive policies, on the other hand, seek to eliminate or reduce the size of low-income areas, stemming from predominant perceptions of policy-makers who underestimate the capability of the urban poor to help themselves.

At best they feel that the poor have to be guided, at worst, the poor have to be prevented from *"carrying out innately mischievous acts."* (United Nations Centre for Human Settlements, 1981) Government policies that enforce the rule of law too strictly, however, have led to mass evictions – including measures such as barricading of dwellings, demolitions by bulldozing, arson and violence against persons – which continues to spark public outrage from civil society and international organizations alike. As exhorted by the Supreme Court in the *Heirs of Malabanan* case (supra.), that while there is much to be said about the virtues of legitimizing informal settlers, it is beyond the powers of the Court to translate this into positive law. It is incumbent on Congress to *"set forth a new phase of land reform to sensibly regularize and formalize the settlement of such lands which in legal theory are lands of the public domain before the problem becomes insoluble."* Two examples were given as means of mitigating the strain of restrictive land policies: (a) *liberalize* the standards for judicial confirmation of imperfect title; or (b) amend the Civil Code itself to *ease* the requisites for the conversion of public dominion property into patrimonial.

In contrast with the abovementioned policies are the so-called *"supportive"* policies, which are founded in the belief that informal settlements have an inherent potential for improvement. These policies seek the inclusion of informal settlers in the national

development process and, ultimately, in the social and economic integration of the residents into the surrounding area. Examples of supportive policies include providing basic amenities, building low-income public housing projects and granting technical and administrative aid for self-help housing. Thus, the policy offers to rehabilitate and upgrade informal settlements.

5. Metalegal Housing Strategies

The planning and execution stages of any government-sponsored land titling initiative tends to be a very slow process because of the manpower constraints associated with organizational planning. One has to take into consideration those government regulations that involve plan approval, tendering procedures, construction supervision and disbursement of funds. (Wegelin, 1983: 114) This is especially true in the Philippines where administrative bottlenecks and deadlocks may often lead to frustration and, possibly, disregard of the legal modes of acquiring housing. De Soto provides an eye-opening heuristic device in *The Mystery of Capital* by mapping at least 168 cumbersome steps that is required so that persons may legally purchase a dwelling built on either state or privately owned property in Metro Manila. De Soto concludes that this tedious and costly progression involving a lot of maneuvering through bureaucratic red tape has led many migrants to opt out of the system – *"it is nearly as difficult to stay legal as it is to become legal."* (De Soto, 2000: 20-21) Such barriers to access are intimately linked with poverty since *"opting out of the system"* may negatively affect those marginalized indigents who are unable to attain any legally recognized evidence of ownership over the land on which they reside in the long run.

De Soto's proposal that formal legal titling as a solution to the housing problem has been criticized as too idealistic, taking too much time. A squatter on a piece of land without legal title and in violation of building codes may pay for the legal title and improve the structure but this is unlikely among the poor. (Lim, 1995: 526) It is immensely difficult for the poor to move from informal to formal housing market since it is a long-term and multistep transition (Lim, 1995: 256) where laws applying De Soto's principles have not yet been put in place. In the meantime, policy beneficiaries, in this case the urban settlers, may resort to *"metalegal strategies*" instead of relying too heavily on a heavy-handed top-down approach from a government that may be too resistant to change.

Asido and Talaue-Macmanus describe metalegal strategies as those *"creative actions employed by the basic sectors to further their particular interests in cases where the relief or remedy provided by law is too slow or non-existent."* (2000: 101-109) While not prescribed by law nor prohibited by it, these strategies, or tactics, originate from basic human rights such as the freedom of free expression and assembly, the freedom to form associations, and to petition the government for redress of grievances. The self-help approach is based on democratic principles of self-determination (Asido & Talaue-Macmanus, 2000: 101-109) and the *a priori* presumption that *"people can be meaningful participants in the developmental process and*

have significant control" over such. (Lyon, 1987: 115) These may include tactics such as, but not limited to: mediation, negotiations, rallies and mobilizations, community and public conscientization, law and policy reforms, the use of media, among others.

Metalegal strategies, when employed in relation to housing rights, inherently rely on the capacity of informal settlers to help themselves. It involves demarcating of issues and enumeration of clear demandable rights to further collective aims in participatory decision making.

This participatory approach may help combat administrative bottlenecks and soften the built-in resistance to changing existing (ineffective) housing practices. This paper, thus, enumerates four possible strategies, or tactics, based on the experiences of the informal settlers of Cardiz Street, specifically: *lobbying and institutionalized resident's participation, mediation and amicable settlement*, and *metalegal training*. The last proposal, the Community Mortgage Program, is not a metalegal strategy *per se* but is a state-sanctioned policy that necessarily involves a combination of the above-mentioned strategies and may provide a solution to the housing problems of informal settlers.

5.1 Lobbying and Institutionalized Resident's Participation

As a metalegal strategy used in the process of urban development planning, lobbying includes, but is not limited to consultations, multi-sectoral dialogues, and networking with the local government units. Community meetings with neighboring *barangays* (4) and other neighboring settlements should be regularly conducted to ensure that there will be no inadequate guesses or estimates regarding housing needs. This helps clarify local perceptions about the living urban resources, the legal and social mechanisms that govern access to them, and the problems and possible solutions associated with their utilization.

The active participation of stakeholders in the process deepens their sense of involvement and commitment to achieving prospective solutions to the problems they identified. Lobbying inherently involves premeditated intentions and concerted action to influence decisions made by legislators and officials in the government. The residents of Cardiz Street formed the Cardiz Neighborhood Association in recognition of the common concerns of its residents. They have registered themselves with the Securities Exchange Commission (SEC) and was organized by the residents ultimately to increase collaborations with the city government.

5.2 Creative Legal Intervention

There are other non-governmental agencies that are devoted to the cause of informal settlers, whose findings further highlight and aim to address the ways to manage problems concerning urban housing and the need for an integrated planning process. Aside from providing legal assistance, these NGOs provide studies and the participatory

approaches that may be used to further galvanize community sectors to actively take part in the planning process. What was needed however was the capacity and skills to engage government and stakeholders in the legal aspects of policy formulation and adoption. It was in this context that metalegal strategies and paralegal philosophy advocated by Tanggol Kalikasan (TK) of the Haribon Foundation came into play. Perhaps a factor that is pronounced in the planning and enactment of these strategies is the involvement of legal resource persons in the process. Recognizing that housing rights involves an apprising of property rights through policy review and formulation, the CNA approached various NGOs that conduct seminars addressing the nexus between private property and human rights so as to their rights as informal settlers and how to combat the threat of summary eviction.

5.3 Mediation and Amicable Settlement

Another alternative is to propose a friendly mediation conference with the landowner to explore possible alternatives to court litigation, such as the availment of the community mortgage program or negotiated direct purchase. This is in line with the government policy favoring the amicable settlement of disputes. Moreover, resort to mediation may result in mutually beneficial terms for the parties, considering the incentives available under the law.

So as not to delay the settlement of the respective rights and obligations, experience has taught the CNA that proactively drafting a document entitled "Agreement to Mediate" addressed to the landowners or pertinent government agencies allows their voices to be heard while lessening potentially strained relations between the opposing parties. Entering into such an agreement may even be considered as a "best practice" considering that: (1) the policy of the law encouraging amicable settlements; (2) the avoidance of unnecessary expenses of legal counsel and filing fees; (3) the likelihood that mediation will also be required in the event of court litigation; and finally, (4) the appeal towards the principle of social justice and the protection afforded to the urban poor communities. Indeed, it would truly be advantageous to attempt mediation at an earlier stage, before positions harden and before large expenditures of time and money have occurred. Through mediation, the parties will be able to communicate directly and listen to each other's real concerns.

5.4 The Community Mortgage Program

Through RA 7279, the Community Mortgage Program (CMP) can help unlock *"dead capital"* not only on the part of the informal settlers, but also on the part the formal landowners of the land. The CMP is essentially a financing scheme that allows informal settlers the opportunity to own the lots they occupy and to construct houses with the possibility of LGUs as loan originators. Without an unlocking mechanism such as the CMP, the landowner, who is the *de jure* owner of the property, cannot maximize his

property rights. Burdened by the informal settlements on his land, he continues to pay real estate taxes on his property, but cannot develop or exploit his property to create value for him without first evicting the informal settlers on his land. Cases of eviction can take years and cost a lot of money, with no assurance of success on the part of the landowner. Neither can the landowner sell his property at reasonable market rates so long as potential buyers are aware of the existence of informal settlements on his property. Through the CMP, the landowner will be able to sell his property to the settlers on his land, and get reasonable value for his property. This frees *"dead capital"* on the part of the landowner.

By using the abovementioned metalegal strategies, an informal community may organize themselves and enter the formal system through the CMP. By acquiring title to the land where they are settling, they are able to access the urban market or use their property as a source of livelihood, and the property they are holding becomes *"leverageable*" and *"liquid"* as it can now be used as collateral to obtain loans or capital. These, in turn, can be used for entrepreneurial endeavors, freeing "dead capital".

The advantage of the CMP is that it recognizes dual conflicting rights to the property – the legal and *de jure* ownership of the landowner, and the *de facto* possession of the informal settlers.

6. Conclusion and Recommendations

The benefits of a property rights system founded on what Peruvian economist Hernando De Soto calls a *"strong, well-integrated social contract"* can hardly be argued against when transplanted in the Philippine setting. In Metro Manila, the urban poor have been steadily carving out a sizable niche for themselves within the margins of the formal economy, straddling the line between legal and extralegal notions of property, and generally going about the business of living under the ambivalently watchful eye of the government. In this regard, property rights is truly placed on equal footing to life and liberty, proof of the role it plays in democratization. The goals of optimal economic efficiency, peace and order, and collective security are impossible to maintain in the long run with a disgruntled and oppressed community of people whose human rights are ignored by the government. A citizenry pushed to edge of a proverbial cliff by intractable law enforcers may even trigger violence or, at the very least, an all-encompassing disregard for the rule of law. It is in this way that an inadequate and poorly enforced formal property system that neglects to take into account certain social, political and economic realities tends to be no different from De Soto's *"imagined country."*

This is not to say, however, that government regulation and its rules-based system should be entirely dispensed with. Rather, the objective of such regulation should not *"oppress the owner but to impress upon him the social character of [the property] he holds."* (Bernas, 2004: 112) The experiences shared by Cardiz Street residents should teach the straightforward lesson

that if such overly strict and complex procedures eclipse the legitimate need for control, a loss of welfare will indubitably arise. Hence, while land titling by itself may not be the catch-all solution to poverty, it has that transformative capacity to be that crucial first step towards economic development. However, land titling may prove costly and slow, hence metalegal strategies by the informal settlers themselves and concerned advocates who have actual knowledge of slum life contributes to the formulation of creative and imaginative policies that will have substantial political and economic dividends.

With a strong commitment to a common national project, increased political will, and a sense of social obligation from both public and private sectors, the enfranchisement of informal settlers is possible. Nevertheless, any initiative that aims to streamline the current formal system necessarily becomes a balancing act: first, while certain key changes must be made to simplify registration proceedings and relax excessive government control; conversely, such measures must be applied in a manner that does not unduly weaken the government's ability to resolve the housing shortage.

This can only be achieved through the concerted efforts of the public and private sector, especially when making the costly initial investments that would help improve efficiency and expedite government processing.

It is likewise submitted that increased accommodation of the extralegal sector becomes a national objective in light of the principle of social justice as enshrined in the Philippine Constitution. Thus, the institutions that seek to promote justice must embody creativity that can be gleaned from the use of metalegal strategies. Development policies should take into consideration complex and interdependent expressions of humanity embodied by the informal settlers, instead of clinging to the rigid and static definitions of archaic laws. The law should necessarily incorporate change and should not be so enmeshed in outdated notions of traditional order. While the law was created to provide predictability and regularity, the extralegal, oftentimes irregular, experiences of informal settlers reveal that insisting on these notions of traditional legal order may not promote greater manifestations of justice.

The next step involves the creation of various policies, procedures, programs, management initiatives and legislative efforts. While this paper does not provide specific recommendations along these lines, it was written with the hopes that while a viable framework has not yet been proposed to alleviate the housing problem, the introduction of metalegal strategies may help ease the growing pains and provide solutions while the greater ideal of *"housing for all"* has not yet come to pass. It is self-help justice without being illegal – a means of strengthening economic, social and cultural rights, within the confines of existing laws in the hopes that one day, the proper laws that will solve the problem will be enacted.

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ENDNOTES

[1] There is no one particular definition for *"informal settler"* as it may include those living in squatter settlements, slums or socialized housing projects. The underlying commonality between these signifiers, however, is the informality or irregularity in which housing is ac quired. At least for purposes of policymaking, further distinctions between popular de scriptions are necessary.

[2] Grey Alba vs. de la Cruz, 17 Supreme Court Reports Annotated 49 (1910): *"The boldest effort to grapple with the problem of simplification of title to land was made by Mr. (afterwards Sir Robert) Torrens, a layman, in South Australia in 1857… In the Torrens system title by registration takes the place of 'title by deeds' of the system under the 'general' law. A sale of land, for example, is effected by a registered transfer, upon which a certificate of title is issued. The certificate is guaranteed by statute, and, with certain exceptions, constitutes indefeasible title to the land mentioned therein... "The object of the Torrens system, them, is to do away with the delay, uncertainty, and expense of the old conveyancing system."*

[3] In Philippine jurisprudence, the guarantee of freedom from unreasonable searches and seizures is construed as recognizing a necessary difference between a search of a *"dwelling house"* and other structures for the purposes of obtaining a search warrant. (*See* ***Papa vs. Mago***, 22 Supreme Court Reports Annotated, 857 [1968]) To further illustrate, special laws may further provide that persons exercising police authority may only enter and search dwelling houses "***only upon warrant issued by a judge or justice of the peace****…"* (***Viduya v. Berdiago***, 73 Supreme Court Reports Annotated 553 [1976]).

[4] A *barangay* is the smallest local government unit in the Philippines.

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SHOPPING FOR THEIR OWN PAIR OF PINK STILETTOS: LGBT RIGHTS VIS-À-VIS THE MAGNA CARTA OF WOMEN AND OTHER RECENT LAWS AND JURISPRUDENCE IN THE PHILIPPINES

Sherwin Dwight Ocampo Ebalo

In the struggle for human rights recognition, the movements of women and lesbians, gays, bisexuals and transgenders (LGBT) are kindred spirits. Ideally, the developments in one movement benefit the other.

However, recent women's rights laws do not extend their protection to LGBTs. The disjuncture lies with the clear legal distinction secured by women as a group as against all other groups, including LGBTs. Like its kindred spirit, the LGBT rights movement should also establish its clear legal identity.

The need for a clear legal identity for the LGBT rights movement is emphasized by three recent Supreme Court decisions. *Silverio vs Republic* shows the strict application of the law in favor of only those who are expressly granted with statutory benefits. *Republic vs Cagandahan* carves out an exception not specifically stated in the law because of the presence of substantial distinctions. Finally, *Ang Ladlad vs Comelec* successfully established a distinct legal identity for LGBTs, albeit for a specific purpose only.

In the end, equal human rights treatment begins with the recognition of each group's substantial characteristics. The challenge for the LGBT rights movement, therefore, is to clearly establish itself as a distinct group under the law.

1. Introduction

The LGBT[1] and women's movements are kindred spirits. The two groups fight for the same thing—the respect and recognition of human rights. Hence, it is but reasonable to deduct that the victory of one *should* be a victory for the other.

The LGBT rights movement is cognizant of this. In the recent 2010 Philippine National elections, the first ever LGBT party list group ran under a platform of "*equal rights, not special rights*" (Ang Ladlad, 2010). The slogan implied the syllogism above by tracing the root of party's purpose to something more fundamental than LGBT rights, or women's rights for that matter—*human* rights.

The women's rights movement in the Philippines has significantly progressed in the past decade. Ideally, the success of this movement should be benefitting the LGBT rights movement as well. However, a survey of the country's laws and jurisprudence show no hard-and-fast correlation. There is still a manifest disparity between the quantity, nay, even the quality, of laws promoting and respecting the rights of women and LGBTs.

This paper seeks to, first, illustrate how recent pro-women laws in the Philippines do not fit LGBT concerns[2], and, second, portray the present status of the LGBT rights movement through recent Supreme Court decisions. Then, the paper tries to reconcile the discussions to reveal just what the LGBT rights movement can learn from its sister movement.

Frequent analogies will be made to shoe-shopping. The quest for LGBT rights is much like shopping for the perfect pair of shoes. It is a long cycle of fitting and mis-fitting with one end in mind—to find one's identity.

2. A primer on the LGBT movement in the Philippines

Before analyzing the present state of the LGBT movement, a brief backgrounder is in order.

The *Yogyakarta Principles*[3], an outline of principles relating to *sexual orientation* and *gender* which seeks to be "a universal guide to human rights which affirm binding international legal standards with which all States must comply" provides thus:

> Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (Preamble, Note 1).

> Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms (Preamble, Note 1).

In the Philippines, a number of private organizations have fearlessly championed human rights as applied to the LGBT community. As early as 1999, the The Lesbian and Gay Legislative Advocacy Network Philippines (LAGABLAB-Pilipinas) was formally created with an aim to "[achieve] a society free from all forms of discrimination particularly those based on gender and sexual orientation." (Lagablab, n.d.)[4] During the 12th Congress and the Congresses thereafter, Lagablab focused on the enactment of the Anti-Discrimination Bill which seeks to "[criminalize] a wide range of policies and practices that discriminate against Filipino LGBTs."(Lagablab, n.d.)

Another pioneer LGBT group is Ang Ladlad, which ran as a party list group in the recent national elections. Its candidacy was, prior to the last elections, twice railroaded by the Commission on Elections (Comelec) on different grounds (Ang Ladlad, 2009). It espouses a five-tiered agenda.[5]

At present, Philippine law does not formally prohibit same-sex activities (Ang Ladlad vs Comelec, 2010)[6], adoption by same sex couples (Domestic Adoption Act, s.7), nor disallows the conscription of LGBTs in the military (Noypitayo, 2010). However, Congress has yet to pass an Anti-Discrimination law, laws allowing the change of name and status of transgenders, laws recognizing LGBT relationships, and laws allowing same-sex marriages (Family Code, s.1)[7].

There is no set of conclusive statistics on the demography of LGBTs in the country. Interestingly, however, the Separate Opinion of Justice Abad in the case of *Ang Ladlad vs Comelec* (2010) recognizes the "universally accepted estimate that one out of every 10 persons is an LGBT of a certain kind." It estimates the LGBT population in the Philippines at 8.7 million.

A special feature of the LGBT campaign is "equality."[8]

3. The incompatibility of LGBT rights with recent pro-women laws

If women's rights and LGBT rights are intricately connected, then surely, the latter will benefit from the recent developments in the former. However, such is not the case in the Philippine context. There is an apparent incompatibility between the two, and this is shown in the wording of recent pro-women laws.

In the past six years, women's rights took an upsurge through the passage of two laws, the Anti-Violence Against Women and Children Act (Anti-VAWC, 2004) and the Magna Carta of Women (2009).

3.1 Anti-Violence Against Women and Children Act and LGBT Rights

The first law greatly expanded the concept of violence against women and children. In addition to physical violence, the following became actionable violence: sexual, psychological and economic violence. The Anti-VAWC Law provides for an efficient remedy against any act of violence through the swift issuance of barangay, temporary or permanent protection orders.[9]

Another salient point of this law is the recognition of the Battered Women's Syndrome as a defense against criminal charges.[10] The said innovation codified the Supreme Court's ruling on the case of *People vs Genosa.*[11]

The Declaration of Policy[12] provides that the law embodies the country's obligation to protect women's human rights under the Philippine Constitution, the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and other international instruments.

If the Anti-VAWC Law embodies women's human rights, will it also apply to LGBTs, following the transitivity of human rights? A simple textual analysis of the law answers the question in the negative.

The rules of statutory construction provide that laws should be understood using the ordinary meaning of their words (*Romualdez vs Sandiganbayan,* 2004). [13] "Violence against children" is defined as those committed by "any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate (Anti-VAWC*,* s.3)." The coverage obviously operates on a biological distinction, not a gender one. The combination of the words "woman, wife, and child" clearly removes a gay man or a transgender from the scope of the law.

The transitivity of human rights from women's rights to LGBT rights crumbles at this point. To illustrate, consider the case of an abused lesbian. A study conducted by Lesbian Advocates Philippines (LeAP!) revealed that lesbians experience the following "covert" forms of discrimination and violence: "(1) negative treatment from family members, where lesbianism is seen as a source of shame for the entire family… and (5) ostracism (2004, p. 151)." These violations fall squarely under *psychological violence* in the Anti-VAWC Law (s.3).[14]

If the victim obtains a protection order under the Anti-VAWC Law, the grant will be based on the victim's being a woman, not on her being a lesbian. This is because the law which grants the statutory remedy is a woman's rights law (Anti-VAWC, s.2), not a LGBT rights law. No transitivity occurs even if the victim succeeded in getting the desired protection. If the victim were gay or a transgender, the law will not even operate.

3.2 Magna Carta of Women and LGBT Rights

The second big legal leap for women's rights is the Magna Carta of Women (Republic Act 9710). It revolutionized women's rights by reinforcing them in the different social aspects of a woman's life. One of its salient provisions is Section 12 which provides: "The State shall take steps to review and, when necessary, amend and/or repeal existing laws that are discriminatory to women within three (3) years from the effectivity of this Act." The *Implementing Rules and Regulations* (IRR) of the said law mentions some of these "discriminatory laws" and the list is comprehensive.[15]

The Magna Carta of Women focuses on gender-discrimination which it defines as:

> Sec. 4. (b) "Discrimination Against Women" refers to any gender-based distinction, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status. on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.
>
> It includes any act or omission, including by law; policy, administrative measure, or practice, that directly or indirectly excludes or restricts women in the recognition and promotion of their rights and their access to and enjoyment of opportunities, benefits, or privileges.
>
> A measure or practice of general application is discrimination against women if it fails to provide for mechanisms to offset or address sex or gender-based disadvantages or limitations of women, as a result of which women are denied or restricted in the recognition and protection of their rights and in their access to and enjoyment of opportunities, benefits, or privileges; or women, more than men, are shown to have suffered the greater adverse effects of those measures or practices.
>
> *Provided, finally*, That discrimination compounded by or intersecting with other grounds, status, or condition, such as ethnicity, age, poverty, or religion shall be considered discrimination against women under this Act.

The use of the term "gender" is misleading. It gives the nuance that LGBTs are included in the provision as gender is commonly defined as one's sexual identity in relation to society and culture, which may broadly include one's sexual preference. Ironically, the illusion of LGBT inclusion in the law is shattered by no less than the law's human rights provision. Section 3, paragraph (4) states:

> All individuals are equal as human beings by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of ethnicity, **gender**, age, language, **sexual orientation**, race, color, religion, political, or other opinion, national, social, or geographical origin, disability, property, birth, or other status as established by human rights standards [emphasis supplied].

The separation of "gender" and "sexual orientation" clearly evinces that the former does not contain the latter. Therefore, "gender" in this law is more properly construed as "sex."

That LGBTs are not included in the scope of the Magna Carta of Women is clarified in other provisions of the law. The laws suggested by the IRR to be amended because of their discriminatory character are those which prejudice women vis-à-vis men. Examples of these are the Family Code provision which gives preference over the husband's decision over his wife's on matters involving parental authority (a.71)[16], the Revised Penal Code article on concubinage (a.334)[17] which is more onerous than its male counterpart, adultery (a.333)[18], and the Rules of Court section which presumes that a man will survive a woman if both were caught in a calamity (r.131.3).[19]

Human rights again do not flow from women to LGBTs in this law.

3.3 Why transitivity of human rights between the two movements is not guaranteed

The problem is one of classification. The Anti-VAWC Law and the Magna Carta of Women are, by express statutory provisions, women's rights laws. That the rights enshrined therein apply only to women and not to LGBTs as a whole are clear in their sections on scope. They cannot be unduly applied to LGBTs, even if the LGBT rights movement and the women's rights movement are kindred spirits.

To expand LGBT rights, the solution lies not in stretching the scope of clear-cut provisions of present women's rights laws, but in taking inspiration from them. One such inspiration is the ability of the women's rights movement to prove itself as a clear and distinct group under the law. The legal identity of women, as opposed to men, proved to be clear enough for Congress to recognize the group's fragility from violence (Anti-VAWC) and subjection to discriminatory laws (Magna Carta of Women). The same distinctiveness and clarity is required from the LGBT rights movement.

4. The need for LGBT legal distinction

Even if the principle of transitivity does not operate as between women's rights and LGBT rights, the latter is still supported by a broader set of rights (on which women's rights are also anchored)—human rights. These human rights are translated into statutes of general application. Philippine courts do not hesitate to apply these rights,

whenever clearly applicable, to LGBTs. In fact, the Philippine Supreme Court has made pronouncements about LGBTs which, although not binding, may prove to be useful precedents for future legislation.

Two relatively recent cases, however, reveal that general laws in themselves can be picky. Courts that will try to apply them will rely on either the fine classifications as enumerated in the laws or on clear and substantial distinctions as proved by the circumstances of the case.

4.1 Silverio vs Republic

In the case of *Silverio vs Republic of the Philippines* (G.R. No. 174689, 2007), Rommel Silverio underwent sex reassignment surgery and "from then on, lived as a female, and was in fact engaged to be married." He then filed a petition in the Regional Trial Court to have his first name and sex as found in his birth certificate changed. The lower court granted his petition on the basis of justice and equity and on the belief "that no harm, injury [or] prejudice will be caused to anybody or the community in granting the petition (Silverio vs Republic, 2007)" On appeal by the Solicitor General, however, the decision was overturned.

The Supreme Court sustained the decision of the Court of Appeals on the issue of Silverio's change of name. It stated that the present law does not allow one's change of name on the basis of his or her sex reassignment.[20]

The Court noted that "Rather than avoiding confusion, changing petitioner's first name for his declared purpose may only create grave complications in the civil registry and the public interest (Silverio vs Republic, 2007)."

The Supreme Court likewise affirmed the decision regarding Silverio's change of status.[21] The Court mentioned that:

> Under the Civil Register Law, a birth certificate is a historical record of the facts as they existed at the time of birth. Thus, *the sex of a person is determined at birth,* visually done by the birth attendant (the physician or midwife) by examining the genitals of the infant. Considering that there is no law legally recognizing sex reassignment, the determination of a person's sex made at the time of his or her birth, if not attended by error, is immutable.

The Supreme Court also rejected the grant of the petition on the basis of equity. It noted that Silverio's prayer was contrary to public policy. The Court clarified that:

> The changes sought by petitioner will have serious and wide-ranging legal and public policy consequences. First, even the trial court itself found that the petition was but petitioner's first step towards his eventual marriage to his male fiancé.

> However, marriage, one of the most sacred social institutions, is a special contract of permanent union *between a man and a woman*. One of its essential requisites is the *legal capacity of the contracting parties who must be a male and a female*. To grant the changes sought by petitioner will substantially reconfigure and greatly alter the laws on marriage and family relations.

Nevertheless, the decision notes in its penultimate paragraph that "The Court recognizes that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal. However, the remedies petitioner seeks involve questions of public policy to be addressed solely by the legislature, not by the courts (Silverio vs Republic, 2007)." This is arguably a judicial recognition of the LGBT community. Nevertheless, it only goes as far as that, a mere recognition, because of the fact that there is no law from which the Courts may base a favorable decision for Silverio. The case therefore suggests the need to make LGBT a legally distinct group in order for it to be granted with statutory privileges.

4.2 Republic vs Cagandahan

In the case of *Republic vs Cagandahan* (G.R. No. 166676, 2008), the Court itself "made" a new legal classification as an exception to the rules on changing one's name and sex. Jennifer Cagandahan was born female but developed Congenital Adrenal Hyperplasia (CAH), a condition where persons thus afflicted possess both male and female characteristics. He filed a petition in the Regional Trial Court for change of first name and sex. The lower court granted said petition on the basis of a showing of "very clear and convincing proofs" and that "[Jennifer] has chosen to be male (Republic vs Cagandahan, 2008)." The Solicitor General challenged the decision on the basis of lack of legal basis.

The Supreme Court classified Jennifer as an "intersex individual"[22] and carved out an exception to the laws on change of name and sex. It mentioned that:

> In deciding this case, we consider the compassionate calls for recognition of the various degrees of intersex as variations which should not be subject to outright denial. "It has been suggested that there is some middle ground between the sexes, a 'no-man's land' for those individuals who are neither truly `male' nor truly `female'." The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.

The Court further anchored its decision on Jennifer's choice of his sex.[23] That Jennifer chose to be male rather than female, when the intake of appropriate hormones could have made him conform with the sex stated in his birth certificate, the Court deferred to "dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse

the male tendency due to CAH. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female (Republic vs Cagandahan, 2008)."

4.3 Reconciling the Silverio and Cagandahan cases

The difference between the Silverio and the Cagandahan cases is simple—the latter was able to create an exception based on substantial distinctions. In the former case, the Court applied the law strictly by making immutable the sex determination of a person at birth. Sex reassignment was not recognized as a ground for changing one's sex because of the absence of a law allowing such.

In the second case, however, the immutability of the sex determination at birth was muddled by a cause which was not a ground formally recognized under the law. The Court considered the special circumstances in the case, in particular, the "dictates of nature" and Cagandahan's sexual preference to carve out an exception to the law. In effect, the decision made a new classification—intersex individuals—who, for purposes of petitions for change of name and sex, now enjoy certain privileges.

The two cases make it clear that in order to enjoy certain statutory privileges, those who wish to avail it must show substantial qualifications sought by the law. The implied challenge for the LGBT movement, therefore, is to establish itself as a distinct group entitled to statutory rights and privileges which actualize human rights.

5. Political representation of the LGBT

The need to establish a distinct legal classification was achieved politically by the LGBT movement in the last elections. After being denied twice by the Comelec in four years, the Supreme Court held in the case of *Ang Ladlad LGBT Party vs Commission on Elections* (G.R. No. 190582, 2010) that the petitioner was eligible for candidacy as a party list representative. The Court slammed Comelec's denial of Ang Ladlad's petition on the basis of moral grounds.[24] Such reasoning ran afoul with Article III, Section 5 of the *Constitution* which states that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

The Court also overturned Comelec's public morals argument. It noted that Comelec did not allege any "specific overt immoral act performed by *Ang Ladlad*" and neither has it shown that "petitioner's admission into the party list system would be so harmful as to irreparably damage the moral fabric of society."[25]

On the issue of equal protection,[26] the Court formally recognized that LGBT may constitute a valid group or classification for purposes of the Party List System. It stated:

> From the standpoint of the political process, the lesbian, gay, bisexual, and transgender have the same interest in participating in the party-list system on the same basis as other political parties similarly situated. State intrusion in this case is equally burdensome. Hence, laws of general application should apply with equal force to LGBTs, and they deserve to participate in the party-list system on the same basis as other marginalized and under-represented sectors (Ang Ladlad vs Comelec, 2010).

It must be noted, however, that the decision was specific as to sectoral representation only. The Court was quick to point out that:

> **We are not prepared to single out homosexuals as a separate class meriting special or differentiated treatment. We have not received sufficient evidence to this effect**, and it is simply unnecessary to make such a ruling today. Petitioner itself has merely demanded that it be recognized under the same basis as all other groups similarly situated, and that the COMELEC made "an unwarranted and impermissible classification not justified by the circumstances of the case…
>
> **Of course, none of this suggests the impending arrival of a golden age for gay rights litigants.** It well may be that this Decision will only serve to highlight the discrepancy between the rigid constitutional analysis of this Court and the more complex moral sentiments of Filipinos. We do not suggest that public opinion, even at its most liberal, reflect a clear-cut strong consensus favorable to gay rights claims and we neither attempt nor expect to affect individual perceptions of homosexuality through this Decision [emphasis supplied] (Ang Ladlad vs Comelec, 2010).

The Court also noted that the decision is in accord with anti-discrimination precepts embraced in international law.[27] On the fundamental issue of whether or not such precepts which pertain to discrimination against "sex" included the concept of sexual orientation, the Court observed that: "Although sexual orientation is not specifically enumerated as a status or ratio for discrimination in Article 26 of the ICCPR, the ICCPR Human Rights Committee has opined that the reference to "sex" in Article 26 should be construed to include "sexual orientation." Additionally, a variety of United Nations bodies have declared discrimination on the basis of sexual orientation to be prohibited under various international agreements (Ang Ladlad vs Comelec, 2010)." The Yogyakarta principles were merely considered as soft law.

> Using even the most liberal of lenses, these *Yogyakarta Principles*, consisting of a declaration formulated by various international law professors, are – at best – *de lege ferenda* – and do not constitute binding obligations on the Philippines. Indeed, so much of contemporary international law is characterized by the "soft law" nomenclature, *i.e.*, international law is full of principles that promote international cooperation, harmony, and respect for human rights, most of which amount to no more than well-meaning desires, without the support of either State practice or *opinio juris* (Ang Ladlad vs Comelec, 2010).

The decision was a success on the part of the LGBT movement because it was able to establish itself as a legal group, albeit only for a specific purpose, i.e. political representation in Congress. Nevertheless, the hesitation of the Court to recognize the LGBT as a "special class", coupled with international law's silence on the matter, underscore the need earlier pointed out in the *Silverio* and *Cagandahan* cases—the establishment of the LGBT as a distinct group under the law.

6. Conclusion: Shopping for their own pair of pink stilettos

This paper began with a premise: the women's rights movement and the LGBT rights movement are kindred spirits such that the development in one is a development in the other. However, the preliminary section debunked this intuitive principle by showing that recent legal developments in women's rights are inapplicable to LGBTs. The paper then perused recent jurisprudence on LGBT concerns. Juxtaposing these two sections shows why the two movements are not in perfect sync, and why, for its own sake, the LGBT rights movement should shop for its own pair of stilettos.

The argument is simple: LGBT rights need clearer bases. The Anti-VAWC Law and Magna Carta of Women are laws which find their roots in specific provisions of the Constitution and the CEDAW. These provisions and this treaty specifically recognize women's rights as a species of human rights (Anti-VAWC, s.2; Magna Carta of Women, s.2).

Consider, in particular, the following provisions of the Constitution:

> The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men (*1987 Constitution*, a.2, s.14).
>
> The party-list representatives shall constitute twenty *per centum* of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector (a.6, s.5.2).
>
> The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost. There shall be priority for the needs of the under-privileged, sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers (a.3, s.11).

> The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation (a.12, s.14).

The legal environment is different for LGBT rights. The Constitution does not make any mention of LGBT, gender or sexual orientation. There is no treaty of which the Philippines is a signatory that recognizes the LGBT group. The Yogyakarta Principle dubbed as a reflection of "the existing state of human rights laws in relation to issues of sexual orientation and gender identity" was treated only as soft law by the Philippine Supreme Court (Ang Ladlad vs Comelec, 2010).

It is not surprising, therefore, that there are more pro-women's rights laws than there are pro-LGBT rights laws. Nevertheless, the absence of specific provisions in the Constitution or international agreements does not debilitate the LGBT rights movement altogether. The said specific "foundations" only give a head start to certain marginalized groups like women. The LGBT still find comfort under the general protection of human rights also found in the Constitution (Art III, Bill of Rights) and international agreements. For example, the ICCPR provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (*ICCPR*, a.26).

These provisions are the most basic foundations of LGBT rights, and in fact, of any other group. Ang Ladlad recognizes this when it sports the slogan "Equal rights, not special rights," and wisely so. Recently, the group opposed an ordinance in Cebu which established a separate toilet for the "third sex" (Ang Ladlad, 2010).

But what is genuine *equality*? One women's rights framework offers a helpful definition:

> This report defines gender equality in terms of equality under the law, equality of opportunity (including equality of rewards for work and equality in access to human capital and other productive resources that enable opportunity), and equality of voice (the ability to influence and contribute to the development process). It stops short of defining gender equality as equality of outcomes for two reasons. First, different cultures and societies can follow different paths in their pursuit of gender equality. **Second, equality implies that women and men are free to choose different (or similar) roles and different (or similar) outcomes in accordance with their preferences and goals** [emphasis supplied] (World Bank, 2001, pp. 2-3).

Equality under the law is not just about treating everyone in the same way. It is treating people under *similar circumstances* the same way (*Association of Small Landowners in the Philippines Inc. vs. Secretary of Agrarian Reform*, 1989). Hence, equality comes with an appreciation of the distinctions of each group.

Here lies the challenge for the LGBT movement: to establish a sense of identity necessary to prove before the law that they have circumstances which significantly differ from other groups, even as against women.

The LGBT movement has already realized this early on by lobbying for the Anti-Discrimination Bill, but it should not stop there.

In this crucial period, the LGBT should cling to its identity and broadcast what makes it a distinct group in the first place. Public opinion will play an important part. Consider the following excerpt:

> A basic premise of the discussion thus far is that deliberate public policy is the prime mover for change in gender structures. Indeed, governments possess a range of instruments for catalyzing social transformations, including legal and regulatory policies. But state action also needs the broad support of society in order to effect a deep and lasting change. State effectiveness is greater when civil society groups, especially women's organizations, are able to organize and participate actively in open dialogue. In fact, behind many government actions to promote gender equality have been civil society groups providing support—or pressure—for change. And through treaties, conventions, and donor assistance the international community has supported or pressed national governments to recognize and eliminate gender inequalities (World Bank, 2001: 2-3).

Hence, the LGBT movement should not be afraid to flaunt its defining characteristics. If its constituency desires to lobby for same-sex marriages, the recognition of same-sex civil partnerships, and the expansion of the exceptions for changing one's name and sex, then the LGBT movement should do so, without any hesitation. Those desires and needs of the group, no matter how alien to the common Filipino, are what defines the LGBT movement and should be proudly donned. The public needs to be educated and Congress needs to understand exactly what the LGBT movement is about in order for it to distinguish the LGBT movement from all other groups, and, consequently, to tailor statutory privileges for the enhancement of LGBT rights.

Consider the following excerpt from a thesis regarding the women's movement written eleven years ago:

> The nationalist movement in the Philippines has gradually recognized the importance of women's liberation in its vision of social change…Yet, there seems to be a greater pull of political and national issues that the women's movement

> has been paying less attention to gender issues in social relations. Also, due to the deep-seated traditions and religious culture in the Philippines, women activities, feminists and even academics involved in women's studies have not yet developed a critique of the Filipino family, marriage and church practices leading to a systematic conceptualization of how culture reinforces female subordination. It appears, therefore, that such critique has been **consciously avoided by the women's movement and progessives** as a whole because doing so could antagonize the larger population and hence, result to **political suicide** [emphasis supplied] (Angeles, 1989).

On hindsight, the women's rights movement eventually made the said critiques on the Filipino family, marriage and the Church. Contrary to earlier fears, making the said moves did not amount to political suicide. The women's rights movement is very much alive and kicking.

The LGBT movement should take the same leap of faith. There is much to learn from its kindred spirit, and the first challenge is simple yet profound. It should go find its own perfect pair of pink stilettos, its clear legal identity, and firmly assert it in its demands for the fair and equal enforcement of human rights.

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ENDNOTES

1 LGBT stands for "Lesbians, Gays, Bisexuals and Transgenders."

2 The author is not espousing a view that the women's rights movement and the LGBT rights movement are totally incompatible. What is suggested is that the *present* statuses of the two are not in sync, such that the success of one does not automatically carry over to the other. In fact, many of the sources cited herein are products of the women's rights movement.

3 The *Yogyakarta Principles* was drafted by 29 human rights experts from 25 countries in No vember 2006. The experts have agreed that the *Yogyakarta Principles* "reflects the existing state of human rights laws in relation to issues of sexual orientation and gender identity." The *Yogyakarta Principles* also contain State recommendations.

4 Lagablab is composed of a number of organizations which include: The Library Foundation (TLF Share), Indigo Philippines, Lesbian Advocates of the Philippines, Metropolitan Community Church-Manila, Order of St. Aelred, UP Babaylan and Womyn Supporting Womyn Center.

5 (a) Support for the Anti-Discrimination Bill that gives LGBT Filipinos equal rights and opportunities in employment and equal treatment in schools, hospitals, restaurants, hotels, entertainment centers, and government offices. The bill makes discrimination versus LG BTs a criminal act.

(b) Support for LGBT-related and LGBT-friendly businesses.

(c) Setting up of micro-finance and livelihood projects for poor and physically-challenged LGBT Filipinos;

(d) Setting up of centers for old and abandoned LGBTs. The centers will also offer legal aid and counseling, as well as information about LGBT issues, HIV-AIDS, and reproductive health. These centers will be set up in key cities of the country.

(e) Support for the bill repealing the Anti-Vagrancy Law that some unscrupulous policemen use to extort bribes from gay men.

6 *Ang Ladlad LGBT Party vs Comelec*, G.R. No. 190582 (8 April 2010). "We recall that the Philippines has not seen fit to criminalize homosexual conduct."

7 *Executive Order 209 (Family Code)*, Art. 1. Marriage is a special contract of permanent union **between a man and a woman** entered into in accordance with law for the establishment of conjugal and family life [emphasis supplied].

8 It is interesting to note that Lagablab sports the credo "Equality is our agenda," and Ang Ladlad, in turn, believes in "equal rights, not special rights."

9 *Republic Act 9262*, Section 8. *Protection Orders*.- A protection order is an order issued under this act for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of this Act and granting other necessary relief. The relief granted under a protection order serve the purpose of safeguarding the victim from fur ther harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The

protection orders that may be issued under this Act are the barangay protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO).

[10] *Republic Act 9262*, Sec. 3. (c) "*Battered Woman Syndrome*" refers to a scientifically defined pattern of psychological and behavioral symptoms found in women living in battering relationships as a result of cumulative abuse.

Sec. 26. *Battered Woman Syndrome as a Defense.* – Victim-survivors who are found by the courts to be suffering from battered woman syndrome do not incur any criminal and civil liability not with standing the absence of any of the elements for justifying circumstances of self-defense under the Revised Penal Code.

In the determination of the state of mind of the woman who was suffering from battered woman syndrome at the time of the commission of the crime, the courts shall be assisted by expert psy chiatrists/ psychologists.

[11] G.R. No. 135981 (January 15, 2004). In this case, Genosa used the defense of the Battered Woman's Syndrome against charges of parricide. The Court recognized the Battered Women's Syndrome as a defense, but Genosa, failing to prove that she fell under said defense, was convicted.

[12] *Republic Act* 9262. Sec 2. *Declaration of Policy*.- It is hereby declared that the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security.

Towards this end, the State shall exert efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the Provisions of the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.

[13] *Romualdez vs Sandiganbayan,* G.R. No. 152259 (29 July 2004). "Elementary is the principle that words should be construed in their ordinary and usual meaning."

[14] *Republic Act 9262*, Sec. 3. Pyscological violence refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.

[15] Section 15 of the *IRR* lists down provisions from the *Family Code, The Revised Penal Code, Rules of Court* and the *Code of Muslim Personal Laws*.

[16] *Family Code, Art.* 71. Who exercises. — (1) The father and the mother shall jointly exercise just and reasonable parental authority and fulfill their responsibility over their legitimate and acknowledged children. In case of disagreement, the father's decision shall prevail unless there is a judicial order to the contrary.

[17] *Revised Penal Code*, Art. 334. *Concubinage.* — Any husband who shall keep a mistress in the conjugal dwelling, or shall have sexual intercourse, under scandalous circumstances, with a woman who is

not his wife, or shall cohabit with her in any other place, shall be punished by prision correccional in its minimum and medium periods.

The concubine shall suffer the penalty of destierro.

[18] Ibid., Art. 333. *Who are guilty of adultery*. — Adultery is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her knowing her to be married, even if the marriage be subsequently declared void.

Adultery shall be punished by prision correccional in its medium and maximum periods.

If the person guilty of adultery committed this offense while being abandoned without justification by the offended spouse, the penalty next lower in degree than that provided in the next preceding paragraph shall be imposed.

[19] *Rules of Court*, Rule 131. SEC. 3. *Disputable presumptions*.—The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

(jj) That except for purposes of succession, when two persons perish in the same calamity, such as wreck, battle, or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, the survivorship is determined from the probabilities resulting from the strength and age of the sexes, according to the following rules: (4) If both be over fifteen and under sixty, and the sex be different, the male is deemed to have survived; if the sex be the same, the older

[20] *Republic Act 9048*, Sec. 4. *Grounds for Change of First Name or Nickname.* – The petition for change of first name or nickname may be allowed in any of the following cases:

(1) The petitioner finds the first name or nickname to be ridiculous, tainted with dishonor or extremely difficult to write or pronounce;

(2) The new first name or nickname has been habitually and continuously used by the petitioner and he has been publicly known by that first name or nickname in the community; or

(3) The change will avoid confusion.

[21] The Court defined status as: "The status of a person in law includes all his personal qualities and relations, more or less permanent in nature, not ordinarily terminable at his own will, such as his being legitimate or illegitimate, or his being married or not. The comprehensive term *status*… include such matters as the beginning and end of legal personality, capacity to have rights in general, family relations, and its various aspects, such as birth, legitimation, adoption, emancipation, marriage, divorce, and sometimes even succession [emphasis supplied]."

[22] "Intersex individuals are treated in different ways by different cultures. In most societies, intersex individuals have been expected to conform to either a male or female gender role. Since the rise of modern medical science in Western societies, some intersex people with ambiguous external genitalia have had their genitalia surgically modified to resemble either male or female genitals. More commonly, an intersex individual is considered as suffering from a "disorder" which is almost always recommended to be treated, whether by surgery and/or by taking lifetime medication in order to mold the individual as neatly as possible into the category of either male or female."

[23] "Ultimately, we are of the view that where the person is biologically or naturally intersex the determining factor in his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex. Respondent here thinks of himself as a male and considering that his body produces high levels of male hormones (androgen)

there is preponderant biological support for considering him as being male. Sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like respondent, is fixed."

[24] The Comelec Second Division actually quoted Romans 1:26, 27, the story of Sodom and Gomorrah, and the Koran.

[25] *Ang Ladlad vs Comelec,* supra. *The* Court also recognized the unique plight of the LGBT and the fact the homosexual conduct has not been criminalized; it stated: "We are not blind to the fact that, through the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval. It is not difficult to imagine the reasons behind this censure – religious beliefs, convictions about the preservation of marriage, family, and procreation, even dislike or distrust of homosexuals themselves and their perceived lifestyle.

Nonetheless, we recall that the Philippines has not seen fit to criminalize homosexual conduct."

[26] *Central Bank Employees Association, Inc. v. Banko Sentral ng Pilipinas.* "[i]n our jurisdiction, the standard of analysis of equal protection challenges… have followed the 'rational basis' test, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution."

[27] *International Covenant on Civil and Political Rights (ICCPR),* Art. 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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THAI TRANSSEXUAL'S EXPERIENCES WITH DISCRIMINATION IN EMPLOYMENT: MIGRATION AND COMMERCIAL SEX IN THAILAND AND THE NETHERLANDS

Witchayanee Ocha

This paper investigates the working and life histories of Thai transsexual (male to female) sex workers in Thailand's sex tourist spots of Pattaya and Patpong. It also includes a narration of the situation of globetrotting Thai transsexual (male to female) sex workers who have been working in the famous Amsterdam's Red Light District. The paper is based on the concept of "the ritual of passage" (Rites de Passage by Arnold van Gennep, 1977) in describing the marginalized identities situation through the multi-sited fieldwork method in Thailand and The Netherlands. It shall discuss the notion of liminality becoming the pushing factor for the Thai transsexuals to migrate to Europe.

The author focuses on two aspects of the sexual minorities' experiences: (1) the discrimination based on their sexual orientation and gender identity in job recruitment process in homeland (Thailand), and (2) the diaspora and international connections resulting in migration to Europe (The Netherlands). The data is mainly qualitative in nature. In-depth interviews were performed with 50 Thai transsexual sex workers by tracking their lives/biographies as methodological and representational strategy (Marcus, 1995). The paper reveals that emerging marginalized sexual minorities still have limited employment prospects and find themselves channeled into the industries of entertainment and sex work. The paper contends that the sexual minorities' liminality keeps them away from engaging in the mainstream jobs, which arguably may fit their ability and knowledge. Finally, the paper concludes with the assertion that sexual minorities have been deprived of specific types of rights, especially the rights to work and to self-determination. These transsexuals have indeed attempted to shrug off their liminality through these rites of passage, just to find that they have to suffer even more as they attempts to attain salvation.

1. Introduction

1.1 Discrimination in the Homeland

Thailand has a rich indigenous history of complex patterns of sexuality (*phet-phawa*) and gender (*phet-withi*), with an intermediate category, the *kathoey*, historically being available to both males and females and existing alongside normative masculine and feminine identities (Jackson and Sullivan, 2000, pp. 3). As some Thai scholarly works seek to explain the existence of *kathoey*, this paper accepts their existence as a phenomenon and then seeks to explain the cause of their existence.

Thailand is reputed to be a tolerant society in terms of personal behavior, including homosexuality, as long as one does not 'flaunt' such behavior. There is very little open and frank space for discussion about the realities of sex, especially homosexuality and other gender variants [transgender [1] , transvestite [2] , transsexual [3], inter-sex people [4]] in Thailand, as public revelations of what are perceived to be private and personal affairs are not considered proper" (Jackson, 1995 cited in Sinnot, 1999, p. 99). To date, there have been very few academic studies on the context of sexual minorities in the country. Therefore, this paper aims to investigate on the working life of Thai transsexuals (male to female) in the sex industry centers such Pattaya, Patpong, and other places abroad specifically in the Red Light District of Amsterdam in The Netherlands). It employed in-depth interviews to track their lives/biographies as methodological and representational strategy (Marcus, 1995).

The paper is based on the concept of "the ritual of passage" (Rites de Passage) as a general theory of socialization. This concept was first formally enunciated by Arnold van Gennep (1999). Anthropology defines "the Rites of Passage", (Turner, 1964, 2000 [1969] upon Van Gennep's (1999) [1909]) as a denotation of rituals marking the transitional phase between childhood and full inclusion into a tribe or social group (Garces-Foley, 2006). Modern conceptions of liminality appeared in van Gennep's Les Rites de Passage (1909) and later developed by Victor Turner. Rites of passage happen in three basic stages: separation, limen, and reincorporation. In the first stage, separation consists of symbolic behavior signifying the detachment of the individual or the group from either an earlier fixed point in the social structure or from an established set of cultural conditions (Turner 1974). During the liminal period, the state of the ritual subject (the liminar) becomes ambiguous, neither here nor there, betwixt and between all fixed points of classification. In the third phase, the passage is consummated and the ritual subject re-enters the social structure, always at a higher status level. In this stage, ritual degradation, as well as elevation, occurs (Turner 1974).

In this paper, the concept is applied to describe the context of marginalized identities. This was verified through a multi-sited fieldwork method in Thailand and The Netherlands in which the notion of liminality becomes the pushing factor for the Thai transsexuals

to migrate to Europe. Vogel pointed out that "some authors, though, go beyond a metaphorical use of liminality and rites of passage when aiming at an interpretation of contemporary phenomena" (Vogel, 2009, p. 368).

Correspondence to Vogel's study, the main interpretative axis in this the paper is "the ritual of passage, inherent both in *transformistas*' (Venezuelan version of Thai *kathoeys*) migration from Venezuela/Thailand to Europe and their bodily transformation from male to female" (Vogel, 2009, pp. 368).

Kempadoo stated that "Migration is the road many take to seek other opportunities and to break away from oppressive local conditions caused by globalization" (Kempadoo, 1998, pp. 17). The paper highlights the fact that discrimination against transsexuals during job recruitment processes in their homeland has pushed them into a frantic search of greener pastures abroad. Furthermore, all respondents were reported to have sent their earning from their sexual services in The Netherlands to their homes in Thailand.

From the Thai cultural perspective, this implies their "purchase" of respect or their way to elevate their personal status in their family, community and even in the Thai society. Finally, the paper shows that migratory Thai transsexual sex workers usually experience poor working conditions without the protection of the labor laws. This means that their lives do not lead to what they imagine as a context of "greener pasture".

1.2 Migration to Europe

The figures from Siriporn (1986), although outdated, provides some estimates. The assumption here is that these relative proportions would still hold true until today, although the numbers may have increased in an era of rapid globalization. Siriporn states that the number of commercial Thai sex workers flowing in and out of the Kingdom of Thailand is difficult to establish, but she estimates that in 1986 there were several thousands of Thai sex workers working abroad. "Although the number of Thai sex workers working outside the country is undoubtedly lower than the number working within the country, it is also true that an increasing number of Thai sex workers are seeking opportunities outside the country. In part, this must be viewed as a consequence of internationalization of the Thai economy" (Siriporn, 1986, p. 23). Siriporn notes that Thai sex workers are highly valued abroad because they are willing to work for lower fees and are less emancipated (i.e. more submissive) than sex workers of other nationalities. "The reasons that transsexuals get involved in the sex industry are usually failures to find jobs in government or the private sector, not because they do not have the qualifications but because of their choices of who they want to be" (Slamah, 1998, p. 212).

Globalization does not only make the sex industry visible in Thailand but it also creates a new way of interacting with its clientele (tourists/foreigners). Sexual exploitation comes under many guises such as the mail order bride industry, in which agencies in

the western world offer chances for migratory Thai transsexual sex workers to fulfill the sexual demands in more developed countries. Globalization through tourism has had a profound effect on Thailand including the issues of race, gender, class and sexuality and how these issues intersect with the global economic inequalities to shape the informal sex tourism industries in developing countries. This is indeed seen as a growing problem.

Presently the sex entertainment industry attracts these emerging identities to get involved in an industry where they can express their sexualities, to become what they want to *be*, and to find others who share similar experiences, identities or sexualities. Based on the multi-sited fieldwork research, evidences show that the globalization of the sex industry is opening new possibilities for "employment opportunities" to sexual minorities. This paper suggests that marginalized identities have been pushed towards the direction of the entertainment and sex industries although they should have the right and freedom to access employment in mainstream industries which fit their interests, capabilities and skills.

2. Gender and Qualitative Methods

In 2006-2009, the author interviewed 25 male-to-female transsexual (full transformation) sex workers in the famous sex tourism spots in Bangkok and Pattaya, Thailand. Furthermore, the author also explored the situation of migrant Thai transsexual sex workers in the Amsterdam's Red Light District during her student exchange program in Europe in 2005 which was funded by the European Union (EU). The Netherlands was chosen for its policies on sex work, which has been legalized together with the usage of some lighter forms of drugs such as marijuana. In this light, the author interviewed 25 Thai male-to-female transsexual sex workers who were working in the Butterfly Club in De Wallen, Amsterdam's Red Light District. It has been said that Amsterdam is the sex capital of Europe. The Crime Prevention Agency (2006) indicated that approximately 40,000 visitors per day visited the Amsterdam's Red Light District. "It is well known that Thai sex prostitutes have found ways to penetrate many European capital cities. *Kathoey* prostitutes, although, again, by comparison, their members are small. Amsterdam is a favorite destination for them and they have an established presence there" (Totman 2003, p. 108).

The primary method of gathering data is through in-depth interviews. Respondents are strongly encouraged to provide their expert or semi-expert opinions regarding their gender/sexual identities. Most respondents have had more than a year of experience in the sex tourism industry. Before engaging in any research activity, the author first asked their permission and carefully recorded and analyzed the respondents' replies. Later, the author showed the analysis conclusions back to the respondents for verification. The names mentioned in this paper have been slightly changed to protect the identities of the respondents.

3. Findings

Despite fully realizing the life of a post-operative woman, legal documents still classify them as male. These documents include passports and national identification cards. This raises many problems for the transsexual on a number of fronts. Employment is often refused when official documentation reveals their male biological identity. Moreover, traveling can be difficult when officials have to question the feminine personality carrying a male passport. This will often leads to refusal of entry to other countries, limiting travel opportunities for *kathoey*. Relationships are also affected as same sex marriage is not legalized in Thailand. K*athoeys* always engage in long term relationships with men.

These symptoms reiterate the liminality these kathoeys suffer not only in their homeland but also in the far-away places where they can possibly enjoy what Aizura (2006) calls "the imagined community of (trans)sexual citizenship". State borders like the customs are spaces where those who do not 'belong' are separated from those who are 'socially included'; everyone must produce the right papers and look or act what is socially accepted. If geographical borders cannot be divorced from the integrity of 'home', then the boundaries between gendered bodies raise the specter of not being 'at home' in one's body (Aizura 2006, p. 289).

3.1 Rites of Passages of Transsexuals Sex Workers (Full Transformation)

3.1.1 Liminality in Discriminated Occupational Opportunities

The study discovered that the subjects living in Thailand have ages ranging from 17 to 37. Nine had obtained high school education or higher, while the majority had quit school at grade nine or lower. Many of them wished to have a female physical identity since childhood. However, they tried to avoid showing gender-bending behaviors to their families. The general characteristics of their families and the ways they have been raised do not differ from practices of other families in general.

Many transsexuals, often labeled as ladyboys or *kathoey*, are forced into periodical working as sex workers in the sex industry in order to pay for their Vaginoplasty operations and to fend for their basic living needs such as house rent and food. This industry also offers these *kathoey*s the potential of obtaining greater income than those offered by mainstream industries. Some *kathoeys* deliberately entered the sex trade as a route to a better standard of living. Performing the female role when engaging with paying customers is often seen by a *kathoey* as confirmation of their femininity. "Incidentally, the heavy involvement of *kathoey*s in sex works is nowadays reflected in the plethora of pornographic websites displaying Thai 'ladyboys'; and these sites are almost always owned and operated by Westerners" (Preecha MD and Prayuth, 2004, p. 1403).

"Within the workplace, *kathoey*s have also frequently suffered implicit and explicit discrimination both by employers and other staff" (Preecha MD and Prayuth, 2004, p. 1403). Some do manage to make themselves successful in business but many find themselves edged out of the mainstream jobs associated both with male and stereotypically female professions. Prejudice often causes them to be marginalized and ostracized by others, and this marginalization often forces them into sex trade.

3.1.2 Mama-Contract's Recruitment Practices on Gender and Sexual Identity

It is hard to distinguish Transsexuals or ladyboys from naturally-born women; though some pundits reveal some key characteristics such as "their height [bearing in mind that most Thai women are very petite so a ladyboy can appear in the same height as a western woman rather than a western man], signs of an adam's apple, the shape and size of wrists and hands" (Totman, 2003, pp. 147), muscular shoulders and arms, and a deep voice.
The working life of the transsexuals depended on their statuses and the nature of the employment they are involved in. The employment opportunities and subsequent progression within their chosen field are more limited than those of natural males and females, especially those working for private companies and the public sector. Superiors and employees in the latter types of employment do not easily accept the presence of transsexuals despite their tendency to work harder to fit in and become more useful employees. The most crucial aspect to be addressed regarding the transsexuals in employment is discrimination.

Transsexuals need understanding, acceptance, justice and a positive attitude from society and from colleagues they work with. Currently, most members of the Thai society have not fully absorbed and understood these sexual dimensions, especially gender dimensions. One interviewee explained her experience of discrimination in employment outside the sex industry as the followings .

> "I experienced discrimination during a job application at a factory in Bangkok. When I submitted my identity card with a title of "Mr," one employer shouted at me, '*Hey Toot* (faggot) Get Out'. People think I have mental problems, of being a '*kathoey'*. They didn't accept me for the job not because of my abilities but because of my gender identity.
>
> I then decided to go to where most transsexuals are welcomed, like the cabaret shows. Pattaya is really the place for us; we get respect as we attract tourists to visit Pattaya" (Yai, 30 year-old, an artiste or dancer in Pattaya).

Cabaret performing is among many dream careers for many transsexuals. This certain job has encouraged them to behave in a perfectly hyper-feminine manner which leads to their transformation into becoming professional transsexuals. Most artists perform on stage until around 11.00 pm and are then free to socialize with tourists. Some of the

respondents revealed that they were searching for good opportunities to go out with sex tourists (selling sex with the prices vary from 2,000 to 5,000 baht per night). The most attractive artist can earn extra money from tips from tourists who take their photos in front of the theatre. All these earnings will be collected and shared with other artistes, especially those who are unable to perform, the old and the unattractive ones. A photo with a single transsexual costs tourists around 40 baht. Yet tourists usually pay more than the average price. An earning of 100 to 500 Thai Baht per photo is a common occurrence.

Many respondents reported a feeling of insecurity in terms of comparing their work with mainstream jobs as they have experienced discrimination in many aspects. One respondent felt insecure to co-exist with straight people in the university. She was looking for advice from her (transgender) lecturer during the time she was studying. Finally, she decided to quit her studies to undergo Vaginoplasty operation in order to become a transsexual (full transformation).

> "It was a very confusing period when I was in the final year of my bachelor degree studies. At that time, I had long hair and breasts. I wore skirts in the university. I was afraid of what would happen to me being *kathoey* in this university. I decided to talk to a lecturer who was also a *kathoey* when I had problems dealing with my gender identity and studies.
>
> Once, I heard from my close friend that this teacher knew someone who could help me make my dream come true. This person proposed the financial support for a sex-change operation but with a trade off which is to provide sexual services in Amsterdam, The Netherlands. I took three days me decide and finally I accepted it. What was my reason to accept this proposal? I was not happy to live with the straight people in the university. I wanted to be what I was born to be……I was born to be a *kathoey*" (Nok, 26 year old, an artiste in Pattaya).

When they were asked about how they came to be involved in the sex industry, many of them said the sex industry offered more opportunities for a better life.

> "It was the only job offered to me after I had completed the sex-change operation. I worked for a few years in Amsterdam's Red Light District until I was able to pay back all my debts s. I still carried on with this job after I returned to Thailand. I needed the money to maintain this anatomy. When people ask how many times I undergone operations…I usually say at least two (smiling)" (Nok, 26 year-old artiste in Pattaya).

Most respondents shared that they regularly need a huge sum of money to maintain their new physical look and built. Well-known problems after the surgical operations could always occur and the cost is usually unimaginable. Many of them experience some unsatisfactory outcomes after surgery, which have to be undone. There will then be a period of recovery before the normal procedure can be re-applied, and many surgeons

reveal that the corrections are usually more difficult to accomplish than the original surgery (Preecha MD, 2004).

One of these unsatisfied customers is Nira, a 32 year-old sex worker in Patpong, who had to have her silicone breasts removed when the size and shape did not turn out right just three years after a series of surgeries. She said that many of her transsexual friends experienced unsatisfactory post-operation results but some did not have the money to correct them. Thus, selling sexual service is one way to augment finances for their corrective surgeries.

Tina is the most senior in a group of the transsexual sex workers. She has had surgeries three times in a span of ten years. Her female genital has undergone operations with different surgeons. She undergoes the required regular health check and its specific treatments. She pays more to maintain her new physical anatomy. She reveals that the long-term side effects after surgeries can worsen as she aged. This fact has persuaded her to become a long-term patient; requiring lifetime medical treatments in order to maintain her best health condition.

In this regard, an important question surfaced. How do *kathoeys* support themselves and their families in light of employment difficulties? Occasionally, they would find employment in a stereotypically set of female jobs such as hairdressers, shop assistants or waitress. Many of them find their way into the cabaret shows as the dancers wearing flamboyant costumes in family-oriented shows. As for the respondents who have been working in the Thailand's sex tourism, all of them typically send their remitances on a monthly basis in amounts ranging between 2,000 and 5,000 baht. As for the Thai transsexual sex workers who tried to seek for greener pastures in the Netherlands, all shared that they normally send amounts ranging between 50,000 and 100,000 baht back to their homes in Thailand. Some transsexuals are lucky to have started their own small businesses, like a floral shop or market stall, after returning to Thailand.

3.2 Gold Rush Abroad: Thai Kathoeys Turning Globetrotters

Kartin Vogel (2009) points out that migration to Europe enables *transformistas* (Venezuelan version of Thai *kathoeys*) to invert the sexual minority's situation in Venezuela.

"*Transformistas* uphold the binary gender-system rather than contesting it since they depart from core gender identities when embodying feminine qualities in order to seduce masculine men" (Vogel, 2009, p. 737). Similarly, as revealed by the Thai respondents, many transsexuals breakdown the gender dichotomy by mixing and matching or even diversifying their sexual practices to become a effective sexual service providers in European sex market, particularly in Amsterdam's Red Light District, The Netherlands.

The author has discovered some of these Thai transsexuals who went on to join the "Gold Rush" for big money in Amsterdam's Red Light District during the past six years. Kelly, for example, is a 40 year-old Thai male-to-female transsexual who runs a club in De Wallen, Amsterdam's Red Light District. After being informed of the purpose of this research, Kelly allowed a series of in-depth interviews with her 25 Thai male-to-female transsexual employees. Kelly is a senior transsexual who has been working in Amsterdam for more than 20 years. It was difficult to notice her transsexualism as she looked like a perfect woman. Kelly explains that she received her sex re-assignment surgery when she was 17, and she believes that she did not undergo the phase of "being a mature man". She revealed that she jumped from being a boy to being a woman. She believes that this fact allowed her to resemble into a woman in a more perfectly way than the other more mature transsexuals who had sex-change operations. She adds that her Vaginoplasty operation was funded by a Dutch agency. They made a deal with her. She had to pay off her debts by providing sexual services for three years in Amsterdam. After the contract ended, she continued to work in Amsterdam again with the hope of changing her sexual status into "Miss", which is not normally allowed by the Thai law.

Kelly explains that the male personality indicated in her passport had been bothering her all her life. She explained that the conflict between her feminine appearance and passport information increased the possibility of her being refused entry to a destination country, and could even open chances of her suffering the indignity of anatomical inspection at immigration offices. Presently, Kelly has changed the male status on her Dutch passport into "Miss," which is allowed by the Dutch law. (The Dutch law allows immigrants and foreigners to apply for Dutch passports after certain requirements had been fulfilled.) She is proud of her new title. This was evident when she would always present her passport several times during the four weeks of interviews at her club.

Another narrative is the exploitation case of Prim, a Thai transsexual whose reason to travel to Amsterdam was different from other respondents. Prim traveled to Amsterdam with the help of her Dutch lover who later became her pimp. Prim met him during his holiday in Pattaya where she was working as a waitress. Her lover invited her to meet his family in Amsterdam. As soon as she arrived in Amsterdam, the customers were queuing up for her sexual services, as arranged by her Dutch lover. Since then, her lover kept her passport and convinced her that she needed him to renew her visa, and thus she could not run away from him. A few Dutch customers already offered her help to escape from her lover during the first year of her 'job'. She was too afraid of him, and she was more scared that she might run into an even worse situation outside. After two years, she gathered the courage and strength to ask help from Kelly to free her from her Dutch lover.

Prim needed 15,000 Euros as a quick cash to trade with her passport, and Prim promised to pay back this amount to Kelly over two years of working in her club. Prim shared about her new life at Kelly's place, the Butterfly Club: "*Thai transsexuals usually live together here to feel empowered...It's not easy to work in a foreign country without connections with groups with senior peers."*

Prim explained that although sex work is considered legal in the Netherlands, this status does not apply to the immigrant Thai sex workers. Legal sex workers often stand at the windows in slightly darkened rooms waiting for customers. The bed is located behind the room and the light is turned off when they are entertaining their customers. Sex workers who work under legal conditions are mainly Dutch and some immigrants from the Eastern European countries. Although the way that the sex trade functions in Amsterdam provides safe conditions for the sex workers as they do not need to go out with tourists as they do in Thailand.

They reveled that the rental cost for a windowed room is very costly. Most Thai sex workers cannot afford to operate this way without Dutch agency sponsorships since a "European Union Passport" is required to rent one windowed room. Thai sex workers are likely to be gathering in a well-known and advertised place. Interestingly, the author discovered an advertisement of a club of Thai sex workers and tried to enquire in Thai language. She found out that none of the sex workers was a Thai. Sex workers in that particular club came from other Asian countries. This shows that European tourists imagine *'Thais'* as the race of which provide premium sexual fantasies. Moreover, these tourists are unable to distinguish between the Thais and other Asian countries' citizens. Luk Ked, a 20 year-old with a year of experience as a sex worker, is a transsexual who joined the gold rush in the Netherlands with the help of senior *kathoeys* working as managers for the Thai transsexual Club called The "Butterfly" located in the Red Light District.

> "I'm just lucky…I knew the right person who could help me to get a job. Some Thai sex workers get cheated by mafias or gangsters abroad.
>
> I've learned a lot from my senior. At least, I know how *kathoeys* look like after reaching 35 years old. We need a lot of money to maintain this body and to cope with all the consequences and problems when we get older."

Kae, 29 year old, who has a few months of sex work experience, reported that she joined the Gold Rush in several countries such as Germany, the Netherlands, Singapore, etc. However, Kae went to work abroad temporarily only during low [tourism] seasons.

> "I go to these countries through '*mae tact*' (contract) for a short period (2-3 months). I prefer to work in Thailand, because nowhere else is better than home. But then there are fewer tourists in the low seasons. I earn 200,000 to 500,000 baht per work trip abroad. Then I send half of my earnings back home."

Based on the Buddhist understanding, many of the respondents viewed the life of transsexual as a life of punishment. They usually explained that their lives are hanging on the margins of society, and the fact that they could not marry and have kids often make them emotionally sensitive. Their relationships are usually affected by this emotional sensitivity. This prevented them from sustaining a lasting and stable relationship as a couple with their 'lovers.' They usually see themselves as prisoners under a dire sentence from which there can be no remission in this life. The only glimmering light of redemption can only be achieved in the next life. This might be one of the many reasons why all of the respondents send remittances to their homes to support their family members, members of society, and even donate money to temples. This is their way of gaining more merit and hope for the better position in the next life. The other explanation is that the remittance sent back home was a means to negotiate for societal acceptance. This is a statement of opening oneself to society after a long arduous time of hard work in the foreign lands.

Although majority of the respondents are satisfied with their earning, they still complain about the difficulties of working in a foreign country. Majority of the respondents expressed feelings about their working life in Amsterdam Red Light District:

> "It was not easy working abroad especially in sex industry; I feek insecure, lonely and it was difficult if I get sick or get into trouble there" (Kae, 29 year-old transsexual sex worker in the Netherlands).

Statements like this imply that working abroad do not assure of the "Gold Rush" life abroad. Indeed, the migratory Thai transsexual sex workers were experiencing poor working conditions and working without the protection of any labor laws.

Despite the apparently rather successful attempt for a Gold Rush, these sex workers were still facing a different kind of liminality in the foreign lands. The liminality arises when the success to attract male clients is clearly declining when the new fresh sex workers arrive. As conceptualized by Vogel (2006, p. 38) as two strategies to face this liminality, Thai sex workers also follow the similar strategies. First, these sex workers must continuously refine their feminine beauty through expensive cosmetics procedures. Luk Ked, the 20-year old, for example, states her constant need for funds to maintain her feminine beauty as she is aware of the ill-effects of aging. Kae, the 29 year-old, uses the second strategy called peripatetic migration (Vogel, 2006, p. 38) through working under short-term contracts (2 to 3 months) with *mae tact* (mother contract, mama-san) to move around several countries including her homeland.

4. Conclusion : Rites of Passage of Kathoeys into Globetrotting Beauties

Although Thai society has apparently got used to the reality of transsexuals as "Third Gender", inequality still persists. Transsexuals actually face many hardships in terms of realizing education, travel, marriage, employment, and other major aspects of life. Many of these problems stem from the fact that transsexuals appear as females amidst documents revealing them as legally male. Presently, these transsexuals have limited employment prospects and find themselves channeled into the industries of entertainment and sex work. These are the rites of passage they choose to traverse ways of changing their status 'at home' in Thailand. Troubles with their families, migration to other places and bodily transformation lead them into various forms of liminality: ironically the achievement of perfect femininity produces and insurmountable hiatus between their beauties and their male official identity.

One important fact signifies the apparent free-choice perspective of the majority of Thai transsexuals who have experienced job discrimination in their homeland and turn to seeking for greener pastures abroad. Transsexuals' engagement with sex work, despite its negative implications, means economic autonomy, freedom to experience sexuality, and non-conformity with sex/gender norms (Vogel, 2006, p. 382). Furthermore, remittances sent back to Thailand is their way to "purchase" the full right to sexual and gender autonomy within their families and communities. By providing financial support, they are able to 'buy' a space for queer sexual autonomy within a hetero-normative culture where in family ties remain central to queer identity and sense of self-worth" (Witchayanee cited in Jackson 2011, pp. 202). However, the migratory Thai transsexual sex workers still experience poor working conditions and are not protected by any labor laws. Their strategies of facing decreasing incomes, due to regular maintenance of feminine beauty and peripatetic migration, have created another kind of liminality abroad. Their life paths thus resemble a search for identity, a kind of "neither here nor there" (Vogel, 2006, p. 382), and an attempt to transcend durational time.

Before they migrate to other places, to shrug off their 'liminal' status with associated marginalization and discrimination, these transsexuals were just like other Thais of similar economic background. They were stigmatized due to their sexual identity and gender. Now a part of the globetrotter segments in their society, they remit quite a high amount of cash back to their families at home. Thus they can 'negotiate' their previously liminal status at home vis-à-vis those surrounding their native lives.

In the backdrop of these quiet but real stories, the decision of the UN Human Rights Council to pass a historical resolution that seeks equal rights for all regardless of sexual orientation on 17 June 2011 is just a drop of morning dew in a thick forest of marginalization and discrimination. The resolution "affirms that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights

and freedoms ... without distinction of any kind" (The Universal Declaration of Human Rights 1979, article 27(1)). "It also commissions a study on discriminatory laws and violence against individuals based on their sexual orientation and gender identity" (Straits Times, 2011). Given the dark stories of the colorful lives of the globetrotting hyper-feminine Thai transsexual sex workers, this is arguably a rather modest mark of progress in attempts to end the rampant discrimination, marginalization, or violence against those with different sexual orientations and gender identities.

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ENDNOTES

[1] 'The term 'transgender' is widely used to encompass transsexual people, cross-dressers or intersex'(Tirohl, 2007, p. 287) : 'to described those who do not conform to the expected roles of either male or female' (Chau and Herring 2002, p.333).

[2] 'Transvestite' is usually a heterosexual men who dress as they think women dress, and who are out in the open about doing such a deed.

[3] Transsexual (MTF) is a male-to-female transgender who have had full sex reassignment surgery to be a full female (outwardly appearing).

[4] 'Human beings whose biological sex cannot be classified as clearly male or female' (Money and Ehrhardt, 1972; Domurat D.A. 2001).

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GOOD PRACTICES FOR THE IDENTIFICATION, PREVENTION AND REDUCTION OF STATELESSNESS AND THE PROTECTION OF STATELESS PERSONS IN SOUTHEAST ASIA

Laura van Waas

This paper provides an overview of good practices relating to the identification, prevention and reduction of statelessness and the protection of stateless persons in Southeast Asia. It covers the following countries: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. The paper provides a description of how the laws, policies and practices of Southeast Asian countries have helped to address statelessness and highlights some of the key lessons learned. It also discusses some remaining challenges that the region's stakeholders face as they seek to fully address problems of statelessness in the future.

1. Introduction to statelessness in Southeast Asia

On the global scale, interest in statelessness has steadily increased over the past few years. This trend reflects the growing awareness that statelessness can have harmful consequences for the lives of individuals and the fabric of communities. Statelessness can also strain inter-State relations, for instance because it may lead to forced displacement. Moreover, statelessness is a truly global issue, with no region left unaffected, including Southeast Asia.

Thanks to the growing attention the issue is receiving from States, civil society, the international community and affected populations, there has been significant progress, for instance in terms of putting in place safeguards to prevent statelessness or resolving existing situations. Nevertheless, there are an estimated 12 million stateless persons spread across the globe (UNHCR, 2009e). In addition, policies and practices can be identified in many countries that may create new cases of statelessness or allow for perpetuation of statelessness from one generation to another.

The heightened interest in statelessness is welcomed, since further effort is evidently needed to comprehensively address the issue. To this end, it is helpful to consider what lessons can be taken from the advances made in different countries. This is the focus of the present paper: to discuss good practices for the identification, prevention and reduction of statelessness and the protection of stateless persons in Southeast Asia.

1.1 Terminology and definitions

Nationality is the legal bond between a person and a state, also known as citizenship. In some countries and contexts, the terms "nationality" and "citizenship" are used to refer to other characteristics. However, when it comes to discussing statelessness, the crux of the matter is whether a person enjoys a nationality in the legal-political sense. In this paper, as in most reports relating to statelessness, the terms nationality and citizenship are used interchangeably and refer to membership of a state.

> A **stateless person** is a person who is not considered as a national by any state under the operation of its law.

A stateless person then, is someone who does not enjoy the legal bond of nationality with any state. In effect, a stateless person is a non-national in every country in the world. The above definition of statelessness has been codified in the 1954 Convention relating to the Status of Stateless Persons (article 1). This definition is now also recognised to be customary international law, meaning that it should be applied by all states regardless of whether they are parties to the 1954 Convention. In other words, the identification

of a person as "stateless" should always be on the basis of this definition.[1] This will facilitate the enjoyment by stateless persons of their rights, as set out under domestic and international law. It will also ensure that situations are comparable and that good practices become visible.

When applying the definition of statelessness in practice and deciding if a person is considered as a national by any state *under the operation of its law,* it is important to not only look at the content of relevant nationality law. How the legal provisions are interpreted and applied, by the state in a particular case, should also be considered. This means studying how the administrative authorities and the courts work with the nationality law when they apply it in practice. In some cases, but certainly not always, a stateless person may *also* be undocumented, hold an irregular immigration status or qualify for protection as a refugee. The fact that a stateless person's circumstances can also be characterised through the use of other terms has no bearing on the finding of statelessness.

1.2 Stateless and at Risk Populations in the ASEAN region

This paper looks at statelessness in Southeast Asia. The focus is on the ten countries that are presently members of the Association of Southeast Asian Nations (ASEAN): Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. In terms of statistics, data suggests that this region is significantly affected by statelessness. UNHCR has flagged the existence of a stateless population in eight of the ten ASEAN states (UNHCR, 2009e). Although there are gaps in the reporting of exact figures, information from UNHCR and other sources indicates that the stateless population of several countries in the region numbers in the thousands or even tens of thousands. This initial window into statelessness in the ASEAN region suggests a problem of substantial magnitude.

Regardless of the question of numbers, it is possible to gain a sense of the problem of statelessness in the ASEAN region from various factors on the ground. To begin with, the colonial era has left a mark on Southeast Asia. As the contemporary independent states emerged, there were difficult questions of national identity and belonging to answer. The case of the Muslim population of northern Rakhine State – a group often referred to as Rohingya – is illustrative of the danger that statelessness can emerge in this context. Since gaining independence, Myanmar (also known as Burma) has not recognised this ethnically, linguistically and religiously distinct minority as full members of the state. When a new nationality law was passed in 1982, the Rohingya were not included among the 135 "national races" granted full citizenship. They also faced great difficulty establishing an entitlement to nationality under any of the other provisions of the law. When the state started to issue Citizens Scrutiny Cards to all Myanmar nationals from 1989 onwards, the Rohingya were not provided with any cards, leading to the conclusion that the government considered them to be foreigners (MRP, 2003; RI 2009). Other countries in the region have faced a similar challenge in successfully incorporating ethnic

or indigenous minorities in the body of citizens. In some cases, the state's approach has raised concerns about statelessness. In Indonesia, for instance, efforts to ensure that the country's ethnic Chinese minority are recognized as citizens and issued appropriate documentation are ongoing (RI 2009; US Dept., 2010d). Concerns have also been flagged with regards to access to nationality for ethnic Chinese in Brunei Darussalam (MRGI, 2008b; US Dept., 2009a; Freedom House, 2010). Meanwhile in Thailand, a proportion of the hill tribe community, comprising various ethnic and linguistic groups, has yet to acquire citizenship (CCPR, 2005; UNHCR, 2009b; RI 2009). Some indigenous groups in Cambodia may reportedly also have had difficulty establishing their nationality (CERD, 1998).

Historic and modern patterns of human migration, across the sometimes porous borders of ASEAN states, have added a layer of complexity to the question of access to citizenship.[2] In regulating access to citizenship governments need to determine which groups "belong" to the state. While conferring nationality to those with a clear, enduring link, states may decide not to include more recently arrived migrants. They are seen, instead, as a foreign presence. In practice, however, it may be difficult to differentiate between persons with a longstanding connection to the state and individuals who have settled there more recently – especially if there has not been a comprehensive civil registration or documentation system in place. Moreover, even within one or two generations after emigration, individuals may no longer be considered citizens by their state of origin. Consider the example of Vietnamese women who gave up their nationality when they emigrated to marry a foreign man and found themselves stateless when the marriage broke down (RI 2009; US Dept., 2010g). Where migrants are or have become undocumented, the risk of statelessness is heightened because it can become very difficult to establish a tie with any state – as can be seen today in the situation of children of Philippine and Indonesian migrant workers in Sabah, Malaysia (RI, 2007; UN HRC 2009a).

Another issue generating a risk of statelessness in ASEAN countries is the often inadequate coverage of birth registration systems. UNICEF has estimated that 17% of births, an equivalent of 5.1 million children per year, go unregistered in the East Asia / Pacific region (UNICEF, 2007). In some ASEAN states, the registration rate is well below even this average. For instance, UNICEF statistics point to 71.5% coverage in Lao PDR, 64.9% in Myanmar and just 55.1% in Indonesia. Moreover, particular difficulties are experienced by children born within isolated, ethnic minority, migrant or refugee communities (CRC, 2003a, 2007 and 2009). The lack of birth registration renders children significantly more vulnerable to statelessness because it leaves them without proof of place of birth, parentage and other key facts needed to establish their position under the nationality law.

Finally, a brief examination of nationality legislation reveals that ASEAN countries generally do not uphold adequate safeguards to prevent statelessness. For example, only

half provide for any right to acquire citizenship on the basis of birth on state territory and there are inadequate safeguards in place to prevent statelessness in the context of the renunciation, loss or deprivation of nationality. These and other shortcomings in the region's nationality laws will continue to contribute to problems of statelessness in the region until they are addressed.

On the other hand, it is important to acknowledge that there have – especially over the course of the last decade – been many initiatives within the region that have had a highly positive impact. As explained, these examples of ASEAN states' response to statelessness form the central focus of this paper.

1.3 Building a response to statelessness

According to UNHCR, there are four aspects or "pillars" to a response to statelessness: identification, prevention and reduction of statelessness and protection of stateless persons (UNHCR, 2006). This conceptual framework is an invaluable tool in understanding how statelessness can be addressed.

Identification:	What methods can be used to "map" the situation of stateless persons and individuals at risk of statelessness?
Prevention:	What can be done to avoid *new* cases of statelessness?
Reduction:	What measures can be taken to resolve *existing* cases of statelessness?
Protection:	What is needed to ensure that stateless persons enjoy their fundamental rights, pending a comprehensive solution to their situation?

Thus, for instance, the identification of statelessness may be accomplished through a specially tailored population survey while the reduction of statelessness may be achieved by helping stateless persons to access naturalisation procedures. It is important to realise that activities in one pillar can also help to achieve objectives under another. One example is the issuance of identity documents to stateless persons. This can have an immediately positive effect in terms of *protection,* while also laying the groundwork for the *reduction* of statelessness in the future by ensuring that these individuals have proof of their existing ties to the state. As such, it can be helpful to consider whether there is scope to serve multiple objectives through the design or implementation of a particular activity. After offering a brief overview of the tools that the international legal framework provides for addressing statelessness, this paper discusses regional good practices for each of the four pillars.

2. International legal standards relating to statelessness

International law gives states the tools that they need to identify, prevent and reduce statelessness as well as to protect stateless persons. In terms of identification, it has already been noted that the definition of a stateless person can be found in a dedicated international instrument, the 1954 Convention relating to the Status of Stateless Persons. Moreover, this definition has become customary international law and should therefore form the basis for the identification of stateless persons in all states, regardless of whether or not they are state parties to the 1954 Convention.

Where the prevention and reduction of statelessness is concerned, the central international standard is the right to a nationality. This is now recognised as a fundamental right to be enjoyed by everyone, everywhere. Virtually all of the major, contemporary human rights instruments include a provision inspired by article 15 of the Universal Declaration of Human Rights, which simply states that "everyone has the right to a nationality". This development means that, under international law, states are obliged to do what they can to avoid statelessness. Several concrete norms have been formulated which give further content to this ambition, including the elaborate safeguards compiled within the 1961 Convention on the Reduction of Statelessness. Therefore, while states are generally still free to regulate access to nationality as they see fit, international law now imposes certain limits on this freedom and provides important tools to ensure that no one is left stateless.

The same body of human rights law is also highly relevant to the question of protection – of how states should treat people who nevertheless end up stateless. According to international law, nationality is no longer the primary basis for the enjoyment of rights. States must respect and protect the human rights of all persons under their jurisdiction, including non-nationals. There are a few exceptions, where rights are specifically ascribed to "citizens" under international law. Stateless persons may be excluded from such rights as are reserved to citizens but should enjoy all other human rights without discrimination.[3] This legal framework is complemented by the 1954 Convention relating to the Status of Stateless Persons that deals specifically with a number of issues regarding the rights of stateless persons.

2.1 Human rights law

ASEAN states have expressed their commitment to address statelessness and its consequences through their ratification of a range of international human rights instruments. All are, for instance, state parties to the Convention on the Rights of the Child (CRC). This instrument elaborates the right of every child to a nationality – as well as the right to be registered at birth, a valuable tool in the prevention of statelessness – in its article 7. It furthermore provides for the non-discriminatory enjoyment of rights by all children, regardless of their nationality or statelessness (CRC, 2005). Similarly, all ASEAN

states have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 9 explicitly provides for the equal enjoyment of nationality rights by men and women, including in the context of marriage (paragraph 1) and in transmitting nationality to their children (paragraph 2).[4] In addition, more than half of ASEAN countries, namely Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Vietnam, are state parties to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 24 of the ICCPR provides for the right of every child to acquire a nationality. The CERD prohibits racial discrimination in the enjoyment of a catalogue of rights, including the right to a nationality, in its article 5.

By ratifying these key human rights instruments, ASEAN countries have not only committed to uphold the fundamental rights of persons within their jurisdiction, they have also agreed to the monitoring of their efforts by the relevant UN treaty bodies. As such, institutions such as the CRC and the CEDAW Committees have provided comments on countries' policy and practice in areas relating to statelessness. Their recommendations can show states how to more effectively ensure the enjoyment of the right to a nationality and protect the rights of stateless persons. Additional guidance may also come from the Universal Periodic Review mechanism as well as reports compiled by relevant special procedures (UN HRC, 2009a and 2010). Moreover, the same mechanisms can highlight positive developments and help to share good practices.

2.2 Nationality-specific instruments

ASEAN countries have been less active in ratifying international agreements that focus specifically on nationality and statelessness. In fact, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness have yet to attracted any accessions within the region. It should, however, be noted that the Department of Justice in the Philippines is currently engaged with UNHCR in policy discussions on statelessness and an analysis of the national legal framework with a view to pursuing the state's accession to both statelessness conventions. Meanwhile, the Convention on the Nationality of Married Women has just two ASEAN state parties, Malaysia and Singapore.

Regardless of formal accession, the influence of these instruments and the fundamental principles that they espouse can be traced in the legislation of many ASEAN countries. For instance, several of the safeguards contained within the 1961 Convention on the Reduction of Statelessness have made their way into domestic nationality laws.[5]

Meanwhile, Lao PDR and Vietnam have included a definition of statelessness in their law, which has been informed by the 1954 Convention relating to the Status of Stateless Persons and customary international law. Moreover, the ratification of the human rights

instruments discussed above lays a firm foundation in the region for both protecting the rights of stateless persons and avoiding statelessness by promoting the right to a nationality.

2.3 Relevant regional standards and initiatives

In terms of regional initiatives, the first to mention is ASEAN itself. Promoting and protecting human rights is one of the purposes of this regional cooperation. In fact, the ASEAN Charter provides for the establishment its own human rights body. On this basis, the ASEAN Inter-governmental Commission on Human Rights (AICHR) was inaugurated in 2009. Part of the AICHR's terms of reference is to develop an ASEAN Human Rights Declaration so as to establish a regional human rights framework that is complementary to existing international obligations. ASEAN States' commitment to the right to a nationality and the non-discriminatory enjoyment of human rights may be further strengthened by such regional agreements in future.

The separate ASEAN Commission on the Promotion and Protection of the Rights of Women and Children may also come to play a role in tackling issues of access to nationality and protection of stateless persons as they affect women and children. Meanwhile, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers provides, among other things, for close cooperation between receiving and sending states to "resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented" (article 2). Such activities may lead to the identification of stateless persons and will contribute to the prevention and reduction of statelessness.[6] The ASEAN Committee on Migrant Workers established to promote the implementation of the Declaration may also look at the link between statelessness and migration in its future work.

The second relevant regional body is AALCO – the Asian African Consultative Organisation – established as a forum for exchanging views and issuing advice to governments on matters of (international) law. Brunei Darussalam, Indonesia, Malaysia, Myanmar, Singapore and Thailand are also members of AALCO. Taking its lead from the International Law Commission, AALCO has dealt with a number of topics that touch upon the right to a nationality and the protection of stateless persons. For instance, in 1961 it elaborated principles on the admission and treatment of aliens, including a list of basic rights that are to be enjoyed by all non-nationals. In 1964, AALCO issued some model articles relating to dual nationality that provided, for instance, that a woman's nationality shall not automatically change upon her marriage to a person of another nationality. To date, the most pertinent initiative for addressing statelessness within AALCO has been a half-day special meeting held in 2006 on "Legal Identity and Statelessness". This meeting culminated in the adoption of a resolution recalling the importance of avoiding statelessness and taking steps to improve the situation of stateless persons (AALCO, 2006).

Finally, it is also important to note the role of counter-smuggling and trafficking initiatives. Five ASEAN countries have ratified the "Palermo Protocol" to the UN Convention Against Transnational Organised Crime on the smuggling of migrants while four have also ratified the protocol on human trafficking. These protocols explicitly call for cooperation between states in verifying and documenting the nationality of victims of smuggling or trafficking. Such efforts can play a vital role in protecting individuals and preventing statelessness in the context of these forms of migration (UNHCR, 2006). Moreover, all ASEAN countries participate in the so-called "Bali Process" – the Bali Ministerial Conference on People Smuggling. Among the purposes of the Bali Process are several objectives relevant to statelessness. For instance, states pledge to cooperate in verifying the identity and nationality of illegal migrants and trafficking victims. More broadly, the Bali Process aims to support the provision of appropriate protection and assistance to the victims of trafficking, particularly women and children, some of whom may be stateless. Another objective is to ensure an enhanced focus on tackling the root causes of illegal migration, which include statelessness.[7]

3. Identification of stateless and at risk populations

"Identification" of statelessness essentially means mapping stateless persons as well as at risk populations. Such mapping should be as comprehensive as possible. Compiling statistics that provide an insight into the magnitude of the problem is an important part of this, but effective identification of statelessness goes much further. It includes mapping the demographic profile of the population, establishing the cause of statelessness and highlighting any obstacles standing in the way of addressing the issue. Another component of identification is assessing problems of access to rights and services, as well as any other protection concerns. Finally, mapping all stakeholders concerned and establishing their interests will complete the identification exercise (UNHCR, 2008a).

3.1 Background research, including legal analysis

A good place to start in identifying statelessness is some form of background research. A desk review of existing reports by academics, government bodies, civil society, human rights institutions, the UN system and the media will offer a first insight into the problem in a particular country. It will also uncover gaps in information. The present paper is a case in point – the exercise of compiling existing information relating to statelessness in ASEAN countries was, in itself, informative. Some situations are relatively well documented. For example, with regard to the Rohingya, there has been widespread reporting on magnitude, underlying causes, protection concerns and efforts to tackle the issue (MRP, 2003 and 2004; RI, 2008; HRW, 2009). There has also been a substantial amount of writing on problems of statelessness in Thailand (Lee, 2005; Saisoonthorn, 2006; UNESCO, 2008; Komai, 2009). Additionally, there are sources that offer some insight into the issue in different countries as part of an overall discussion of human

rights practices, such as annual reports by the US Department of State (US Dept., 2004-2010).

Overall, however, a common theme across the region is the lack of comprehensive research into the problem of statelessness, meaning that much work still needs to be done in the area of identification.

One particular type of background study that can be carried out with relevant ease is a legal analysis. If done systematically, this will provide an immediate insight into potential problems of statelessness. By identifying gaps in the law or its implementation, where there are inadequate safeguards to prevent statelessness, it is possible to establish which sectors of a population may be stateless or at heightened risk of statelessness. For example, legal analysis may uncover that women cannot transmit nationality to their children when they are born outside the territory of the state – as is the case under Malaysian law (Section 1 b, c and d, Part II of the 2nd Schedule, Federal Constitution). This finding enables the identification of a population that is at risk of statelessness: children born abroad to Malaysian mothers. With this information as a starting point, studies can be conducted to discover the size and profile of this at risk population and to identify actual cases of statelessness. Legal analysis can also help to uncover protection concerns by establishing whether access to certain rights is barred to stateless persons.

If property ownership or the practicing of certain professions are areas reserved to citizens under the law, this can negatively affect the protection situation of the stateless. Alternatively, legal analysis may reveal an opportunity to resolve an existing situation of statelessness - for example, by revealing that stateless persons enjoy access to facilitated naturalisation.

In view of the cross-border dimension that statelessness may have, a regional approach to background research and legal analysis can be even more informative. A comparative analysis of nationality policy that incorporates, for instance, both the sending and receiving states of migrants can shed light on which persons are at risk of being left stateless. A number of such comparative exercises from different parts of the world have illustrated the value of this technique in making nationality policy more transparent and comparable and identifying good practices.[8] These studies help to guide further policy-making while providing inspiration for similar research processes elsewhere.

3.2 Extracting information from population data sources

Certain government planning tools can also be tapped for information about statelessness. A periodic population census, for instance, may capture data about access to nationality which can be used to identify stateless or at risk populations. Other population data sources can also be helpful, such as birth, marriage and household registers or electoral lists. Analysing the information contained within existing data collections is a simple and

cost-effective way of starting to map the issue on the ground. Some form of preliminary background research, along the lines described above, will enable an understanding of what the data actually shows in terms of stateless or at risk populations.

In fact, by first establishing potential areas of concern through a background study or legal analysis, future data collections can be tailored to ensure that the details gathered are even more informative to the identification of statelessness.

Thus, the information logged as part of civil registration procedures can be augmented with data collection geared specifically to detect problems of statelessness. Introducing relevant questions into a population census will facilitate the quantification of the statelessness situation on a state's territory.

Most ASEAN States conduct a census on a ten-yearly cycle. The so-called "2010 round" of population and household censuses is now underway. Regional meetings have been held between governments' statistical divisions, including specifically in the context of this census round, to exchange good practices. To facilitate the identification of statelessness through population census and other data collections, this issue could be discussed in the development of the next round of population censuses through a devoted regional workshop. A number of UN agencies, including UNHCR, UN Population Fund and UN Statistics Division, can provide technical assistance with such an exercise as well as direct support to individual states (UNHCR, 2006).

3.3 Tailor-made surveys

A more direct approach to gathering data on statelessness is a survey which specifically seeks to uncover individuals who are stateless or at risk of statelessness. Through tailor-made questionnaires, it is possible to build a profile of the population and gather detailed statistical or even qualitative data. A survey can be supplemented by participatory assessment, such as focus group discussions (UNHCR, 1998). This will help to build a better understanding of the impact of statelessness in terms of access to rights, uncover factors that may obstruct a solution and determine the interests and capacity of different stakeholders.

Survey of enjoyment of nationality and basic services among Thailand's hill tribes

With comprehensive technical support from UNESCO, the Thai Ministry of Social Development and Human Security conducted a large-scale survey to study the link between nationality and access to services in Thailand. The survey focused on hill tribe communities, collecting information on almost 65,000 individuals in

192 border villages. Of this number, 38% were found not to hold Thai nationality. This sample survey alone identified around 25,000 persons who are either stateless or at significantly heightened risk of statelessness. The findings can be extrapolated to get an impression of the magnitude of the problem as it affects Thailand's hill tribe community as a whole.

The survey uncovered some of the effects felt by individuals who do not hold Thai nationality. Persons without Thai nationality are 99% less likely to use public healthcare and 25% less likely to be able to access loans than those who hold citizenship. Children without Thai nationality are 73% less likely than Thai citizen children to enter primary school. They are 98% less likely to progress to higher education.

The survey thereby identified the main areas in which action could be taken to improve the protection situation of these individuals, pending a resolution of their case (MRGI, 2009; US Dept., 2010f).

Information gathered through a survey can feed directly into strategies for the prevention and reduction of statelessness and the protection of stateless persons. For example, in Vietnam, a survey facilitated the development of the state's policy on naturalisation of stateless former-Cambodian refugees by providing current and accurate data on the group concerned (US Dept., 2010g). Funding has now been secured from the European Union for a new project in which Vietnam's Ministry of Labour, Invalids and Social Affairs will work with UNHCR to survey cases of statelessness that have resulted from marriages with foreigners and implement an appropriate response. Studying the objectives, approach and outcome of such surveys can be helpful in determining how to address remaining gaps in information relating to stateless persons in the region.

3.4 Individual registration and status determination

Stateless persons and individuals at risk of statelessness can be identified on a case-by-case basis through registration and status determination procedures. Having established that a segment of the population is undocumented or of unknown nationality status, government authorities may proceed by requesting such persons to come forward for registration and nationality verification. This kind of exercise has been implemented, for example, in Thailand, in a bid to address the situation of the large number of undocumented migrant workers. The immediate product of registration efforts is a more accurate picture of the magnitude and profile of the population at risk of statelessness. With the subsequent verification and confirmation of nationality it becomes possible to clarify who among this group does, in fact, hold a nationality and who is stateless.

Legal assistance and community outreach programmes offer a further opportunity for identifying individuals affected by statelessness. In Malaysia, community centres operated by ERA Consumer in Kedah, Perak, Selangor and Negeri Semilan received around 100 cases per month in which they uncovered facts relevant to the identification of statelessness. On the basis of this information, ERA Consumer was able to estimate that approximately 20,000 Indian women lack birth certificates, identity cards or marriage certificates (Koya, 2006; Tikamdas, 2006). They and their family members are at heightened risk of statelessness.

Finally, states can put in place dedicated stateless person status determination procedures that can be accessed on an ongoing basis. There are currently no examples of this practice within the ASEAN region. However, elsewhere, this approach has been very effective, especially where the individual identification of stateless persons has formed the basis for access to the protection regime of the 1954 Convention relating to the Status of Stateless Persons (Gyulai, 2007).

3.5 Challenges in the identification of statelessness

As shown, some encouraging examples of identification efforts can be found in the ASEAN region. However, large gaps remain in the information on stateless and at risk populations. This echoes a global trend. For instance, while UNHCR estimates that there are 12 million stateless persons worldwide, it is only able to report data on a far smaller number (UNHCR, 2009e). In many cases, a comprehensive analysis is also lacking of the causes of statelessness, protection problems experienced by stateless persons and existing capacities in building a response. UNHCR has noted that "the absence of a clear assessment in some countries impeded effective planning of responses, underlining the importance of ongoing work on surveys, registration and population censuses" (UNHCR, 2009a).

One significant challenge that arises in the context of improving the identification of statelessness is promoting a common understanding of terminology. The majority of ASEAN countries do not define statelessness in their law, so different definitions, procedures or standards of proof may be applied.

Definitions of statelessness under domestic law

Vietnam and Lao PDR are the only ASEAN countries to provide a definition of a stateless person in their law. The Law on Vietnamese Nationality provides that a *stateless person* is "a person who has neither Vietnamese nationality nor foreign nationality" (Article 3, Law on Vietnamese Nationality). While not following the formula to the letter, this definition is in general conformity with the internationally

recognised definition of a stateless person. It thereby offers Vietnam an invaluable tool in the identification of statelessness such that situations become both transparent and comparable at the international level.

According to the Law on Lao Nationality, an *apatrid* [stateless person] is "an individual residing in the territory of the Lao People's Democratic Republic who is not a Lao citizen and who is unable to certify his nationality" (Article 7, Law on Lao Nationality). On the one hand, this definition is more restrictive than that provided under international law: only once a person is *residing* in Lao PDR can his or her statelessness be recognised under this law. On the other hand, the definition is also quite pragmatic, since it refers to persons who are *unable to certify* their nationality. This could lower the burden of proof, in practice, for persons seeking to be recognised as stateless and make it easier for them to access entitlements accordingly.

The absence of coherence of definition has somewhat muddied the picture of statelessness in the region. The term "statelessness" may be used to describe a population even though there is insufficient knowledge or capacity to ascertain whether the individuals are stateless in accordance with international law. In fact, many groups that have been described as stateless at one time or another, can more properly be labelled as *at risk of statelessness*. This is the case, for instance, where children who lack birth registration or migrants who have become undocumented are classified as stateless without further regard for their circumstances. Their situation does make them more vulnerable to statelessness and some among them may indeed lack a nationality, so it is certainly useful to identify such groups with a view to adopting strategies to prevent statelessness. However, it would be inaccurate to describe these entire populations as stateless (UNHCR, 2010a). Instead, effort is needed to fully assess the situation of individuals within these broader groups in order to verify people's nationality and ascertain who is, indeed, stateless. For those whose nationality can be confirmed, statelessness has been avoided. For those who remain, other solutions must be pursued to address their situation. This is how identification can successfully feed into the prevention and reduction of statelessness as well as the protection of stateless persons.

4. Prevention of statelessness

"Prevention" refers to any measures taken to avoid creating new cases of statelessness. Indeed, "the easiest and most effective way to deal with statelessness is to prevent it from occurring in the first place" (Guterres, 2007). Given the fundamental importance of prevention activities, it is encouraging that many ASEAN countries have begun to identify populations within their borders that are at risk of statelessness. This information can strengthen strategies for prevention in the region.

4.1 Legislative safeguards for the prevention of statelessness

A particularly important step towards prevention is to close gaps in nationality policy that could leave an individual stateless (UN GA, 1995). States must, for instance, find a way to balance their interest of perhaps preventing dual nationality or protecting national security with the avoidance of statelessness. For instance, rather than obliging a person to renounce their former nationality *before* applying for a new one, dual nationality can be avoided by allowing people to first acquire the new nationality then setting a deadline for the renunciation of the previous nationality. Cambodia and Indonesia provide firm guarantees against statelessness in the context of the renunciation of nationality (article 18, Cambodian Law on Nationality; article 23, Law on Citizenship of the Republic of Indonesia), while safeguards that go some way to avoiding statelessness in this context are also in place elsewhere in the region. Similar guarantees are needed to prevent statelessness from arising due to loss or deprivation of nationality. Cambodia's law is the only one in the region that does not prescribe the withdrawal of nationality under any circumstances. All others allow nationality to be lost or deprived if certain conditions have been met, which may lead to statelessness. Nationality acquired automatically at birth tends to enjoy greater protection against loss or deprivation than nationality acquired through naturalisation, registration or marriage.

Given that migration is a significant phenomenon in the region, a particular area of concern is where nationality may be lost due to long-term absence from state territory. Six countries currently provide in their law for the loss of nationality by all or some categories of citizen when they take up residence abroad, subject to certain provisions: Brunei Darussalam, Lao PDR, Myanmar, the Philippines, Singapore and Thailand. Cases of statelessness have arisen, for instance, among Indonesian émigrés under the previous nationality law that allowed citizenship to be lost after more than a 5-year absence. This was one of the key points of reform when the Indonesian nationality law was amended in 2006 and nationality can now no longer be lost in this way if it would result in statelessness (article 23). Transitional provisions also allowed those who had previously forfeited their citizenship to reacquire their nationality through simplified procedures, combining prevention with *reduction* of statelessness (article 42).

Safeguards are also needed to ensure that everyone starts out life with a nationality. Here, "one of the surest methods [to prevent statelessness] is to guarantee that individuals born on a state's territory have the right to that state's nationality *if they would not obtain any other*" (Guterres, 2007). This safeguard is laid down in the 1961 Convention on the Reduction of Statelessness and a number of human rights instruments. Today, 100 states have a clear international legal obligation to grant nationality to children born on their soil who would otherwise have none (UNHCR, 2010b).

Where children have been abandoned, their origin and parentage unknown, there is an even greater onus on the state to confer nationality so as to prevent statelessness.[9]

Examples of safeguards to ensure the child's right to a nationality in the ASEAN region

Malaysia: The following persons born on or after Malaysia Day are citizens by operation of the law […] every person born within the Federation who is not born a citizen of any country (Section 1e).

Vietnam: Abandoned newborns and children found in the Vietnamese territory whose parents are unknown, have Vietnamese nationality (article 18).

Lao PDR: In the event that one of the parents is a Lao citizen and the other parent is an apatrid, the children will be considered Lao citizens by birth without taking their place of birth into consideration (article 11).

Children born in the territory of the Lao People's Democratic Republic to apatrid parents permanently residing in the Lao People's Democratic Republic and integrated into the Lao society and culture will acquire Lao citizenship if requested by their parents (article 12).

Children found in the territory of the Lao People's Democratic Republic and whose parents identity is unknown will be considered Lao citizens (article 13).

Indonesia: Citizen of the Republic of Indonesia is […] children born in Indonesian territory whose parents are of undetermined citizenship at the time of the child's birth; children newly born and found in Indonesian territory and whose parents are undetermined; [and] children born in Indonesian territory whom at the time of birth both parents were stateless or whose whereabouts are undetermined (article 4).

A further point to consider when assessing the potential for statelessness to be created is whether everyone enjoys equal protection under the law. If there are elements of discrimination on the grounds of gender, religion or ethnicity, this can increase the risk of statelessness for particular groups. Thanks to the international legal principle of non-discrimination and the influence of CEDAW, many states have now corrected any gender inequality that was previously present in their nationality laws. This trend can also be seen in the ASEAN region. In most circumstances, women can now pass on their nationality to their children on equal terms with men.[10] Singapore and Indonesia, for example, both amended their nationality law on exactly this point in recent years (2004 and 2006

respectively). However, there are still a number of states that have yet to provide for equality between men and women in the right to confer nationality through marriage, namely Brunei Darussalam, Malaysia, Singapore and Thailand.

In terms of other forms of discrimination, a small number of nationality laws in the region make reference to race or ethnicity. This is one of the circumstances that underlies the statelessness of the Rohingya in Myanmar (RI 2008; HRW, 2009). However, states are also moving away from this kind of distinction. For instance, in Indonesia, a differentiation between "natives" and "non-natives" based on ethnicity was also abolished with the 2006 legal reform (US Dept., 2007a; MRGI, 2008c).

Preventing statelessness requires not only introducing safeguards in the letter of the law but also ensuring appropriate interpretation and application of the law. Procedural safeguards can play an important role here. By ensuring that decisions relating to nationality are properly motivated and subject to review, there is less room for arbitrary decision-making and greater opportunity to fully assess the circumstances so as to ensure that statelessness is prevented. As yet, few ASEAN states provide in their law for an opportunity to ask for a review of nationality-related decisions. Myanmar is an exception, where decisions of the Central Body on citizenship can be appealed before the Council of Ministers (article 70, Burma Citizenship Law). In both the Philippines and Singapore, the law also provides for the possibility of a review in some cases. This is an area in which further lessons could be taken from outside the region.[11]

4.2 Reducing the risk of statelessness by promoting birth registration

Promoting access to birth registration is another straightforward yet highly effective measure that can help to prevent statelessness. Birth registration vouches for the child's legal identity and provides official recognition of a child's date and place of birth as well as parentage. These are vital facts in determining the position of the child under applicable nationality laws, thus birth registration can help to avoid nationality disputes and statelessness (UNHCR, 2010a). In the ASEAN region, there have been some major developments in this field in recent years. Progress can be traced at two levels: policy and practice.

In terms of creating a conducive legal or policy framework for birth registration, one recent example of reform is the new Civil Registration Act adopted in Thailand in 2008. Under the old law, there was some confusion as to whether children born in the state whose parents were not Thai nationals and had no right to reside in the country were eligible for birth registration (van Waas, 2007; UNESCO, 2008). This is a highly pertinent question since Thailand has a large presence of irregular migrants. In the past, children born within these communities were commonly unable to access formal birth registration procedures (CRC, 2006; van Waas, 2006). Through the new Civil Registration Act of 2008, the right of *all* children born in Thailand, regardless of their nationality or

the status of their parents, has been reaffirmed. On this basis, there has been renewed effort to facilitate the implementation of this crucial principle, including through the establishment of procedures to allow children born in the refugee camps along the Thai border to be registered at birth. Meanwhile, in Vietnam, the 2004 Law on the Protection, Care and Education of Children and the 2005 Civil Code also provide that every child has the right to be registered. Among the changes brought in was the standardisation of birth registration for all ethnic groups, while protecting the practice of specific ethnic groups with regard to the name of the child.

Changes to the law in the Philippines addressed another sociological obstacle to birth registration. The reform sought to "minimise exclusion and stigmatization of children born out of wedlock by allowing children born to register using the name of the father, regardless of the parents' marital status" (UNICEF, 2006).

Indonesia outlined its own commitment to universal birth registration in its 2002 Law on Child Protection and reaffirmed this commitment in the 2006 Law on Population Administration. However, in 2008, Indonesia was still considered to rank among the bottom 20 countries in the world in terms of birth registration coverage. This situation led the Ministry of Home Affairs to adopt the "National Strategy on Birth Registration: All children are registered by 2011". The strategy aims to translate Indonesia's domestic and international legal commitment to birth registration into a successful policy of universal birth registration on the ground. Similar efforts to put the law into practice using a wide variety of techniques can be seen throughout the region.

Lessons from Cambodia's campaign for universal birth registration

In 2000, the Committee on the Rights of the Child expressed concern that many births were going unrecorded in the country. In fact, at that time, only approximately 5% of the Cambodian population was registered. A pilot project was then carried out by the Ministry of Interior to test the ground for mass mobile registration. With continuing support from Plan and UNICEF, the campaign was subsequently rolled out nationwide. 1600 registration teams – some 13,000 people, many of whom volunteers, were trained. Thanks to this huge push, more than 7 million adults and children were registered during just the first 10 months of the national programme. Today, the Asian Development Bank estimates that over 90% of the Cambodian population is registered.

Numerous factors contributed to the success of this campaign. Guidelines were adopted and the law was subsequently reformed such that birth certificates could be issued free of charge throughout the campaign and thereafter no fee would

be levied for birth registration within 30 days from birth. Only a nominal fine is incurred for the "late" registration of a birth beyond this time limit. Awareness raising was another main focus, using tools such as television and radio broadcasts, information posters and leaflets, a Civil Registration Awareness Bus that visited dozens of communities and the celebration of Universal Children's Day with a large children's fair centred around the importance of birth registration. The campaign invested in broad partnerships, getting local people involved in spreading the word and building trust – including teachers, monks and community leaders. This allowed fears surrounding the misuse of personal information and documentation, stemming from the era of the Pol Pot regime, to be overcome. Children were also invited to help design and implement parts of the campaign, further increasing the effectiveness of awareness raising activities.

Another major focus throughout, was building the capacity of government officials to take charge of the registration process, for instance by ensuring a steady supply of civil registration materials and by arranging a trip to study registration practices in the Philippines. This will help to ensure sustainability in the long term (CCPR, 1998; Setha, 2006; UNICEF, 2006; Heap, 2009; Plan, 2009).

Many lessons can be extracted from the innovative birth registration practices in ASEAN countries. The Committee on the Rights of the Child has commended, for example, the work of the "Flying Doctor Team" in Brunei which enabled children in remote areas of the country to be registered (CRC, 2003b). The institution of computerised registration systems with online data storage in Thailand has dramatically reduced the time taken to process birth registration and made it possible for copies of missing documents to be issued instantly on site at any office (Kaewdee, 2006). This move towards computerisation is also allowing new avenues to be pursued for the promotion of birth registration through Thai hospitals, by directly linking hospital records to the civil registration system.

Village midwives can now play a role in procedures in Indonesia to allow early and easy access to birth registration. In Lao PDR, the Ministry of Security has offered training to village police officers to encourage them to support the civil registration process. The Indonesian Head of State and First Lady have taken on the role of champions and advocates for the campaign for universal birth registration in their country. And in the Philippines, a Memorandum of Understanding was settled between the National Statistics Office, Plan Philippines and a national television network allowing infomercials on birth registration to be broadcast free of charge on television and radio stations across the country (UNICEF, 2006). By sharing these and other good practices, ASEAN countries can further strengthen their birth registration systems and avoid leaving children at risk of statelessness.

4.3 Verification and confirmation of nationality

Where an individual or group's nationality is uncertain or undocumented, states can take action to confirm or certify their citizenship. This can also be a way to pre-empt any question of statelessness if the application of the nationality law to a particular group has been called into question by a third party. Such confirmation and certification of nationality may also take place on a case-by-case basis. Where an individual's nationality is unclear or disputed, for instance due to lack of documentation, procedures can be put in place to investigate (UNHCR, 2006).

An example of such practices can be found in Thailand – a receiving country for large numbers of migrants, principally from Myanmar, Lao PDR and Cambodia. The Thai government concluded a Memorandum of Understanding with each of these countries in a bid to address the problem of undocumented migrants and better regulate migration flows. Migrants who have their nationality verified will be entitled to stay and work legally in Thailand. Between 1 and 1.5 million irregular migrants could potentially benefit from this policy (IOM, 2009-2010). By July 2010, close to 400,000 migrants had successfully completed nationality verification and been issued with a document attesting to their nationality. This enables them to obtain a work permit in Thailand, regularising their stay and improving their enjoyment of rights in the country. It also serves to prevent statelessness among the persons concerned by ensuring that they have proof of nationality. However, there is currently no contingency in place to address the status of those persons who were unable to complete the nationality verification – i.e. individuals who submitted their application but were not confirmed to be nationals of the relevant state (IOM, 2010a). This failure to obtain nationality verification may signal a problem of statelessness. Therefore, when conducting nationality verification, it will also be important to consider the appropriate next step to address the situation of persons who remain without confirmation of nationality.

4.4 Challenges in the prevention of statelessness

In accordance with their human rights obligations, states across the ASEAN region are promoting the enjoyment of the right to a nationality by investing significantly in measures to prevent statelessness. However, none are state parties to the 1961 Convention on the Reduction of Statelessness.

This presents a challenge to the extent that the 1961 Convention is the only universal instrument providing concrete, detailed guidance on the avoidance of statelessness. While many of the safeguards it prescribes have nevertheless made their way into the nationality laws of ASEAN countries, accession to the 1961 Convention would help states to identify and address any remaining gaps in their legislation. The 1961 Convention outlines a harmonised framework for dealing with the specific circumstance where individuals would otherwise be stateless, while leaving otherwise in tact state parties'

freedom to regulate access to nationality in accordance with their own interests and their other international legal obligations. Regardless of the question of accession, ASEAN countries would benefit from a more detailed review of their nationality legislation to see if the right to a nationality is adequately promoted in accordance with their human rights obligations and identify areas in which the prevention of statelessness can be strengthened through the incorporation of additional safeguards.

Of equal importance is promoting the implementation of the law in a manner that takes into account the need to prevent statelessness. This may require further awareness-raising and capacity building. For instance, migrants must be kept informed of procedures that they are required to follow, while abroad, in order to retain their nationality or to secure a nationality for their children. Meanwhile, easy access to consular authorities may also need to be assured in the receiving state.

Indonesia, for instance, has therefore established consulate offices that directly service areas of Malaysia where a high concentration of Indonesian migrants can be found. The context of irregular migration poses a particular challenge. Irregular migrants may have apprehensions about travelling to or registering with any state entity because of the potential consequences for their situation. Similar fears may hamper individual verification or confirmation of nationality. Thus, for example, when migrants from Myanmar proved reluctant to apply for nationality verification, the Thai Ministry of Labour developed and circulated an information brochure to tackle the specific concerns that this community had regarding the process (IOM, 2010b). A continuous appraisal of the situation on the ground is therefore critical.

The same is true for birth registration. Arguably the greatest remaining challenge for the ASEAN region lies not in the legal framework, but in its implementation. A variety of factors underlie the enduring difficulties in putting universal birth registration into practice across the region. These include: lack of public awareness on the procedures, inadequate decentralisation of the system, insufficient prioritisation of birth registration, insufficient capacity of civil registry offices, prevalence of home births, cultural traditions that are not conducive to immediate registration and language barriers (UNICEF, 2006). Several groups are also seen to be especially vulnerable non-registration – such as abandoned children and people living in rural areas. Identifying specific constraints and dissecting relevant good practices, such as those presented earlier, will enable states to make even greater strides in preventing statelessness in future.

5. Reduction of statelessness

"Reduction" of statelessness describes any efforts taken to find solutions to *existing* cases. One way to achieve this is through a large-scale reduction campaign of some kind. Various techniques have been employed across the world over the last few years. The global impact is impressive, as "more than 3.5 million people were able either to acquire

or confirm a nationality between the end of 2004 and the end of 2008" (UNHCR, 2009a). Less immediately visible, yet of great importance, is a second avenue for the reduction of statelessness: individual naturalisation (UNHCR, 2006).

5.1 (Re)acquisition of nationality following legislative reform

As previously mentioned, numerous countries within the region have amended their nationality laws in recent years. In some cases, these changes have brought an opportunity for people who had been rendered stateless under previous laws to now (re)acquire a nationality.

Legislative reform opens doors for the reduction of statelessness in Indonesia

Indonesia adopted a new nationality law in 2006 which brought important changes for the state's citizenship policy. Previously, nationality could only be passed from *father* to child. Such gender inequality created a heightened risk of statelessness – particularly among children of mixed-nationality parentage. Meanwhile, a person who resided abroad for more than 5 years would lose their nationality if they did not declare their intention to remain a citizen, regardless of whether this would render someone stateless. Given the large numbers of Indonesian migrant workers dispersed around the world, the threat of statelessness under this provision was very real. By the turn of the 21st century, this 1958 nationality law was considered "philosophically, judicially and sociologically no longer compatible to the development of the people and the civic administration of the Republic of Indonesia". Thus, Indonesia reformed the law to introduce gender equality and prevent statelessness from loss of nationality following long-term residence abroad.

Critically, transitional clauses were added to the new law in order to address any existing problems. Under article 41, a child born before the entry into force of the law, whose mother is Indonesian, was given four years to register for Indonesian nationality. Similarly, under article 42, a person who lost their nationality due to long-term residence abroad under the old law could apply for reacquisition of Indonesian citizenship within three years. Unofficial sources reported that several hundred children of Indonesian mothers and non-national fathers were granted nationality within a few months after the new law entered into force. Meanwhile, several thousand migrants in Malaysia alone have successfully re-acquired their Indonesian nationality. In particular among this latter group, it is likely that this policy has had a significant impact in terms of reducing cases of statelessness.

In Vietnam, legal reform presented an opportunity to both reduce existing cases of statelessness and prevent new ones. There, problems stemmed from the lack of adequate safeguards under the previous law to protect women from statelessness in the context of marriage and divorce. Many women who married foreigners – principally Chinese, Korean and Taiwanese men – renounced their Vietnamese citizenship in order to apply for their husband's nationality. If the marriage broke down before the new nationality was granted, the women were left stateless. The numbers are significant, with more than 50,000 marriages contracted between Vietnamese women and foreign men from 1995 to 2002 and up to 10% of these marriages failing. The government estimated that at least 3,000 women were rendered stateless in these circumstances (RI 2009; US Dept., 2010g). This is why a particular focus of the new nationality law passed in 2008 was to allow such women to have their citizenship restored (article 23f).

Moreover, in order to reduce statelessness in accordance with this legal reform, the government now plans to conduct a full survey of the beneficiary population and develop an appropriate strategy for awareness-raising and legal assistance.

5.2 Citizenship campaigns

Whether in the context of the adoption of a new nationality policy or as a separate initiative, states may determine that the time is right for a citizenship campaign geared specifically towards the reduction of statelessness. Such a campaign can take shape in different ways. One possibility is the large-scale naturalisation of stateless persons residing on the state's territory, as seen in Indonesia, for instance, in addressing the situation of stateless ethnic Chinese. Following Indonesia's independence, the citizenship status of Chinese migrants residing on Indonesian soil was unclear. Many lacked the necessary documents to establish a longstanding tie to Indonesia and claim nationality under the law. However, nor did they adopt Chinese citizenship. Later, approximately 110,000 of these persons successfully petitioned for Indonesian citizenship and were granted nationality collectively by Decree (Sidel, 2007; RI, 2009). Similarly, in the Philippines, successive Presidential decrees passed in the 1970s provided for the "granting of citizenship to deserving aliens". The principal beneficiaries were ethnic Chinese – tens of thousands of applicants and their dependents were naturalised (See, 2004; Palanca, 2004). These policies played an important part in preventing and reducing statelessness at that time and for successive generations. A more recent example is an initiative launched this summer by the Thai Senate: DNA testing will be offered to around 1,000 stateless persons, allowing them to access Thai citizenship by confirming their blood ties to a person who already holds Thai nationality.

Beyond the ASEAN region, numerous additional examples of dedicated citizenship campaigns can be identified. In Nepal, nearly 2.6 million citizenship certificates were issued as part of a mammoth nationwide programme in 2007, dramatically reducing the incidence of statelessness in the country (Gurung, 2007; White, 2009; UNHCR, 2009a).

In Sri Lanka, the "Grant of Citizenship to Persons of Indian Origin Act" was passed in 2003. This conferred nationality to a population of around 300,000 "Hill Tamils" who were left stateless under the nationality law adopted at the time of independence (Perera, 2007; Manly, 2009).

Elsewhere, Bangladesh, Iraq, Mauritania, the Russian Federation, Ukraine, the United Arab Emirates and Kyrgyzstan are among the growing list of states that have taken steps specifically to reduce statelessness (IDMC, 2008; Manby, 2009; Hussein, 2009; Manly, 2009). Therefore, there are now many sources of inspiration for the development of citizenship campaigns if states find that a situation of statelessness within their borders demands a dedicated reduction exercise.

5.3 Facilitated naturalisation

Individual cases of statelessness can also be resolved over time through regular naturalisation procedures. In view of the importance of ensuring that everyone enjoys a nationality, international law now calls for the naturalisation of stateless persons to be *facilitated*. In other words, it should be easier stateless persons to qualify for naturalisation and process an application than is perhaps the case for other non-nationals. Just one country in the ASEAN region makes explicit reference to stateless persons in its regular provisions for naturalisation: Lao PDR. The required period of residence that must be met prior to applying for naturalisation is reduced if the applicant is stateless.[12]

Facilitated naturalisation for stateless persons in Vietnam

One objective of Vietnam's 2008 nationality law was to create conditions for "stateless persons permanently residing in Vietnam to acquire Vietnamese nationality" (article 8). The law does not establish lasting procedures for the facilitated naturalisation of stateless persons. However, it does instruct the government to institute a dedicated procedure for the naturalisation of stateless persons who had already been residing in Vietnam for at least twenty years when the law was passed. Applications may be submitted by "stateless persons who do not have adequate personal identification papers but have been stably residing in the Vietnamese territory since July 1, 1989, or before". Importantly, to further facilitate access to these simplified procedures, applicants are exempt from the regular fees associated with naturalisation.

Long before the ultimate application deadline, the positive impact of these dedicated procedures in terms of the reduction of statelessness is already evident. The first naturalisation ceremony was held in July 2010 in Ho Chi Min City. At this event, 287 stateless, former-Cambodian refugees were granted Vietnamese

nationality. A second ceremony marked the completion of the naturalisation process for a further group of 142 persons in Mihn Long Commune at the start of October. It is expected that over the coming months, a total of around 2000 persons with the same profile will also be naturalised.

Regardless of the availability of *facilitated* procedures, there is evidence that some situations in the region are gradually being appeased as stateless persons naturalise. In Indonesia, the recent legal reform simplified the overall requirements and procedure for naturalisation (Sidel, 2007). In Brunei, the progressive resolution of cases through naturalisation appears to have been the principal approach to reducing statelessness among long-term ethnic Chinese residents and others. According to a 2010 news report in the country, over 30,000 people have been granted citizenship since the nationality law was adopted in the early 1960s. This figure was announced in the context of the 28th "presentation of citizenship certificates ceremony" at which 283 persons were naturalised.

Although separate statistics are not given, it is likely that a significant proportion of this group was previously stateless.[13] Moreover, programmes can be implemented to help stateless persons develop the capacity to meet conditions for naturalisation. For instance, in Myanmar, UNHCR has been funding language classes for Rohingya.

5.4 Challenges in the reduction of statelessness

Encouraged by recent efforts by different countries to reduce statelessness, UNHCR set a target for the world of confirming or granting nationality to at least a further 500,000 stateless persons during 2010 and 2011 (UNHCR, 2009d). The developments highlighted above show how the ASEAN region is playing its part in meeting this target. However, no comprehensive data is available on the overall impact of the laws and policies discussed, making it difficult to determine the exact scope of advances made in the region in terms of the reduction of statelessness.

In fact, the overall lack of detailed and reliable information on current situations of statelessness may be hampering the further development of reduction strategies in the region. As previously discussed, many countries have identified populations that are at heightened risk of statelessness, but the number and profile of persons who are stateless *at present* is unclear. This can form an obstacle to the reduction of statelessness. For example, incomplete identification can result in inflated figures that may discourage stakeholders from taking up the issue. Even with the required will to begin to resolve cases of statelessness, the population concerned must be fully mapped before an appropriate strategy can be developed. Therefore, until the identification of statelessness is tackled in a more consolidated fashion, reduction efforts may not be fully effective and may neglect some potential beneficiaries. Nevertheless, the growing catalogue of examples

of substantial reduction efforts both within and outside the region is evidence of what can be achieved. These examples, when explored in detail, provide valuable guidance as to how similar results can be accomplished in comparable situations elsewhere – what steps are involved, what obstacles may come up and what solutions can be implemented.

While a comprehensive reduction campaign is the most direct way to achieve results when a stateless population has been identified, the importance of individual naturalisation procedures should not be underestimated. There is a danger that by developing a strategy that only addresses the known situations of statelessness some persons may be overlooked by what is essentially an *ad hoc* policy.

Or, indeed, the adoption of such a strategy may currently be out of reach. By providing in the law for the facilitated naturalisation of stateless persons, states are able to reduce statelessness over time without needing to fully map situations of statelessness within their borders. Legislation in the ASEAN region remains underdeveloped in this area and states should give renewed thought to facilitating the naturalisation of stateless persons – as a stand-alone reduction strategy or a compliment to other ongoing reduction efforts. Here, article 32 of the 1954 Convention relating to the Status of Stateless Persons provides guidance that can be informative whether a state has acceded to this instrument or not.[14]

6. Protection of stateless persons

Where stateless persons have been identified, it is important to ensure that they enjoy their fundamental rights as set out under international law until their situation is resolved. This is what "protection" means: respecting, protecting and fulfilling the rights of stateless persons. These include the right to education, to work, to healthcare, to marry, to access courts, to travel and many others. In accordance with their human rights obligations, states bear a responsibility to protect these rights for all persons within their jurisdiction, including those who are stateless.

6.1 Status determination and access to an appropriate legal status

A dedicated stateless person status determination procedure enables states to establish who is entitled to benefit from any special protection regime that has been put in place in response to statelessness. Recognising a person as stateless and granting an appropriate legal status can therefore facilitate the implementation of other protection measures. To determine if a person is stateless, an examination must be made of the nationality legislation of relevant countries and how the law has been interpreted and applied in the context of the case at hand. This may require contacting the authorities of the respective countries.[15] As such, a provision like article 39 of Vietnam's nationality law can be helpful. According to that article, among the "responsibilities of the Government for nationality"

is to "enter into international cooperation on nationality". This, along with the definition of a stateless person provided under the same law (article 3(2)), gives the authorities the basic tools for status determination.

As mentioned earlier, no ASEAN country currently offers access to a dedicated stateless person status determination procedure on an ongoing basis. In terms of principles and procedures that could be established, the practices of countries outside the region that do conduct status determination can be informative.[16] Yet, even without a dedicated procedure for stateless person status determination in place, states may identify individual cases of statelessness through a variety of avenues. One outcome of nationality verification for undocumented migrants – such as that conducted in Thailand, as discussed above – may be the identification of a residual group for whom no nationality can be confirmed. Where this is the case, providing for the possibility of recognising these individuals as stateless will help to stabilise their situation and promote protection. In states where asylum claims are processed, among the applicants for refugee status there may be persons who have no nationality. This process can therefore offer an opportunity to attribute stateless person status accordingly. Alternatively, a state may simply be able to recognize a person as belonging to a known stateless population within its territory, without the need for formal status determination in individual cases.

Perhaps more important than the question of how statelessness is determined, is the question of what effect is given to recognition as a stateless person. Ideally, recognition will lead to the conferral of an appropriate legal status – one that guarantees stability and access to rights (Batchelor, 2003). Unfortunately, none of the domestic laws currently in force in the ASEAN region provide specifically for the legal status of "stateless person". As a consequence, the status of stateless persons often remains ambiguous or is dealt with on an *ad hoc* basis as cases come to the attention of the state. Thus, in Malaysia for instance, the Immigration Act (Act 1959/63) does not differentiate between refugees, asylum-seekers and stateless persons (UN HRC, 2009a). However, section 55 (1) of the Immigration Act gives the Home Minister the power to exempt any person or group from the provisions of the Act. This section provides a legal basis for promoting the protection of certain groups and individuals by offering them a temporary residence permit called the IMM13. In 2006, the government announced it would use this avenue to improve the legal status of Rohingya who had settled in Malaysia, whose situation is characterised by both statelessness and asylum-related concerns. A registration exercise was initiated to issue IMM13 permits to Rohingya in order to allow them to work, attend school and live in the country legally. This exercise was later suspended, but it nevertheless illustrates what steps could be taken to provide a stateless population with a stable legal status and promote their enjoyment of rights through *ad hoc* remedies based on existing domestic law (IFHR, 2008; US Comm., 2009; RI, 2009; ERT, 2010). A similar approach has also been seen in Thailand where, over the years, successive Cabinet Resolutions established a dedicated legal status for specified categories of non-nationals present in Thailand and

granted temporary permission to reside under article 17 of the Immigration Act (Lee, 2005; UNESCO, 2008; US Dept., 2008). In this way, many stateless persons in Thailand have been able to access a legal status of some kind, contributing significantly to their enjoyment of rights.[17]

6.2 Promoting access to personal documentation

The enjoyment of rights often hinges, in practice, on a person's ability to identify him or herself and show proof of legal status. A second critical element in protecting the rights of stateless persons is therefore the issuance of some form of personal documentation. Ideally, stateless persons would be issued with documents that vouch for both their identity and their status as a stateless person. In Thailand, for instance, as successive groups of non-nationals were granted a legal status under the immigration law, identity cards were also developed that verified this legal status (IRC, 2006; UNESCO, 2008; US Dept., 2008).

Issuance of personal identity documentation in Myanmar

In 1995, the Myanmar government instituted a policy that would allow stateless residents of northern Rakhine State – principally Rohingya – to acquire personal identity documents. The authorities began to provide this population with white "Temporary Registration Certificates" (TRCs) and the issuance of these documents has been an ongoing process since. Efforts were stepped up in 2007 thanks to logistical support from UNHCR. The total number of stateless persons over age 10 who now hold TRCs is around 385,000 – an estimated 210,000 remain undocumented.

The issuance of a TRC confirms the lawful residence of the holder in northern Rakhine State. As such, the possession of a TRC may help to confirm the individual's eligibility for citizenship if the authorities change their policy on access to nationality for this population in the future. In the meantime, the certificates may help to improve the holders' legal status and stabilize their situation. The document facilitates the enjoyment of a number of rights for which proof of identity is necessary. For instance, the TRC is crucial for gaining a marriage license or travel authorisation. TRCs also formed the basis for eligibility to participate in certain political processes, including the right to vote in national elections (US Dept., 2009b and 2010a; UNHCR, 2010d).

While identity documents are key to exercising rights within a state's borders, international travel can also play a part in the enjoyment of rights – for instance, where appropriate medical care can only be found abroad. Travel documents then become a necessity. The difficulty encountered by stateless persons is that travel is generally facilitated by a passport issued by the country of nationality. Without travel documents, stateless persons may resort to the use of irregular migration channels. As such they become especially vulnerable to being trafficked. For example, a UNESCO study of trafficking patterns in Thailand showed that lack of nationality was the factor which contributed most to the risk of trafficking among members of hill tribe communities (Lertcharoenchok, 2001; Feingold, 2006). The provision of a passport or other travel document to a stateless person is therefore one of the special measures that states need to pursue in recognition of the particularities of their situation. This is not only in the interest of individuals in terms of promoting the protection of rights, it can also help to combat transnational crime. Several countries have provided for precisely this possibility. In Brunei Darussalam, stateless permanent residents are issued with a so-called "International Certificate of Identity" (ICI) which allows them to travel abroad and return to the country (US Dept., 2009a and 2010b). The Passport Act of the Philippines also provides for the issuance of a travel document, in lieu of a passport, to a stateless person who is a permanent resident (section 13). Meanwhile, according to news reports in both Malaysia and Thailand, there have been cases in which special passports have been issued in order to facilitate the travel of stateless individuals.

6.3 Promoting the non-discriminatory enjoyment of rights

The protection of stateless persons can be directly improved by simply promoting non-discrimination in the enjoyment of rights. For example, if access to schooling is guaranteed for all children, regardless of nationality or status, the protection of stateless children is also assured. However, ensuring that stateless persons enjoy equal access to rights in practice may call for special measures to address any obstacles that they face due to the particularities of their situation. Only then can the protection of stateless persons be ensured and will states be able to satisfy their human rights obligations. For instance, in order to ensure that stateless persons in the Philippines are equally able to enjoy family rights, domestic rules relating to the contracting of marriage by non-citizens have been tailored to take into account their specific situation. Foreigners are generally required to submit a certificate issued by their respective diplomatic or consular office that attests to their legal capacity to contract marriage. Stateless persons, however, may submit an affidavit in lieu of this document, since there is no diplomatic or consular office necessarily obliged to issue documentation for them (article 21, Family Code of the Philippines).

Protecting the rights of stateless persons in Malaysia

After a visit to the country, the UN Special Rapporteur on the Right to Education reported that "one of the most serious education-related problems in Malaysia [is] the lack of access to education, at all levels, for children lacking Malaysian citizenship status, including refugee children, asylum-seekers, children of migrant workers and stateless children" (UN HRC, 2009a; CRC, 2007; RI, 2007). The Ministry of Education has since renewed its pledge to offer an education to all children, irrespective of their circumstances or status, in accordance with the Convention on the Rights of the Child. The Ministry developed strategic partnerships with a number of stakeholders, including UNICEF, the Federal Special Task Force and the armed forces, in order to implement a dedicated education policy for stateless children. Alternative education programmes have been established along the same lines as the formal system with a focus on reading, writing and arithmetic skills, as well as civic education. The Education Minister commented in national news reports that the cost of educating stateless children is minimal, while a flexible and inclusive education policy will help to generate valuable human capital for the state.

In a separate policy focusing on Malaysia's Indian community, Prime Minister Datuk Seri Najib Razak established a Special Implementation Task Force (SITF). The Indian community in Malaysia has been identified as one of the populations at heightened risk of statelessness, although the actual incidence of statelessness within this group is not known (Koya, 206).

The SITF will monitor the participation of the Indian community in government projects and promote access to public-sector services such as poverty eradication programmes, affordable housing and education. It is designed to be a "mobile one-stop centre", with direct involvement of different government departments such as the National Registration Department and Social Welfare Department. In its first outreach effort, the SITF registered around 500 problems, logged during a one-day session in Selangor, with an even greater turnout during the second round of outreach. Welfare cases were the most numerous complaints but this was followed by problems of access to identity documentation and birth certificates. The ongoing efforts of the SITF will therefore provide an opportunity to work on the prevention and reduction of cases of statelessness, while also ensuring that this population – including any persons who may currently be stateless – is included in social and development projects which will help to improve their enjoyment of a wide range of rights.

In some cases, direct assistance may be necessary to tackle the extreme vulnerability that can characterise stateless populations. For instance, in Myanmar, the situation of stateless residents of northern Rakhine State is such that extensive humanitarian aid programmes have been initiated to redress their plight (HRW, 2009; UN HRC, 2010). A Common Humanitarian Action Plan is now being developed to coordinate the delivery of much-needed assistance by government authorities, UN agencies and NGOs in five areas – agriculture and food security, education, health and nutrition, infrastructure and water and sanitation (UNHCR, 2009c). Such efforts have an immediate and indispensable impact on the enjoyment of rights by the persons concerned. In other cases, the protection of stateless persons may be promoted by raising awareness of existing opportunities to participate in government programmes and access public services. For example, in Thailand, a range of projects have been instituted to inform children and families affected by statelessness of their rights under Thai and international law.[18]

6.4 Challenges in the protection of stateless persons

The protection situation of stateless populations remains a subject of concern. In the ASEAN region, as elsewhere, stateless persons continue to face significant obstacles in the practical enjoyment of their rights and can find themselves politically, socially and economically marginalised. Among the common problems experienced are restrictions on land or property ownership;[19] limited access to education, especially beyond primary level;[20] difficulties in lawfully contracting a marriage;[21] and obstacles to full participation in the labour market.[22] Stateless persons are also vulnerable to detention, which may become prolonged or indefinite (ERT, 2010b). Furthermore, stateless persons are generally excluded from political rights, making it hard for them to voice their concerns and influence policies that affect them.[23]

Nevertheless, the good practices highlighted above show that ASEAN states have been able to implement a number of significant measures to promote the protection of stateless persons. The challenge is to consolidate these often *ad hoc* efforts and establish a comprehensive protection regime that has been tailored to the particular needs of stateless persons. For instance, while authorities have used their discretion under the law to address the status of some stateless populations whose situation has come to their attention, this approach does not guarantee all stateless persons access to a stable legal status now and in the future. Greater effort is needed to identify stateless persons, accord them an appropriate legal status and issue them with personal documentation. The importance of these steps to ensure effective protection of the rights of stateless persons must not be underestimated. States should therefore give renewed consideration to acceding to the 1954 Convention relating to the Status of Stateless Persons which provides, among others, a legal framework for the issuance of identity and travel documents to stateless persons. Regardless of accession, states need to look at the possibility of granting "stateless person status" to individuals who have been identified as stateless, be it through the establishment of dedicated status determination procedures

or in another context. This will help to guarantee their enjoyment of fundamental rights in accordance with human rights law.

7. Reflections on statelessness in Southeast Asia

Statelessness is a matter of concern to Southeast Asian states. A variety of historic, legal, political, social and economic circumstances in the region have contributed to the existence of populations who do not enjoy the legal bond of nationality with any state. This presents a serious obstacle to the exercise of fundamental rights by the individuals affected. It can also lead to significant hardship for families, interfere with the social fabric of communities and even strain inter-state relations if problems spill over from one country to the next. By contrast, addressing statelessness can help to prevent forced displacement, avert social tension and boost human capital.[24] With a growing interest in statelessness at the national, regional and global level, the acknowledgement that there is a need to tackle the problem must now be translated into further practical strategies and solutions. This is where good practices come in. Highlighting existing efforts for the identification, prevention and reduction of statelessness and the protection of stateless persons will help to inform future policies, by showing what can be achieved and how. The good practices discussed in this paper illustrate some of the impressive strides taken in the ASEAN region to deal with statelessness. Extracting lessons from these good practices is of value to the region as well as to the broader international community.

At the same time, this paper uncovered several areas in which there is presently a gap in stakeholders' response to statelessness and more work is needed. In the ASEAN region, the nexus between migration and statelessness presents a particular challenge – where statelessness has clearly been both a cause and a consequence of the movement of people. Migration looks set to be a significant socio-political feature in the region in years to come and, especially as the region takes further steps towards the free movement of persons within the ASEAN framework, finding ways to pre-empt problems of statelessness from arising in the migration context must be a priority.

For instance, areas in which the region's nationality laws can conflict and lead to statelessness among migrants and their families need to be further identified and addressed. Sending and receiving states will also need to invest more in promoting birth registration for children born within migrant communities. Moreover, greater effort is needed to identify statelessness among populations whose nationality status is presently unclear or disputed, such as undocumented migrants and victims of smuggling and trafficking. Having found this group to be *at risk of statelessness*, states need to put in place procedures to confirm and document nationality in order to prevent statelessness and identify stateless persons. An appropriate framework will then be needed to protect the rights of those persons who are found to be stateless – one that moves away from *ad hoc* policies towards a more encompassing approach, taking into account the particularities of statelessness and providing stability and legal certainty for individuals.

The same framework is also invaluable to guaranteeing the rights of stateless persons *outside* the migration context. In this regard, it is important to recall that many stateless persons have lived their whole lives in the country in which they were born, with no ties to any other state, and are reliant on that country for the enjoyment of rights and a resolution of their situation. States therefore need to renew efforts to identify *all* stateless persons within their territory, for instance by tailoring data collection exercises accordingly or implementing dedicated surveys. In fact, this paper has shown that strategies for the prevention and reduction of statelessness and the protection of stateless persons could all be improved by placing a greater emphasis on the comprehensive mapping of statelessness. This includes making a clear differentiation between stateless persons and persons at risk of statelessness, establishing the profile of persons affected, identifying underlying causes and protection concerns and assessing the role that different stakeholders can play in a response.

As the situation of statelessness in the region comes into clearer focus with further identification efforts in the future, good practices such as those presented in this paper will help to point the way forwards. The year 2011 marks the 50th year since the adoption of the 1961 Convention on the Reduction of Statelessness and this anniversary will be commemorated with activities across the world to raise awareness of the plight of stateless persons and to discuss ways to more effectively address the issue. This is an opportune moment for assessing progress made to date and setting out future strategies. A spotlight on good practices can help to foster a constructive debate on the issue in the ASEAN region and beyond.

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ENDNOTES

[1] Note that literature dealing with statelessness discusses two separate terms: de jure and de facto statelessness. The former describes a person who meets the international legal definition of a stateless person. The latter refers to persons whose situation is in some way comparable to that of the de jure stateless, for instance because they are unable to establish their nationality. This is an area of ongoing debate. UNHCR is seeking to clarify the use of terminology through the issuance of guidance on the interpretation of the legal definition of a stateless person. The first paper produced to this end is UNHCR, UNHCR and de facto statelessness, Legal and Protection Policy Research Series, April 2010.

[2] During the colonial period, migration was often actively promoted by colonial powers – for instance of Vietnamese to Cambodia under French rule. Minority Rights Group International, World Directory of Minorities and Indigenous Peoples – Cambodia: Vietnamese, 2008. Periods of post-colonial unrest in some ASEAN countries encouraged large-scale displacement within the region. In addition, according to the Working Group for an ASEAN Human Rights Mechanism, today there are more than 13 million migrant workers from ASEAN countries working abroad – of whom, around 5 million can be found in other ASEAN states. ASEAN Secretariat, ASEAN Seeks to Protect and Promote Migrant Workers Rights, 21 July 2010.

[3] The non-discriminatory enjoyment of rights means that non-nationals may only be subject to different treatment from nationals if this is reasonable and objective, pursues a legitimate aim and is proportionate to that aim. Where the question involves stateless persons, account should also be taken of the particular predicament and vulnerability of the stateless who do not hold any nationality. See, for instance, Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant, 26 May 2004; and Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, 1 October 2004.

[4] Two ASEAN countries, Brunei Darussalam and Malaysia, currently maintain a reservation to article 9 (2) of CEDAW regarding the equality of women with men with respect to the nationality of their children. Singapore and Thailand both also initially adopted reservations to article 9 (2) of CEDAW, but have since withdrawn these following amendments to their nationality laws. Malaysia has also made a reservation to article 7 of the Convention on the Rights of the Child.

[5] For instance, a safeguard to ensure that foundlings acquire a nationality can now be found in the nationality legislation of more than half of ASEAN countries. Those are: Cambodia, Indonesia, Lao PDR, Malaysia, Singapore and Vietnam.

[6] Another provision in the Declaration that could be invoked to prevent statelessness and protect stateless persons is the obligation of sending states to ensure the protection of migrant workers when abroad as well as repatriation and reintegration to the countries of origin. Article 13 (Obligations of Sending States) of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007. Consider also the obligation of receiving states to facilitate the exercise of consular functions of a migrant worker's state of origin when he or she has been detained for any reason. This may help

to prevent statelessness by leading to the verification or documentation of nationality. Article 10 (Obligations of Receiving States).

7 States participating in the Bali Process have acknowledged the connection between tackling statelessness and combating human smuggling and trafficking. This is evidenced, for instance, by efforts to discuss concerns surrounding the situation of the Rohingya on the sidelines of a meeting of the Bali Process in 2009. E. Schwartz, Assistant Secretary, US Bureau of Population, Refugees and Migration, Protecting stateless persons: the Role of the US Government, statements made at a conference on statelessness, Washington DC, 30 October 2009; 'Bali Process' may address Rohingya crisis, Inter Press Service [International News Agency], 28 February 2009; Bali process failed to solve Rohingya boatpeople issue: AI, Mizzima News [India], 17 April 2009; Bali process inadequate to help Rohingya: NGOs, Jakarta Globe [Indonesia], 29 May 2009.

8 One example of a regional study is the compilation and analysis of nationality law in Africa completed by the Open Society Initiative in 2009. See B. Manby, Citizenship Law in Africa. A comparative study, Open Society Initiative, 2009. A global questionnaire on statelessness conducted by UNHCR in 2004 similarly helped to trace trends in nationality policy and areas of concern. It also looked at state policy for the protection of stateless persons. Indonesia, Malaysia and Philippines were the only countries from the ASEAN region to submit information in response to this questionnaire. See UNHCR, Final report concerning the questionnaire on statelessness pursuant to the Agenda for Protection, March 2004. See also research conducted by the Hungarian Helsinki Committee on the protection regime for stateless persons in Central Europe, G. Gyulai, Forgotten without reason. Protection of non-refugee stateless persons in Central Europe, Hungarian Helsinki Committee, 2007.

9 This is explicitly provided for in the 1930 Hague Convention on Certain Questions Relating to Conflict of Nationality Laws, the 1961 Convention on the Reduction of Statelessness, the European Convention on Nationality and the Covenant on the Rights of the Child in Islam. It is also strongly evidenced in state practice. See, for instance, UNHCR, Final report concerning the questionnaire on statelessness pursuant to the Agenda for Protection, March 2004.

10 One exception is Malaysia where women cannot transmit their nationality to their children if they are born outside state territory. Section 1 (b), (c) and (d), Part II of the Second Schedule of the Federal Constitution of Malaysia, 1957, as amended. In addition, there is some conflicting information with regard to the nationality law of Brunei Darussalam. Some sources cite the adoption of an amendment in 2002 which allows women to pass nationality to their children on the same terms as men. See Freedom House, Freedom in the World – Brunei (2006), 19 December 2005; US Department of State, 2007 Report on International Religious Freedom – Brunei, 14 September 2007. However, this revised version of the law was not available to the author and other sources continue to express concern as to the gender inequality in the nationality law. See Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1 – Brunei Darussalam, A/HRC/WG.6/6/BRN/2, 7 August 2009.

[11] See, for instance, Chapter IV of the 1997 European Convention on Nationality which is dedicated to "procedures relating to nationality" and provides for processing within a reasonable time, motivation of decisions in writing, reasonableness of fees and an opportunity for administrative or judicial review. The International Law Commission's Draft Articles on Nationality of Natural Persons in relation to the Succession of States and the Council of Europe Convention on the avoidance of statelessness in relation to State Succession also detail a number of procedural guarantees.

[12] Note that this is only the case for applicants who are also "of Lao race". Thus, the regular qualifying period of residence is 10 years; for persons of Lao race, this is reduced to 5 years; and if the applicant, in addition to being of Lao race, holds no other nationality, then the residence period is reduced again to 3 years. See articles 14 and 14 of the Law on Lao Nationality, No. 06/90/PSA, 1990, as amended. Note that rendering access to facilitated naturalisation for stateless persons dependent on being of a particular race may raise questions with regard to the international principle of non-discrimination. Persons belonging to minorities such as other indigenous groups, as well as ethnic Vietnamese and Chinese minorities, will be excluded from the important benefits of this provision.

[13] Brunei Darussalam granted permanent residence status to just under 50,000 persons between 1958 and 2009. Of this number, almost half were categorised as "stateless". With around 30,000 persons granted nationality over the same period, it can safely be assumed that a substantial number of these were previously stateless. Parents blamed for 'stateless' children, The Brunei Times [Brunei Darussalam], 23 March 2010. See also US Department of State, US Department of State Country Report on Human Rights Practices 2005 – Brunei, 8 March 2006; US Department of State, US Department of State Country Report on Human Rights Practices 2006 – Brunei, 6 March 2007; 240 to receive Brunei citizenship, Borneo Bulletin [Brunei Darussalam], 17 December 2008; 208 Receive citizenship at ceremony, Borneo Bulletin [Brunei Darussalam], 7 June 2009. There are also reports that Brunei Darussalam amended its law to allow stateless persons over the age of 50 to satisfy the language requirement for naturalisation through an oral, rather than written, test. US Department of State, US Department of State Country Report on Human Rights Practices 2003 – Brunei, 25 February 2004; US Department of State, US Department of State Country Report on Human Rights Practices 2006 – Brunei, 6 March 2007; M. Lynch; K. Southwick, Nationality rights for all: A progress report and global survey on statelessness, Refugees International, 2009. Note that other sources reported a tightening of access to naturalisation. See Minority Rights Group International, World Directory of Minorities and Indigenous Persons – Brunei Darussalam: Chinese, 2008; 283 granted Brunei citizenship, The Brunei Times [Brunei Darussalam], 25 April 2010; As before, note that this revised version of the law was not available to the researcher so the content of this reform could not be confirmed.

[14] "The Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the changes and costs of such proceedings". Article 32 of the 1954 Convention relating to the Status of Stateless Persons. The European Convention on Nationality also provides guidance on facilitated naturalisation for stateless

persons, declaring that "favourable conditions" should be put in place which may include "a reduction of the length of required residence, less stringent language requirements, an easier procedure and lower procedural fees". See Council of Europe, European Convention on Nationality: Explanatory Report, Strasbourg, 1997. Note that UNHCR's Executive Committee has encouraged states which have not yet acceded to the 1954 Convention relating to the Status of Stateless persons "to consider, as appropriate, facilitating the naturalization of habitually and lawfully residing stateless persons in accordance with national legislation". UNHCR Executive Committee, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106, 6 October 2006.

[15] It is important to note that the authorities of any relevant countries should only be approached in the context of stateless person status determination "once it is certain that the person is not entitled to asylum since an exchange with the country in question could put the person at risk". UNHCR, UNHCR Action to Address Statelessness – A strategy note, March 2010.

[16] In Spain, for example, a dedicated procedure was established by Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons. Applicants may approach police stations or the Office for Asylum and Refugees (part of the Ministry of Interior). The office will conduct an investigation to determine if the person is stateless in accordance with various rules of evidence and procedure. Several other states have also taken steps to identify a competent decision-maker and outline procedures for stateless person status determination – including France, Italy, Hungary and Mexico. C. Batchelor, The 1954 Convention relating to the Status of Stateless Persons: Implementation within European Union Member States and Recommendations for Harmonisation, UNHCR, October 2003; G. Gyulai, Forgotten without reason. Protection of non-refugee stateless persons in Central Europe, Hungarian Helsinki Committee, 2007; UNHCR and IPU, Nationality and Statelessness: A Handbook for Parliamentarians, 2008; UNHCR, UNHCR progress report on statelessness 2009, EC/60/SC/CRP.10, 29 May 2009; G. Gyulai, "Remember the forgotten, protect the unprotected" in Forced Migration Review, Issue 32, 2009. It is of interest to note that the experience of such countries shows that providing for a dedicated determination procedure and status of "stateless person" under the law has not created a significant pull factor for migration. Over the period from 2001 to 2006, Spain saw an average of less than 70 applications per year for stateless person status and recognised only 23 applicants as stateless over this entire period. G. Gyulai, Forgotten without reason. Protection of non-refugee stateless persons in Central Europe, Hungarian Helsinki Committee, 2007

[17] In addition, it has opened avenues for the prevention of statelessness among children of persons who hold one of these dedicated statuses and will facilitate the reduction of statelessness as Thailand develops new policies in this area. This shows how efforts to protect stateless persons can complement and reinforce the prevention and reduction of statelessness. Punthip Kanchanachittra Saisoonthorn, "Development of concepts of nationality and the efforts to reduce statelessness in Thailand" in Refuge Survey Quarterly, Vol. 25, Issue 3, 2006; L. van Waas, Is permanent illegality inevitable? The challenge to

ensuring birth registration and the right to a nationality for the children of irregular migrants – Thailand and the Dominican Republic, Plan International, 2006; UNESCO, Citizenship Manual – Capacity building on birth registration and citizenship in Thailand, 2008.

[18] These initiatives include a human rights caravan project by the National Human Rights Commission; various initiatives by the Payap University Faculty of Law, including UNICEF-supported "Stateless Classrooms"; and ongoing work by Stateless Watch for Research and Development Institute of Thailand. See Abhisit urges rights awareness, Bangkok Post [Thailand], 17 March 2009; The Stateless Classroom, Bangkok Post [Thailand], 23 June 2009.

[19] Non-nationals often face restrictions in the enjoyment of certain property rights. See, for instance, US Department of State, 2009 Country Reports on Human Rights Practices – Vietnam, 11 March 2010; Minority Rights Group International, World Directory of Minorities and Indigenous Peoples – Brunei Darussalam: Chinese, 2008; US Department of State, 2009 Country Reports on Human Rights Practices – Bruenei Darussalam, 11 March 2010; US Department of State, 2009 Country Reports on Human Rights Practices – Cambodia, 11 March 2010; Committee on the Elimination of Racial Discrimination, Reports submitted by state parties: Cambodia, CERD/C/KHM/8-13, 15 June 2009; UN Human Rights Council, National report submitted in accordance with Paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Cambodia, A/HRC/WG.6/6/KHM/1, 16 September 2009; US Department of State, 2009 Country Reports on Human Rights Practices – Malaysia, 11 March 2010.

[20] For instance, in Brunei Darussalam, while primary education is free for citizens and permanent residents, reports indicate that secondary education fees of B$140 (approx. 100 USD) per month are required for non-citizens and university fees for non-citizens are B$2800-3500 (approx. 2000-2500 USD). US Department of State, 2008 Country Reports on Human Rights Practices – Brunei Darussalam, 25 February 2009; US Department of State, 2009 Country Reports on Human Rights Practices – Bruenei Darussalam, 11 March 2010.

[21] In Indonesia, for example, stateless persons commonly feel that they must employ the services of a middleman to sort out the necessary marriage paperwork but brokerage fees can be prohibitively high which may deter people from getting married at all. See Tales of stateless, foreigner status Jakartan Chinese, The Jakarta Post, 12 February 2010. In Myanmar, stateless residents of Northern Rakhine State require official permission to marry – a procedure that can be costly and take up to several years to complete. US Department of State, 2009 Country Reports on Human Rights Practices – Burma, 11 March 2010. Note, however, that the Myanmar Supreme Court has now overturned two convictions for illegal marriage, illustrating the role of the judiciary in safeguarding the rights of stateless persons. UN Human Rights Council, Progress report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/13/48, 10 March 2010.

[22] In Lao PDR, membership of trade unions is restricted to those who hold Lao nationality. International Trade Union Confederation, 2008 Annual Survey of violations of trade union rights – Laos, 20 November 2008. In Malaysia, lack of access to the regular employment market has reportedly forced some stateless persons to resort to 3D jobs (dirty, dangerous and difficult), to begging or to criminal activities and prostitution. L. Koya, "Statelessness in Malaysia" in S. Nagarajan (ed.) SUHAKAM after 5 years: State of human rights in Malaysia, 2006; US Department of State, 2009 Country Reports on Human Rights Practices – Malaysia, 11 March 2010.

[23] Under international human rights law, political participation is an area in which rights may legitimately be reserved for citizens of the state. See, for instance, article 25 of the International Covenant on Civil and Political Rights. An interesting exception can be found in Myanmar where, despite not being recognised as nationals, Rohingya could vote in the 1990 elections and the 2008 constitutional referendum. They will also be eligible to vote in the 2010 elections. In practice, a Temporary Registration Certificate may be required to cast their ballot, illustrating again the fundamental link between access to personal documentation and the enjoyment of rights by stateless persons. Note that the right to stand for election remains reserved to citizens both of whose parents were citizens. Amnesty International, Myanmar: travesties of justice – Continued misuse of the legal system, 12 December 2005; US Department of State, 2008 Country Reports on Hu man Rights Practices – Burma, 25 February 2009; UNHCR, UNHCR Global Report 2008 – Myanmar, June 2009; International Crisis Group, The Myanmar elections, Asia Briefing No. 105, 27 May 2010; UNHCR, UNHCR Global Report 2009 – Myanmar, 1 June 2010.

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ABOUT THE SOUTHEAST ASIAN HUMAN RIGHTS STUDIES NETWORK

The Southeast Asian Human Rights Studies Network (SEAHRN) was born out of a common aspiration to enhance and deepen the knowledge and understanding of human rights of students, educators and the society at large in Southeast Asia.

SEAHRN members do not only confine themselves to academic studies, but are actively engaged in advocacy work such as providing professional trainings for human rights workers, defenders and law enforcers, and in different forms of social activism and policy advocacy. The network believes that a strong regional cooperation, as realized through the work of SEAHRN, will enhance and enrich its commitments to human rights education and activism, and will in turn contribute to better promotion and protection of human rights of Southeast Asian peoples.

SEAHRN has the following objectives:

1. To strengthen human rights education at the university level in Southeast Asia through faculty and course development;
2. To enhance knowledge and develop deeper understanding of human rights in Southeast Asian countries through collaborative research;
3. To achieve excellent regional academic and civil society cooperation in realizing human rights in Southeast Asia; and
4. To conduct public advocacy through critical engagement with civil society actors, governments and inter-governmental bodies in Southeast Asia.

SEAHRN members are committed to enhancing the following areas of activities in human rights studies and advocacy in Southeast Asia:

- Faculty development
- Pedagogical training
- Curriculum and course development
- Research and publication
- Human rights conferences/symposia
- Faculty and student exchange programs
- Outreach programs to ASEAN officials and civil society groups
- Development of human rights studies databases
- Development of internet-based human rights resources

SEAHRN membership is open to academic institutions in Southeast Asia that are engaged in providing human rights courses, conducting research, providing training or engaging in policy or other forms of advocacy of human rights.

To know more about recent and upcoming activities of SEAHRN, please visit www.seahrn.org. Institutions which are interested to join SEAHRN are encouraged to send their letters of interest to seahrn@gmail.com.

SEAHRN FOUNDING MEMBERS

Indonesia | Indonesia

- Human Rights Center, Faculty of Law, Universitas Indonesia
- Center for Human Rights Studies, Islamic University of Indonesia
- Center for Southeast Asia Social Studies, University of Gadjah Mada
- Center for Human Rights Law Studies, Airlangga University

Laos | ลาว

Human Rights Research Center (HRRC), Lao Academy of Social Sciences (LASS)

Malaysia | Malaysia

- Individuals from University of Malaya (Faculty of Law, Gender Studies Program)
- Research and Education for Peace, Universiti Sains Malaysia
- Southeast Asian Conflict Studies Network (SEACSN), Universiti Sains Malaysia

Philippines | Pilipinas

- Ateneo Human Rights Center, Ateneo de Manila University- School of Law School
- Institute of Human Rights, University of the Philippines

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- Individuals from Chulalongkorn University (Faculty of Political Science)
- Centre for the Study of Human Rights and Non Violence, College of Politics and Governance, Mahasarakham University
- Center for Human Rights Studies and Social Development (CHRSD), Mahidol University

Vietnam | *Việt Nam*

- Center for Study of Human and Citizen Rights, Ho Chi Minh City University of Law
- Research Center for Human and Citizen's Rights, Law Department, Vietnam National University-Hanoi

One of the main aspirations of the
Southeast Asian Human Rights Studies Network (SEAHRN)
is to motivate and support scholars, researchers
and activists in contributing to the knowledge
on human rights, peace and conflict in Southeast Asia.
This Series collects and highlights some relevant works
coming from this side of the world.
Indeed, there's no question that Southeast Asians
can stand up to the challenge of BREAKING THE SILENCE
in the name of justice, peace and human rights.

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