Human Rights and Peace in Southeast Asia Series 2

DEFYING THE IMPASSE

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SEAHRN
Southeast Asian Human Rights Studies Network

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Southeast Asian Human Rights Studies Network
Bangkok, September 2013

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The Southeast Asian Human Rights Studies Network (SEAHRN) is an independent consortium of academic institutions and research centres which provide human rights and peace education through study programmes, research and outreach activities within the Southeast Asian region. The Network, which was established in 2009, currently has 20 members from seven countries: Cambodia, Indonesia, Lao PDR, Malaysia, The Philippines, Thailand and Vietnam.

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

Human Rights and Peace in Southeast Asia Series 2:
Defying the Impasse

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Human Rights in Southeast Asia Series 1: Breaking the Silence (2011)
Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices (2013)

FOREWORD

The publication of the SEAHRN Human Rights and Peace in Southeast Asia Series makes an invaluable contribution towards generating interests in, and enhancing understanding about, the human rights conditions and practices in the ASEAN region, as well as the critical link between human rights and peace. The first publication in the series was aptly titled "Breaking the Silence," and this second book in the series is also tellingly titled "Defying the Impasse."

Talking about human rights in Southeast Asia, one can either see the issue as a glass half empty or a glass half-full. It must be admitted that while on the one hand human rights as a universal value is now enshrined in the ASEAN Charter which has been ratified by all of the member states, on the other hand its interpretation and implementation has been so diluted and constraint by numerous caveats, clearly demonstrating the still equivocal attitudes of some ASEAN members towards the protection and promotion of human rights in general. Pessimists would argue that it is probably a losing game to put the protection and promotion of human rights on centre stage in South East Asia, when for so long the principles of national sovereignty and non-intereference in each other's internal affairs have reigned supreme in ASEAN. While ASEAN members have succumbed to some pressures to pay greater attention to human rights, especially in light of the democratisation taking place in key ASEAN states, notably Indonesia, and thus formally agreed to adopt these principles in the ASEAN Charter, in the final analyses ASEAN is still primarily an inter-governmental organisation, and the majority of ASEAN member states are not democracies. While democratic polities do not necessarily have perfect record in protecting and promoting human rights it is neverthless a recognised fact that human rights, especially those pertaining to civil and political rights, would be generally denied in a non-democratic system of government.

Yet at the same time optimists, and I count myself as one, would argue that ASEAN has gone some considerable distance in transforming itself, and neither the region as a whole nor the organisation can be immune to the forces coming from within, namely from the national dynamics, nor from the wider international environment. While the end of history is not yet here with us, and the recent setbacks in a number of the so-called Arab Spring countries show us that transition to democracy tends to be messy and does not always end well, we have nevertheless crossed an important historical line in our views of the relations between the States and the people they govern. Notwithstanding that nation-states still constitute the primary actors in international relations and that the pursuit of national interests is regarded as the legitimate need and concerns of all governments, it is no longer acceptable that those in charge of governments violate human rights in the name of protecting national interests. Governments can no longer comfortably hide behind the facade of national sovereignty when they carry out policies against theit own citizens deemed unacceptable by the wider international community. After allowing a number of atrocities to go unchecked in the immediate post-Cold

War period the international community has lately developed a conscience with the introduction of the concept of "Responsibility to Protect" (RtoP). While remaining problematic as an instrument of international law, the RtoP concept can play a role in preventing ruling regimes from committing gross violations of human rights, and in helping to foster new norms and values about the importance of protecting human rights as an integral part of becoming a modern and civilised nation.

The conferences organised by SEAHRN and subsequent publications of selected papers fill important gaps in the region's knowledge and understanding about human rights in ASEAN, especially as they provide comparative regional perspectives. In countries that already have well functioning national human rights commissions there may be a tendency to view that the existing ASEAN human rights mechanism has little added value and thus is of little importance. Such an inward-looking perspective, however, would be a disservice if one were serious in desiring to develop an ASEAN Community in which the protection and promotion of human rights will be regarded as fundamental values. After all, the reality is that ASEAN comprises of ten countries with varied systems of governments and practices, and recognising the concrete challenges and impediments to human rights would give us better ideas of what would and would not work, rather than wishing to impose highly idealistic but impractical solutions immediately. For those coming from countries where human rights are not yet regarded as important national concerns, the comparative perspectives provided by this book would also be instructive. By telling and sharing the various experiences of a number of ASEAN countries SEAHRN has underlined that, the human rights problems are common throughout the region, and that no one country can claim to be truly superior to others in its human rights record. In doing so it is hoped that the publication of this important book will not only provide us with better insight about the challenges we face in ensuring better human rights protection within ASEAN, but equally important in helping to reduce the political sensitivity about the subject of human rights as a whole.

It is also to be hoped that the publication of this book would indeed contribute to ending the impasse in improving the human rights conditions in all of the ASEAN countries and in increasing support for a stronger regional human rights mechanism that can assist regional members in improving their respective national capacity where needed.

Jakarta, 9th September 2013.

Dr. Dewi Fortuna Anwar
Chair, Institute for Democracy and Human Rights-The Habibie Center
Deputy Secretary for Political Affairs to the Vice President of the Republic of Indonesia

A MOMENT OF REFLECTION AND GRATITUDE

The Southeast Asian Human Rights Studies Network (SEAHRN) launched its first publication, *Human Rights in Southeast Asia Series 1: Breaking the Silence* in Yogyakarta, Indonesia in October 2011. The SEAHRN Editorial Team had meticulously compiled, selected, and edited 12 best papers featured at the First International Conference on Human Rights in Southeast Asia (Bangkok, 2010). Taking advantage of the momentum, in less than two years, the Editorial Team moved on to develop the next sets of the Human Rights and Peace in Southeast Asia Series. The immense number of excellent academic work led the team to produce two equally important volumes. All 16 articles were selected amongst more than 90 papers presented at the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia (Jakarta, 2012).

Both second and third Series, respectively christened as "*Defying the Impasse*" and "*Amplifying the Voices*", are impossible without the generous support from the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI), Swedish International Development Cooperation Agency (SIDA) and Canadian International Development Agency (CIDA). We are particularly most grateful to CIDA for respecting, trusting and supporting SEAHRN's academic and management objectives and freedom in achieving these two new Series. Our utmost appreciation is given to Dr. Dewi Anwar Fortuna and Prof. Harkristuti Harkrisnowo for sharing their invaluable time, expertise and insights on the themes tackled in these two Series.

It is also important to recognize the hardworking and committed members of SEAHRN who engaged in the merciless tasks of reviewing and selecting the best 16 papers for the two Series. The list is long but indispensably essential:

- **Kamarulzaman Askandar** (University Sains Malaysia, Malaysia)
- **Melizel F. Asuncion** (SEAHRN Secretariat)
- **Saifuddin Bantasyam** (Syiah Kuala University,Indonesia)
- **Inge Christanti** (University of Surabaya, Indonesia)
- **Majda El-Muhtaj** (State University of Medan, Indonesia)
- **Michael George Hayes** (Mahidol University, Thailand)
- **Rosewitha Irawaty** (Universitas Indonesia, Indonesia)
- **Huong Ngo** (Vietnam National University, Vietnam)
- **Elizabeth Aguiling-Pangalangan** (University of the Philippines, Philippines)
- **Herlambang Wiratraman Perdana** (Airlangga University, Indonesia)
- **Hadi Rahmat Purnama** (Universitas Indonesia, Indonesia)
- **Eko Riyadi** (Islamic University of Indonesia, Indonesia)
- **Ray Paolo Santiago** (Ateneo de Manila University, Philippines)
- **Heru Susetyo** (Universitas Indonesia, Indonesia)

We are also grateful to the Institute of Human Rights and Peace Studies (IHRP) at Mahidol University for hosting SEAHRN's permanent secretariat and consistently supporting editorial team meetings. Otherwise, publishing and distributing these two series would never appear on the horizon. Just to remind ourselves, the common dream shared by the SEAHRN Members is 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 and peace. These two Series are crucial steps to achieve this and, hopefully, the aspiration of a people-centred and rights- & peace-fulfilling Southeast Asian community.

Azmi Sharom
Chief Editor
on behalf of the Editorial Team
SEAHRN Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse
SEAHRN Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices

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INTRODUCTION

THE CONTINUING STRUGGLE IN SOUTHEAST ASIA

"Human rights were not a free gift. They were only won by long, hard struggle…. (R)espect for individual rights, when it passes from theory to practice, entails conflict with certain interests and abolition of certain privileges. Men and women everywhere should be familiar with the dramatic incidents--well-known and obscure-- of a conquest which has been largely achieved through the heroism of the noblest of their fellows."[1]
-United Nations Educational Scientific and Cultural Organization (UNESCO)

It is widely recognized that, everywhere, the history of human rights is a history of struggle, and Southeast Asia is no exception. In every single country in the Region, people have been struggling for the enjoyment and better protection and promotion of their human rights. In a number of countries, the demand for human rights and freedoms, democracy, democratisation, justice and the rule of law reflected in the forms of critical writings, using social media, petitions, protests, armed struggles, etc. have resulted in harassment, intimidation, detention, imprisonment, and, even the loss of lives. Everywhere, there are always people who, in one way or another, are defying powers that abuse, marginalise and violate rights and freedoms.

Dinh Dang Dinh was sentenced to six years in prison for "conducting propaganda against the State." The former army officer and teacher had been arrested in October 2011 after publishing online articles about government corruption and social and environmental issues.[2] In the same country, the international community and international human rights NGOs witnessed a(nother) mass trial of activists when a group of Catholics, students, and bloggers led by online activists is found guilty of "carrying out activities with intent to overthrow the government" for their involvement with banned opposition group, Viet Tan. Thirteen were given sentences of between three and 13 years in prison, in addition to two to five years' probation, and one was sentenced to house arrest. Two of the 14 were prosecuted because of their blogging activities.[3]

Even in a country where democracy has been claimed as a political mantra, the exercise of the right to freedom of expression has been curtailed. The Asian Legal Resource Centre, in a press release purporting to be a letter to the United Nations Human Rights Council, said the Thai Lese Majeste laws prevent full freedom of speech in the country. The ALRC suggested the UN to "demand that the Government of Thailand revoke Article 112 of the

1 Cited from Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*. University of Pennsylvania Press, Philadelphia, Third Edition, 2011.
2 "Citizen Journalist Dinh Dang Dinh Convicted," 9 August 2012, Available at: http://www.rfa.org/english/multimedia/timeline/VnDissident.html (accessed on 31 August 2013).
3 *Ibid.*

Criminal Code and the 2007 Computer Crimes Act." [4] The UN Human Rights Council' Working Group, which, in 2012, reviewed Thailand's Universal Periodic Review (UPR) report saw their recommendations on the same issue rejected by the Thai government. Another country appeared to be democratic because it has been having regular elections and media freedom and considered to be a "free-speech nation, "but you must be careful all the time,." "You can speak, you can write," so long as your words steer clear of the government or individual officials."[5] It was confirmed that "authorities suppress dissent *through extreme measures* that "instil fear in the population and create a climate of self-censorship," according to the Cambodian Centre for Human Rights. "Activists, NGOs, journalists, bloggers and opposition parliamentarians are routinely targeted." [6]

The struggle for rights and freedoms against the state and state apparatus is known and continues in every corner of the Region. But, in the world of economic liberalism (as well as ethnic and religious conflicts), the struggle against non-state actors is increasingly and equally becoming more serious. A particular case from Thailand is worth highlighting here. "On 21 June 2004, Charoen Wat-aksorn was assassinated as he alighted from a bus returning to Prachuap Khiri Khan after he gave testimony about environmental destruction in Bo Nok and Ban Krut to the Senate in Bangkok. Charoen was a prominent human rights defender and leader of the Love Bo Nok group who fought for over ten years until his death against coal-fired power, large-scale shrimp farming and other environmental destruction projects owned by private companies in Prachuap Khiri Khan.[7] After nine years, his widow still does not see and feel that justice was served. On 16 March 2013, the Appeal Court reversed the conviction of the three suspects on the basis that although two suspects confessed to murdering Charoen Wat-aksorn, and confessed that they were hired to do so by …, the evidence could not be confirmed directly by the Court as they (two of them) were dead.[8] The use of assassination and intimidation to silence these protests against the private (company)'s interests is widespread in the Region.

One can see that the struggles for rights and freedoms (and peace) always confront powerful oppositions either by the state and/or non state actors. Resistance to change is there in every single step of the way. "The reason can be simply stated : they all directly threatened those with power who refuse to share it voluntarily, those with vested interests or prevailing prejudice who wanted special privilege, and those government leaders who

4 Bangkok Post Local News, "UN 'Should Abolish' Thai Lese Majeste Laws" Available at: http://www.bangkokpost.com/news/local/367175/hong-kong-human-rights-group-demands-un-intervene-in-lese-majeste-laws, (accessed on 31 August 2013).

5 …, Editor of the *Phnom Penh Post Khmer*, wrote in email this week, in *Homepage photo by Jerry Redfern* Columbia Journalism Review, 1 September 2013. Available at: http://www.cjr.org/behind_the_news/free_speech_in_cambodia.php?page=all, (accessed on 1 September 2013). The name was removed.

6 *Ibid.*

7 Asian Human Rights Commission, "Thailand: Justice Denied in the Case of the Murder of Charoen Wat-aksorn." Available at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-105-2013, (accessed on 1 September 2013). The names were removed and a few details were added. Prachuap Khiri Khan is a province located in Southern Thailand. It is known for its beautiful beaches and nature.

8 *Ibid.*

hid behind the claims of national sovereignty and insisted that they were immune from being held accountable for any abuses they might committed."[9] For those who defy power, they are endowed with what Paul Gordon Lauren calls "visions." He states that, "these visions challenged traditional authority and attempted to limit the arbitrary exercise of power. They repudiated ideas of superiority on the basis of gender or the colour of skin, refused to accept the proposition that how a state treats its own people is its own business, and rejected the notion that the strong do what they can and the weak do what they must."[10] It's unfortunate that with all visions and efforts, the weak still have to do what they must and the strong do what they want. The very basic fact that human rights lies on the unequal relationships between people and state explains the long lasting fight for human rights and the challenges lie ahead since the resistance from the state remains strong while people awareness of rights is increasing.

The recent development of human rights infrastructure in ASEAN has, somehow, raised expectations of ASEAN people that the Region is already possesses a human rights system. The human rights regime that exists in ASEAN has, however, a lot of weaknesses. The ASEAN Intergovernmental Commission on Human Rights (AICHR), although has generic mandates and functions to promote and protect human rights of ASEAN people, is not equipped with power to receive complaints or to monitor cases of human rights violations. The recently adopted ASEAN Human Rights Declaration (AHRD) was criticized for falling below internationally recognized human rights standards.

Any further developments towards more effective human rights regime cannot be done without challenges. One of the difficulties that ASEAN will have to face is how to make the organization accountable to its own people. Another challenge lies on the very working principle of ASEAN, non-interference in internal affairs, consultation and consensus, and cooperation no confrontation. The issues of human rights and democracy are perceived as internal affairs.

The Article 2, Paragraph 2 of ASEAN Charter emphasises the respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member-States; non-interference in their national affairs; and respect for the right of every member state to lead its national existence free from external interference, subversion and coercion. ASEAN has long emphasised that the promotion and protection of human rights by the international community must recognise national sovereignty, national borders and non-interference in another state's affairs. ASEAN views human rights as an internal affair. The advent of human rights and human rights regime does not contribute much to the change of this principle. The very clear evidence of this is appeared in the AHRD which copies the principles of ASEAN Charter in its general principles. Not only this will hinder the proper and effective protection of human rights but also renders the concept of responsibility to protect completely irrelevant in Southeast Asia.

9 Paul Gordon Lauren, *Op. Cit.*, p. 2.

10 *Ibid.* p. 2.

The struggle for human rights and fundamental freedoms will always, inevitably, face the impasse. It was believed, some years ago, that the concept of human security might be more acceptable in Southeast Asia. Unfortunately like human rights, it is, still, not the case as "the human security approach becomes incompatible with regional security when it challenges certain patterns of resource allocation that favour military security and obsession with defending national frontiers. It becomes objectionable when it threatens power structures that entrench the dominance of a few. Human security is incompatible with regional security when the concerns and priorities of regional civil society are not shared by the political and bureaucratic elites. They are incompatible when regional alliance building of the civil society is threatening the narrow and self-serving interpretation of the principle of non-interference in the internal affairs of states. Incompatibility arises when greed, corruption and the threat or use of force characterize national and regional governance."[11]

It is interesting to note that while the concept of human rights seems to be accommodated by Southeast Asian states, the notion of human security, as clearly stated earlier, does not find its place in the regional agenda.[12] The simple explanation is because human security as advanced by the UN(DP) includes both freedom from fear and freedom from want. "Combining "freedom from fear" with "freedom from want," human security touches on safety, on politics, and potentially on democracy as well. The implementation of such a broad concept could adverse affect the security of the region's non-democratic regimes. Empowered people become more aware of their need for human rights, political participation and open political discourse. The more Southeast Asian governments realize this danger, the harder they may try to mitigate such impacts by reconstructing human security in less overtly political terms."[13] From a human security perspective, Southeast Asian states seem to be more comfortable with the concept of "freedom from want." This reinforces the advocacy by a number of countries in the Region for the priority to be given to economic, social and cultural rights over political and civil rights.

From what was already described, we witness the tension between the rights of people and the rights of states, the tension between the protection of rights including the responsibility to protect and the principle of non-interference in internal affairs, the tension posed by the rhetoric of state security, which, more often than not, is identified as the security of the regime in power and the human security, the tension between holding perpetrators accountable to harms and crimes committed and the transition to peace (transitional justice). These tensions could not be easily addressed as long as the visions for rights,

11 M. C. Abad, Jr., *The Challenge of Balancing State Security with Human Security*. Paper presented at the 9th Harvard Project for Asian and International Affairs Conference, Beijing, 27-30 August 2000, para. 26.

12 Although the notions of "comprehensive security" and "traditional security" were mentioned in many ASEAN official documents.

13 Alfred Gerstl, *The Depoliticization and "ASEANization" of Human Security in Southeast Asia: ASEAN's Counter-Terrorism and Climate Change Policies,* Working paper, prepared for Standing Group on International Relations. Presented at the Seventh Pan European International Relations Conference, Stockholm, 9-11 September 2010.

security, democracy, justice and rule of law are not shared by States and their peoples. The demand for the respect and full enjoyment of human rights and fundamental freedoms will be always considered as defying the existing power, therefore, face with impasse which is not easy to break.

Amidst difficulties, the human rights rhetoric is prevailing in the Region. However, the papers included in the "Human Rights and Peace in Southeast Asia Series II" entitled "Defying the Impasse" reflects the reality of those fighting for rights, respect for diversity, democracy and peace in Southeast Asia.

The first paper in this collection, Dr. N. Hassan Wirajuda's "Pursuing Democracy, Human Rights and Peace in Light of the ASEAN Community in 2015," provides an overarching view of just what that reality is. That human rights are becoming part of the ASEAN discourse cannot be denied. Neither can it be denied that the process is a slow one.

Wirajuda asserts that this is due to the lack of political will amongst governments far more concerned with economic development steered by authoritarian regimes. The problem is that for many years, particularly in the eighties and nineties, this approach seemed to work. The region had unparalleled economic success giving credence to the demagogues who claimed that in order to develop, then "Asian Values" had to be embraced. The concept of "Asian Values" of course had very little space or tolerance for civil liberties. Such things were a luxury which would only get in the way of a paternalistic and authoritarian regime's efforts at ensuring economic growth. After all, how can such developments be achieved quickly, if they are questioned in a free press? And the cheap labour, so attractive to foreign investors, will not be easy to provide if there is a strong labour movement.

However such an approach is ultimately unsustainable as seen in the events that led to the downfall of Soeharto in Indonesia by the "Reformation Movement" , which then led to Indonesia taking its first tentative steps towards democracy; steps which may have had some stumbles initially but is now growing stronger and more self-assured.

It is trite to say that democracy and human rights are intimately and symbiotically linked. What is interesting in Wirajuda's chapter is not that it makes this overheard claim, but that in his analysis, he points out that it is democracy growing in individual ASEAN Member-States that will make the difference to the region as a whole.

The "proof" of the development of human rights in ASEAN would normally take the form of the ASEAN Charter 2007, the forming of the AICHR in 2009 and the adoption of the AHRD in 2012. These developments are laudable as they bring concepts such as human rights and the rule of law, openly and clearly into the ASEAN framework.

However, as mentioned above, they are not without their weaknesses of which there are plenty. The AICHR for example has no investigative powers, let alone any adjudicating

powers and the Declaration, clinging as it does to the values of the "ASEAN Way," that is to say non-interference and non-confrontation, has left much discretion to individual states to determine just what standards they wish to set in the implementation of human rights within their own borders. In short these documents provide no binding or enforceable human rights standards.

It is hardly ideal, yet, Wirajuda puts forward that if it was not for the efforts of the more democratic governments in the region, such slow developments would hardly have been achieved at all. And perhaps that is the future of ASEAN and human rights. Any meaningful developments have to take place from the bottom up; where the people of individual nations demand greater democracy from their own governments and with such changes the attitude of these governments will be modified and this would then be reflected in the regional organisation.

Such a process will take time, and in the meantime much can be done to work within the existing system to democratise and sensitise ASEAN to the need for greater human rights protection. Civil society can play its role in this as put forward by Kimikazu Shigemasa in his paper, "Long Process of Trust Building in Southeast Asia: ASEAN, Civil Society and Human Rights."

Shigemasa's chapter can be seen as an expansion of Dr. Wirajuda's theme, that individual governments can make a difference, in that it states that individuals too can make a difference within the current system. To summarise, in the realm of government and non-governmental interaction, Shigemasa identifies three "tracks" of players. Track 1 are governments and governmental representatives; Track 2 are academic institutions such as universities and think tanks; and Track 3 are Non-Governmental Organisations.

There are therefore many different players in human rights discourse; the issue is how to bring them together in a meaningful manner that could lead to further progressive developments. It is not surprising that Track 1 players are especially suspicious of Track 3. As Shigemasa points out; "The 2006 version of Guidelines on ASEAN Relations with Civil Society Organisation is another example of this reluctance. Accordingly, only such organisations and associations performing functions and activities that are governmental or quasi-governmental in nature, but not part of the formal structure of ASEAN are eligible for having dialogue with ASEAN."

In other words, the governments of ASEAN would much rather play with their "own kind." This insular and exclusive behaviour precludes the many positives that can come from meaningful engagement with non-governmental players. Such engagement provides alternative viewpoints and even data. If civil society is brought into the decision making process, even via mere consultation, there comes with it a sense of ownership and that could well lead to the "buying in" of ASEAN institutions and legal developments and this in turns could lead to greater cooperation. Meaningful participation not only means

that there is a check and balance of ASEAN activities and movements, but it would also mean greater legitimacy for the organisation.

These are all very noble and worthy reasons for engagement, but such openness is naturally an anathema to governments used to doing things their own way. Yet they are vital to the protection of human rights in the region. How then can this particular impasse be broken?

Shigemasa traces the relationship between the three tracks, documenting the highs and the lows of their rather tenuous relationship. The usual approach to open lines of communication and discourse between Track 1 and 3 is usually via Track 2 acting as a bridge between the two. Universities and think tanks being less strident than NGO are seen as more palatable to governments and at the same time are more sympathetic to the civil society players.

What Shigemasa proposes is that such a bridging can come from within Track 1 itself. Progressive individuals who are either in government or in government agencies have a role to play in bringing Track 3 into the equation. A key organisation he identifies is the AICHR amongst whom will be members from the more democratic ASEAN states who are not only sympathetic to the struggles of civil society but indeed may come from their ranks.

The need for greater participation in ASEAN on the part of civil society is given credence by the fact that as it stands there are many problems with even the upholding of the most basic of human rights. This occurs not only in less progressive countries but also nations such as Indonesia which has taken such impressive steps from its previous authoritarian nature. In "Religious Freedom in Pluralistic Societies: Cases of Indonesia and Malaysia," Dian Shah examines the difficult balancing act that plural societies, namely Malaysia and Indonesia, have to perform when faced with differing and competing religious interests.

On the face of it, both Indonesia and Malaysia have clear provisions for protecting the freedom of religion. The difference being that the Malaysian Constitution specifically limits the right to propagate one's religion to Muslims. This includes Muslim to Muslim propagation. Be that as it may, the actual right to follow the religion of one's choice appears to be guaranteed.

In many cases however this right appears to be merely illusory. The Malaysian government has used repressive laws to ban books which it deems to be a threat to peace and stability, and increasingly those deemed to be "an insult to Islam," although how a concept such as religion can be insulted is never made clear. There is also currently an effort by the Malaysian government to ban the use of the word "Allah" amongst Malaysian Christians as it is argued that Malaysian Muslims will get confused and mix the two religions up.[14]

14 The Star Online, "Allah Case: decision in October (Update)," 10 September 2013, Available at: http://www.thestar.com.my/News/Nation/2013/09/10/allah-case-court-of-appeal.aspx (accessed on 11 September 2013).

In the Malaysian states, which have the authority to make certain Islamic laws, there are differing levels of threats to human rights. The state of Kedah for example has recently banned Shi'a teachings, even though Malaysia is a signatory to the 2004 Amman Message which clearly recognises and respects the Shi'a branch of Islam.

In the Malaysian states, which have the authority to make certain Islamic laws, there are differing levels of threats to human rights. The state of Kedah for example has recently banned Shia teachings,[15] even though Malaysia is a signatory to the 2004 Amman Message[16] which clearly recognises and respects the Shi'a branch of Islam.

Indonesia has anti blasphemy laws which are used against "deviant" sects such as the Ahmadiyah, effectively banning and criminalising them. In both countries the excuse of "national security and peace" is the constant refrain on the part of the government, even though the groups which are oppressed have not been shown to be a threat. On the contrary extremist Islamist groups and individuals are the ones who have been using violence. This takes the form of church burnings in Malaysia and the attack and killing of Ahmadiyah followers in Indonesia. The irony is that the governments of both countries have chosen to counter such violence by punishing the victims.

Even, when there is no overt repression of human rights, such as in Indonesia which has not shown the same penchant for book banning as the Malaysians, there is also the lack of willingness to protect. *Allah Liberty and Love* by Irshad Manji was banned by the Malaysian government (a ban lifted in September 2013 by the High Court),[17] but no such ban was imposed by Indonesia. Yet, there was an apparent reluctance on the part of the Indonesian authorities to protect the author and the organisers of her speaking tours from attacks by extremists.

Despite some reasons for optimism, such as the Malaysian High Court's decision in the Irshad Manji case and Indonesia's vibrant and diverse religious community, with voices that are strong in the defence of plurality and human rights, there is still cause for deep concern. Both countries have governments driven by political expediency. This is particularly true in Malaysia where religion and racial identity is so closely linked. The Malaysian Constitution makes it clear that to be defined as Malay, one must be a Muslim. Thus any action deemed to be "against Islam" will also have racial undertones. This is a situation with serious political implications in a nation where the ruling political parties are ethnic based organisations.

15 New Straits Times, "Kedah praised for Shia teachings ban," 20 July 2013, Available at: http://www.nst.com.my/nation/general/kedah-praised-for-shia-teachings-ban-1.322881 (accessed on 5 September 2013)

16 The Amman Message: Summary (2006), Available at: http://www.ammanmessage.com/ (accessed on 5 September 2013)

17 The Star Online, "Court removes ban order Irshad Manji's book (Update)," 5 September 2013Available at: http://www.thestar.com.my/News/Nation/2013/09/05/Irshad-Manji-book-ban-lifted.aspx (accessed on 5 September 2013)

Real politic has led to both governments being unwilling to make a stand on religious freedom; perhaps by their own conviction, but most definitely because to do so means that they may be doing something politically unpopular. Dian asserts that the Indonesian stance against the Ahmadiyah followers for example is the result of not wishing to offend the majority Sunni Muslim populace.

She concludes her chapter by suggesting such reactionary attitudes towards religious plurality and the lack of respect for fundamental freedoms of all peoples could only get worse if nothing is done to curb such actions. What she does not say explicitly but can be drawn from this chapter is that there is a distinct lack of courageous leadership in both nations to protect the religious freedoms of all their people.

A similar lack of protection is given to the freedom of expression as clearly described in Ngo Huong's chapter "Freedom of Expression and the Right to Information in Indonesia, Singapore, Thailand and Vietnam." The writer acknowledges that the freedom of expression and information has their limits and this is reflected in international law. However her review of various ASEAN nations shows that many jurisdictions do not appear to have limits on their limits, thus making a mockery of the concept.

Ngo suggests that there has to be a norm setting in order to have a more uniformed approach towards the protection of these freedoms in ASEAN, using the existing ASEAN mechanisms such as the AICHR. Indeed such standard setting is necessary and it is hoped that when human right values become the norm, then any legal limitations on those rights will be tampered by an underlying philosophy which views freedom as an aspiration and not a hindrance.

Religious freedom and the freedom of expression are well established concepts within the human rights canon, but in a constantly changing world, there are also new ideas with which Southeast Asia has to contend with. One such concept is the responsibility to protect. Borne from the ideological conundrum faced by the United Nations when approving the attack of Yugoslavia by the North Atlantic Treaty Organisation (NATO) in 1999, this concept attempts to circumnavigate the dilemma where international law only justifies military action when a state is under imminent threat. In 1999 the reason for the NATO attack was humanitarian and not self-defence.

Led by the Canadians, the concept of a responsibility to protect was put forward to and accepted by the United Nations General Assembly in 2005.[18] The responsibility to protect has three foundations and they are that every state has the obligation to protect their people from genocide, war crimes, ethnic cleansing and crimes against humanity; the

18 Office of the Special Adviser on the Prevention of Genocide, *"*Report of the Secretary-General on the responsibility to protect: Timely and decisive response.*"* Interactive dialogue (5 September 2013), Available at: http://www.un.org/en/preventgenocide/adviser/responsibility.html (accessed on 6 September 2013).

international community has the responsibility to assist states in protecting their people; and the international community is empowered to take diplomatic measures to protect but failing which more coercive measures can be taken if it is done in a manner consistent with the principles and laws of the United Nations. In this way, the justification for military action has been broadened from the traditional reasons of self-defense.

The responsibility to protect challenges the conventional principle of sovereignty of state; a principle held very dear in ASEAN members. It is not particularly surprising then that in the article, "The Responsibility to Protect in ASEAN and the Inconsistency of Human Rights Engagement" by I Gede Wahyu Wicaksana, it is shown that the regional reaction ranges from resistance to cautious acceptance.

Myanmar has objected to the principle and even countries that have accepted it have not been very vigorous in their acquiescence. Singapore for example, has embraced the responsibility to protect, but is very wary on the use of force in order to implement it. Thus, even though Singapore has expressed concern about Myanmar's crackdown against protesters in 2007, they have never approved the Security Council's condemnation of that country.

Indonesia has demanded that there has to be an international consensus to clarify the definition of the responsibility to protect and Thailand and the Philippines have only paid lip service to the idea, ultimately preferring to depend on good neighbourliness and soft diplomatic action when dealing with humanitarian crisis. This is a classic "ASEAN Way" approach to problem solving and it is an impediment to a whole hearted acceptance of the responsibility to protect.

The concept of a responsibility to protect is used in situations where a humanitarian crisis is imminent or is occurring, the following two chapters discuss the aftermath of conflict. In Timor-Leste, in 1999 after the conflict with Indonesia, the United Nations' Transitional Administration started a process known as Security Sector Reform (SSR). The objective of the SSR is to establish a sustainable peace via a professional, accountable and effective security force.

Mathias E. Valdez-Duffau argues in "Leaving Conflict Behind?: An Analysis of the Security Sector Reform (SSR) and (in)stability in Timor-Leste" that the UN efforts had failed. The main thrust of his thesis is that the SSR attempted in Timor-Leste was a crude imposition of outside ideas, poorly planned, and most importantly done with a lack of cognisance of local needs and sensitivities.

The only indigenous armed group, the Falintil were left in the cold in the new SSR. They were alienated and by and large were not absorbed into the new security plans of the country. This left their future uncertain which led to discontent. A discontent that eventually manifested in armed violence and chaos. To make matters worse, ex members of the

POLRI (Indonesian forces), were drafted into the SSR and effectively this meant that the new forces had the faces of what was deemed by the Timorese as their once oppressors.

Valdez-Duffau's chapter emphatically asserts that what is key in the successful implementing of an SSR is the complete involvement of the indigenous society. Anything imported and unplanned would simply not be "bought" by the local populace and this could only lead to its failure.

Timor-Leste's efforts at establishing its own security forces was important for the stability of a nation and such stability in turn is a necessity in post conflict nations searching for transitional justice. It is still early to determine if Timor-Leste's quest for transitional justice is reaching a satisfactory end, but if the Philippines is to teach any lessons it is that the transitional justice process left unfinished could lead to the re-emergence of oppressive practices and an extended struggle for justice and human rights.

Theodore Te's "Hints and Hues of Transitional Justice in the Philippines Over the Last Twenty Five Years" puts forward that transitional justice is about rectifying past injustices and planning for future progress in an ethical and democratic manner. He argues that the Philippines had to go through the process of transitional justice, not once but twice. As added colour to the narrative the leaders of the nation faced with this challenge are mother and son.

When Cory Aquino led the revolutionary government after the overthrow of Ferdinand Marcos, there were efforts made on her part to purge the government of loyalists to the previous regime and to establish a new system based on democracy. Te argues however that the desire to move forward was too urgent to the point that the wounds of the past were not satisfactorily closed and the new governmental structure still allowed for potential abuse.

Abuse in the form of corruption and the suppression of human rights it is argued arose again under the administration of Gloria Macapagal-Arroyo and it is left to Benigno Aquino III, son of Cory Aquino to continue the work his mother did not complete by going through another transitional justice process to finally get the nation moving away from the possibility of a repeat of authoritarian and corrupt governments. In a way his task is made harder because his is not a revolutionary government with all the freedom that implies, and instead is a constitutional one with proper constitutional limitations, but if history is to be heeded, then regardless of the difficulties, transitional justice must be done and done fully less the process repeats itself.

We close this introduction with Inge Christanti and Yanuar Sumarlan's "Creating Peace through Peace Journalism as an Alternative News Framing." It is a fitting final paper to examine as it brings together two of the fields which SEAHRN is concerned with, which is to say human rights and peace studies.

Christanti and Sumarlan's chapter provides a detailed analysis of the reporting of news from a religious conflict in 2011/2012 in the Indonesian town of Sampang, Madura. She argues the idea for the need of "press responsibility" in conflict situations. Although "press responsibility" is often used as code for press control and suppression, they argue that a responsible press can play a role in preventing further violence.

Peace reporting or journalism as this concept is known is fundamentally about framing the reporting in a way that reduces and prevents the potential for further violence rather than inflaming tensions. It includes being fair in reporting the various perspectives in a particular conflict and also to avoid provocative language and sensationalism.

This chapter binds together a common theme running through this volume. Again and again writers have asserted either explicitly or impliedly that progress needs to be a bottom up process and the importance of the role of civil society. When faced with governments, organisations or agencies not sufficiently supportive of human rights and peace, surely this impasse can only be broken in this way.

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1

PURSUING DEMOCRACY, HUMAN RIGHTS AND PEACE IN LIGHT OF AN ASEAN COMMUNITY IN 2015: ANY IMPASSES?

PURSUING DEMOCRACY, HUMAN RIGHTS AND PEACE IN LIGHT OF AN ASEAN COMMUNITY IN 2015

H.E. Dr. N. Hassan Wirajuda

H.E. Dr. N. Hassan Wirajuda, former Indonesian Minister of Foreign Affairs, is the distinguished opening keynote speaker for the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia (Jakarta, 2012). This Chapter features an edited version of his speech at the said Conference. He discusses about his personal experience and contributions to the development of the human rights agenda of ASEAN. He pointed out the challenges posed by the variety of political regimes (with emphasis on the Soeharto and Reformasi experiences of Indonesia) and economic conditions within the Region and how they affect the smooth transition towards ASEAN's political and economic integration. He stresses the importance of democratisasion and economic stability in effectively fulfilling, promoting, and protecting human rights and freedoms at the regional and national levels.

1. Introduction: The Road to Human Rights, Democratization and Peace

I wish to commend the Southeast Asian Human Rights Studies Network (SEAHRN) for organising this Second International Conference on Human Rights and Peace & Conflict in Southeast Asia. I am pleased to accept the invitation to deliver the keynote address on the topic "Pursuing Democracy, Human Rights and Peace in light of an ASEAN Community in 2015."

I am also delighted to impart my knowledge and insights on an issue which is very dear to me. As Minister of Foreign Affairs of the Republic of Indonesia (2001-2009), I initiated the development of the Association of Southeast Asian Nations' (ASEAN) Political and Security concept in 2002, which by the following year was endorsed by the ASEAN Summit held in Bali. Furthermore, until the end of 2008, I actively participated in discussions on the ASEAN Charter that ultimately enshrines the principles of democracy, respect for human rights and good governance, and conflict resolution and peace. These principles are the core values of the ASEAN Political and Security Community.

Since 1989, I represented Indonesia in international and regional discourses on human rights, specifically at the Geneva-based United Nations Commission of Human Rights and its forum of experts called the Sub-Commission on the Promotion and Protection of Human Rights and the Asia Pacific Regional Conference on Human Rights. Interestingly, while I was studying in England and later on, in the United States, I didn't take a single human rights course which was back then a topical issue. To be frank, I was a bit cynical about human rights as a policy matter, since U.S. President Jimmy Carter brought up the issue of human rights as one of the key issues of U.S. diplomacy.

My initial experience in human rights work and diplomacy then made me realise the importance of human rights as a matter of state policy. I also understood the significance of human rights as an agenda of regional discourse, particularly true since the end of Cold War. The fall of the Berlin wall in September 1989 indeed marked human rights as one of the more important global issues.

Realising that development and following the conclusion of the UN Human Rights Commission meeting in April 1989, I wrote a ten-page policy paper entitled "Re-orientation of Indonesia's Policy on Human Rights." Among the recommendations submitted was for the Government of Indonesia to establish the National Commission on Human Rights (Komnas HAM) and to play an active role in regional and international discourses on human rights. The Government of Indonesia finally decided to establish Komnas HAM in June 1993, on the eve of the Second UN World Conference of Human Rights in Vienna, Austria.

2. The Inevitable Link between Democracy, Human Rights and Peace

There is certainly a close relationship between democracy, human rights and peace. Moreover, as revealed in the mid-1990s, one important international discussion at the United Nations was the inter-relations of the promotion of democracy, fulfilment of human rights and achievement of development.

2.1 The Effects of Political Power on Democracy and Human Rights

Let me begin by saying that there would be no protection of human rights in the absence of democracy.

By human rights, it meant Civil and Political Rights (CPR) and Economic, Social and Cultural Rights (ESCR). The two sets are indivisible. Before the Second UN World Conference on Human Rights, what was called human rights was a matter of great controversy. For "Western" countries, it primarily meant civil and political rights, while for the developing countries, as well as the communist and socialist bloc; their focus was on economic, social, and cultural rights. I would add that for authoritarian governments, human rights only meant those attributed to economic, social and cultural rights, as these regimes are mostly allergic to civil and political rights.

Authoritarian regimes heavily rely on the monopoly of executive power. This led to rather weak legislative and judicial branches of government. Consequently, there are no checks and balances on policy and legislative decision-making and implementation and the media is censored and fully regulated by the government. Civil Society movements are also restricted. There is no political space for the people. As the popular adage goes, "Power tends to corrupt, but absolute power corrupts absolutely."

2.2 Setting the Truth Free

Monopoly of power certainly leads to the monopoly of truth. Hence, an authoritarian government can always justify gross violations on human rights in pursuit of state, national and regime interests. This then results to the perpetuation of human rights abuses and impunity of state officials.

I would say the success of the Komnas HAM, during its early years (between 1993 and 1999), was its ability to present to the Indonesian people its version of truth on gross human rights violations. For the first time, Indonesians had access to two versions of truth, one which was of the military-dominated government and the other was that of Komnas HAM. I strongly believe that the people shared the perspectives of the latter. This led to the gradual erosion of the monopoly of truth by the most powerful political elites of our society. Therefore, the seeds of democracy were eventually sown in Indonesia.

2.3 On Elections: Democracy and Democratisation

By democracy, it does not only mean "procedural democracy." Election is an important feature of procedural democracy. Yet holding regular elections does not mean that a state enjoys full democracy. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) discusses the terms "regular and genuine elections" as a human right. Only genuine elections --which the Global Commission on Elections, Democracy and Security termed as "election with integrity"—which guarantees free, fair nomination and selection of public officials, contributes to democracy and national security. Recent examples show that failure to uphold the integrity of an election leads to violence, conflicts or even civil war as in the cases of Democratic Republic of Congo (DRC) in 2006, Kenya in 2007-2008, Ghana in 2008 and Nigeria in 2011. Therefore, this form of electoral practice contributes nothing to the creation and sustainability of peace.

The primary prerequisite to genuine elections or "election with integrity" is fulfilment and respect for civil and political rights and freedoms such as rights to vote and be freely nominated as political candidate, freedoms of assembly and of opinion & speech. Without the full enjoyment of such rights and freedoms, regular elections may be conducted albeit periodically are not necessarily considered free and democratic.

According to the Freedom House in its 2011 report, only one of the ten ASEAN Member-countries was categorized as having "free" while four as "partly free" and five as "not free." This has been the situation even five years after the ASEAN Charter entered into force in December 2008.

2.4 Democracy is a Work in Progress

We welcome the decision of the Government and the Peoples of Myanmar last year to initiate change and promote democracy, hopefully leading to a strong and democratic country. This, therefore, inspired the continuing development and strengthening of processes of democratization in all ASEAN countries. The progress made in Myanmar strengthens the implementation of ASEAN Charter by Member-States, which by ratifying it, they – both politically and legally – commit themselves to promote democracy and respect for human rights.

It is worthy to note that one of the significant achievements of ASEAN, since its establishment in 1967, is to recognize, by consensus, the promotion of democracy, respect for human rights and good governance, and strong commitment to peaceful conflict resolution as key agenda of ASEAN under the Political and Security pillar in 2003.

Back then, when Indonesia initiated the concept of an ASEAN Political and Security Community, it was a very controversial issue. In May 2002, even the ASEAN Institute of Strategic and International Studies (ISIS), which is the scholarly forum or think tank centre of ASEAN, did not endorse nor support Indonesia's proposal. Some scholars even suggested that thought by speaking about promotion of democracy and human rights and conflict resolutions, Indonesia was playing a hegemonic role, even worse, "bullying" other ASEAN countries. Certainly, this was not Indonesia's motive.

In 2002, Indonesia was in the third year of "Reformasi." At that time, our democratization was still in its early stages. Three years back in 1999, we were able to conduct successful, peaceful, free and fair as well as democratic national election. Yet, from an outsider's perspective, our neighbours then only saw a democratic process that was noisy and messy, as waves of demonstrations were often unruly. During that period, we were still struggling from the 1997-1998 economic crises, which resulted in increasing rates of unemployment, massive public and private debts and immense population living below poverty line. As a result, our credibility was questioned when we tried to speak about democracy.

It was also in 2002 that I had the chance to visit Myanmar. Before the visit, of course I knew that Myanmar was ruled by a military junta. Unlike the case of the New Order government under President Soeharto, no one in Myanmar used the term military dominated government. Moreover, Indonesian military officers who occupied civilian posts under the dual functions of the military (*dwi-fungsi*, defence and political functions) were wearing civilian safari attires instead of the usual military uniform. The visit further made me realize that ASEAN hosts a variety of political regimes (democracy, partial democracy, and authoritarian). In this spirit, we would not be able develop a strong and cohesive ASEAN, if we do not address differences and gaps in political orientations.

2.5. The Value of Development in ASEAN

Since the ASEAN membership expanded in 1997 from six to ten, we frequently discussed about the existing development gaps in the Association. On the surface, six ASEAN Member-countries are more economically advanced than the remaining four. But by development gap it was always meant economic development gap and not on the difference of political orientations among ASEAN members. It is interesting to point out that the prestigious status of the Asian economic tigers were mostly attained under authoritarian rules.

Under 32 years of Soeharto's rule, Indonesia was able to transform its backward economy to a rather respectable one. We even achieved a seven or eight percentage of economic growth for about 30 years. This progress made us the "darling" of the International Monetary Fund (IMF) and the World Bank.

Our development concept was heavily economic, and for economic development it was argued that we needed political stability and security. In our case, economic progress has become a source of legitimacy for authoritarian regimes to neglect the promotion of fair elections, democracy, respect for human rights and good governance.

The East Asian Monetary Crisis in 1997/1998, that made Indonesia in the brink of collapse, ended the only source of legitimacy of the New Order Regime of President Soeharto. It also pressured the Military to end its dual function. What followed is the "Reformasi" which aimed at correcting past corruptive policies and introducing the following four major agendas:

- Promotion of democracy;
- Uphold rule of law and respect for human rights which includes eradicating Corruption, Collusion and Nepotism (KKN);
- Decentralization leading to wide-ranging autonomy; and
- Restore the national economy from the crisis situation.

Recent events in Indonesia, as well as similar experiences in many other countries, show that embracing an imbalanced concept of development leads to the failure of achieving sustainable progress. Moreover, it disrupts both processes of nation and state building. The root causes of the East Asian financial crisis are very similar to that of the Arab Spring. In my view, national prosperity and peace should be anchored on both economic and political development.

3. Achieving a Balanced Approach towards Cooperation, Integration and Community Building in ASEAN

In 2002, at the ASEAN Summit in Singapore, the host country proposed for an ASEAN Economic Community. At that time, all ASEAN members, initially Thailand, Philippines, Malaysia and Indonesia, had to deal with the aftermath of the East Asian monetary crisis; as a result ASEAN had indeed lost its competitiveness. Then Singaporean Prime Minister Goh Chok Tong revealed that 85% of Foreign Direct Investments (FDI) in Asia went to China. He even questioned if ASEAN had a share of the remaining 15%. It was against this backdrop that Singapore tabled the proposal to establish the ASEAN Economic Community. But Indonesia argued that the ASEAN Economic Community concept alone was not enough, and instead, opted for a more balanced approach by initiating the ASEAN Political and Security Community in 2002. This was the prime reason why there is the need to strengthen ASEAN Cooperation and Integration processes – both politically and economically.

This meant discussing and mending divides amongst ASEAN member-countries. One relevant example is border conflicts within the Region. In the past, we tend to ignore this sensitive issue for the reason that we did not want to compromise peace and harmony within the Association. Yet, we cannot simply shelve conflict (resolution) in the name of ASEAN consensus. It is therefore crucial to address causes of these conflicts and map out potential conflict areas systematically as an ASEAN agenda. And this is what I call "taking the bull by the horn."

One way to resolve conflicts is for ASEAN members to address their differences through peaceful and secure dialogue. Only through this can ASEAN be at peace within itself and with its immediate neighbours.

The adoption of the three pillars of ASEAN community, including the Political and Security Community, is a good example that resolution through political cooperation is possible despite sensitivity of certain issues. Interestingly, it took us only a year to adopt the ASEAN Community concept based on the three pillars (Political & Security, Economic and Socio-Cultural). Through a consensus decision-making process, the ASEAN Political and Security Pillar was finally accepted at ASEAN Summit held in Bali, Indonesia (2003). I recall that at the ASEAN Foreign Minister's meeting held in July 2003 in Phnom Penh, Cambodia, I suggested to critically examine our widely shared notion that ASEAN is one of the more successful regional organizations in the world. I asserted that we do not need to compare ourselves with the European Union (EU) which is more ahead of us. Even if we compare ourselves with the other regional or sub-regional organizations such as the African Union (AU), Organization of American States (OAS), and Latin America's Mercado Comun del Sur (MERCOSUR), we are still very much behind in terms of political development. These regional and sub-regional organizations embrace the promotion of democracy and human rights as part of their formal agenda. Some were also able to establish mechanisms and standards to uphold these principles, such as the Political and Security Council of the African Union, the African Charter of Rights and Obligation, the African Human Rights Court, and the African Peacekeeping Force.

At the end of the day, ASEAN was "allergic" to democracy and human rights. I believe that we were…and we still are. ASEAN is a reflection of the wider Asia and Pacific Region, which has exempted itself from a full process of democratization. There are a number of factors contributing to the mindset and practice: (1) strong presence of authoritarian regimes with successful economic developments brought about emerging economic tigers and (2) China's rapid economic transformation under a single party rule was – perhaps still is – seen as a model for economic development.

When all these elements come into play, some wonder, "Why bother about democracy and democratisation in ASEAN?"

4. Possibilities of a Human Rights-, Peace- and Democracy-Embracing ASEAN

In ASEAN, there exists an excessive notion of non-interference amongst Member-States. More often, during the debates among ASEAN Ministers, some are still sensitive and resistant towards issues of democracy, democratisation, and human rights.

4.1. Long and winding Road towards an ASEAN Human Rights Body

It was indeed a rocky journey towards the endorsement of ASEAN Community based on the Three Pillars in the ASEAN Charter, namely the ASEAN Political Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community. Moreover, it is more challenging to develop a new binding document such as an "ASEAN Constitution" with a treaty binding effect, than simply forging declarations or political commitments such as the Bali Concord II at the ASEAN Summit.

Intense discussions on human rights at the ASEAN Senior Official Meeting failed to agree on enabling provisions for a regional human rights body. Similar experience was present during the adoption the draft article of the ASEAN Charter. The burden to decide was passed on to ASEAN Foreign Ministers who, back then, met in Manila. The Chair and I were the only ones supporting such provision. Apparently, had it was decided by vote, the provision would have been easily voted out.

The difficulties of the discussion on human rights, including the enabling provision for human rights body were caused by: (1) the existence of non-democratic regimes; (2) treatment of human rights as a sensitive political issue; (3) excessive adherence to the principles of non-interference in domestic affairs, and; (4) mindset of human rights as a western concept which conflicts with Asian values, which to Prof. Amartya Sen simply defines as "authoritarian values."

When it came to developing the terms of reference (TOR) of this body, which is now called the ASEAN Intergovernmental Commission on Human Rights (AICHR), the promotional and protective functions of the body were strikingly imbalanced.

Indonesia joined the consensus to accept AICHR's weak TOR with a condition or assurance (made by leader's decision) that when the TOR is reviewed in 2014, the revised TOR will be balanced. Only after review in 2014 that the TOR would be balanced and include both functions of promotion and protection mandates of the AICHR. While other regional organizations have their human right courts, AICHR is still struggling in terms of monitoring functions. It is still unable to accept individual complaints and authority to investigate on alleged abuses and violations.

In terms of the promotion of democracy and human rights, there is a still a big gap, between *das sollen* (what should) and *das sein* (what is). Following this logic, we cannot expect that by 2015 all ASEAN countries will commit to democracy and democratic values; more so, be able to strongly fulfil, promote and protect human rights and peace.

In all fairness, it took the EU 15 years (following the Helsinki Final Act, 1975) to establish new ideology based on three principles – multi-party democracy, open and competitive economy and respect for human rights – through the Paris Charter of 1990. It might take ASEAN more time to reach our aspirations and goals for human rights, peace and democracy.

4.2. Hope for Human Rights, Democracy and Peace in ASEAN

As evident in the current civil war in Syria, human rights can easily be trampled in the midst of the internal conflicts. Most interestingly, UN Security Council did nothing to address this conflict. It is a clear statement that conflicts lead to human rights violations. Luckily, for us in ASEAN, we have enjoyed relative peace and security for more than four decades. But still inter- and intra- State conflicts and potential conflicts need to be addressed.

Democracy is just not a matter of having genuine or regular elections. Democracy means a continuing process of dialogue between various stakeholders and groups in society. Echoing Prof. Sen, it is a process of public reasoning on matters of public interest. Based on our experience, a strong government does not assure ability to resolve conflicts. Worse, authoritarian ruler tends to address conflict with an iron fist which normally leads to gross violation of human rights.

For Indonesia, a more open and democratic State had allowed us to be receptive to newer ideas and realize helpful dialogues with conflicting parties. This has lessened the burden of the military to protect national security and interests. Moreover, more Indonesian troops now serve as peacekeepers in areas of conflicts such as Congo, Darfur (Sudan), Haiti and Sudan. This State attitude allowed us to play a greater role in building and restoring peace in the world. There are various conflicts happening in our region. I think that we have to be more open to each other, rather than positioning ourselves within the notion of non-interference. We have to see and believe that we can function as one family. With this approach, it is not about interference, but helping each other to mend differences and address challenges.

To move forward, I strongly believe that there are a number of areas that ASEAN must continue to address: (1) the excessive notion of non-interference, which is actually not a sacrosanct principle of ASEAN (but of the UN Charter Article 2 paragraph 7 and, moreover, Consensus of the 1993 Second World Conference on Human Rights, gross violation of human rights is a matter international concern); (2) the need to focus on non-derogable rights, namely by addressing concerns about right to life, independent judiciary,

rights against torture, rights against arbitrary detention, and ameliorating extreme poverty as a crucial element for development; and finally (3) redefining "Asian values" congruent to democratic principles and not universal values.

In this spirit, I send my praises to the Philippines for its openness which invited Indonesia to facilitate peace talks between the Moro National Liberation Front (MNLF) and the Government of the Philippines, which lead to the Final Peace Agreement in 1996. More so, in pursuit of sustainable peace in Aceh, Indonesia invited EU and ASEAN members to monitor the Aceh Peace Process (APP).

In conclusion, we are still working to realise the dream of an ASEAN which promotes and fulfils human rights and peace, as mandated by the ASEAN Charter. This may require more time as we have yet to address economic, social and political gaps in the Region.


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2

REALIZING HUMAN RIGHTS IN ASEAN: CONTINUING STRUGGLE

FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION IN INDONESIA, SINGAPORE, THAILAND AND VIETNAM

Ngo Huong

This paper addresses the extent to which freedom of expression and the right to information (FOE/I) have been extended to citizens of ASEAN Member-States. Criteria to assess conformance with international standards in FOE/I are established and applied to the cases of four states - Indonesia, Singapore, Thailand, Vietnam. - selected to represent differing political situations and states of practice. The analysis shows that whilst these states are variably committed to FOE/I in law and practice none yet accords with international standards and principles of jurisprudence. The major arguments made by states to justify non-compliance with international standards are based on the notion of 'Asian Values' and national security needs. It is argued that neither of these positions is generally justified. In order to move access to human rights closer to international norms, the following three recommendations are made. Firstly, FOE/I should derive from a regional human right mechanism. Secondly, ASEAN needs stronger dialogues for norm setting and interpretation of rights should be strengthened, so that states can collectively link to the global human rights regime. Thirdly, ASEAN Member-States should undertake the constitutional building process in line with international standards in the process of developing regional laws and human rights mechanisms that confer the right to FOE/I at state level.

1. Introduction

This paper identifies restrictions on freedom of expression and information (FOE/I), in selected ASEAN states, by reviewing laws and practices in the context of international norms. Arguments adduced by states, from national security positions and 'Asian values', to restrict FOE/I are analysed in order to understand the dynamics of resistance to change in the Association of Southeast Asian Nations (ASEAN). The analysis tests the notion of a state's 'margin of appreciation' whereby states may have broadened the scope of the United Nations General Assembly (1966) 'International Convention on Civil and Political Rights' (ICCPR) Articles 19(3) and 20 in ways that do not meet the strict test under Article 19(3) referring to exceptions being 'provided by law' and 'necessary'. The paper applies the sociology of law based on an empirical study of international human rights instruments, domestic constitutions and others laws with regard to freedom of expression in the ASEAN context.

Four of the 10 ASEAN states were chosen for study in this paper based on differences in levels of democracy and openness. They are: Indonesia, Thailand, Singapore and Vietnam. Whilst it cannot be argued that the situation in these nations applies to other ASEAN Member-States, they do represent a range from more or less democratic polities (Indonesia and Singapore) through one party states (Vietnam) and the Thai anomaly of a constitutional monarchy that remains a strong part of the power structure in that country. Moreover the four cases provide a template that can be readily applied to all states through further investigation.

The next section of the paper sets the question of FOE/I in the context of a broader debate within ASEAN, around acknowledging and securing human rights in member states. Section 3 then outlines the primary international conventions and jurisprudence applicable to FOE/I as benchmarks against which practices in the selected ASEAN states can be assessed. Section 4 details restrictions imposed on FOE/I in the four states. Section 5 then identifies challenges to the legitimization and implementation of FOE/I. Section 6, based on the previous section, outlines recommendations to overcome these challenges. A brief conclusion identifies further the work needed to flesh out an understanding of the subject.

2. The context: ASEAN and international human rights instruments

> *We believe that the dream of a true ASEAN community and the formation of an ASEAN human rights body must recognize free expression, press freedom, and people's access to information as essential to human rights.*[1]

1 Statement made by ASEAN parliamentarians at the ASEAN Officials Summit, February 2009, Thailand.

ASEAN, 40 years after its establishment in 1967, incorporated regional human rights principles in its Charter and established a human rights mechanism.[2] Whilst the ASEAN community shares common objectives of peace, stability and prosperity, other values constructing ASEAN are mutual respect, consensus and tolerance. The challenge in implementing the Charter lies in the region's cultural diversity and the notion of state sovereignty embraced by states.

The need to regionalize protection of human rights is well recognized in ASEAN but states have differing understandings and practices. Amongst them, FOE/I are constrained by restrictions under Articles 19(3) and 20 of the ICCPR and within the laws and practices of individual states.[3] Amongst states, there exist differing interpretations of, and resistance to, FOE/I on the grounds of 'Asian values' and 'national security'. The challenge is to figure out how a norm of fundamental human rights, such as FOE/I, can be developed and commonly accepted by all ASEAN states in the broader process of regionalising human rights in ASEAN. Like the European and American systems, an ASEAN human rights mechanism will need to emerge from a gradual process of building common understandings and acceptance of international norms on rights. Given the lack of understanding on norms and governance of freedom of expression in an 'Asian way', under the ASEAN human rights mechanism, it may be more difficult to have freedom of expression protected by ASEAN states as there exists a wide space for applying restrictions on the right. In addition, a regional judicial or quasi-judicial mechanism to protect rights has yet to be established. Therefore, the realization of the freedom of expression and information depends on national implementation through domestic constitutions and jurisdictions.

The establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2008 was a radical step towards regionalising human rights in ASEAN.[4] The Commission aligns with the roadmap for making the ASEAN Charter work for all member states. The mandate was of great interest to scholars engaged in promoting 'norm setting' for human rights for ASEAN based on regional particularities and values. ASEAN needs to define a common understanding and acceptance of minimum standards on different notions of rights and freedoms before a mechanism can be set up to protect them.

2 At its establishment in 1967, 10 countries were included: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. The ASEAN Charter, ratified fully by all 10 states, came into force on 15 December 2008. The ASEAN Intergovernmental Commission for Human Rights came into being on 23 October 2009.

3 ICCPR, Art. 19(3) provides for restrictions on the grounds of: (i) respect for the rights and reputations of others; (ii) protection of national security or of public order, public health and morals. Article 20 allows for restrictions based on the grounds of war propaganda and incitement of hatred.

4 The Terms of Reference for AICHR, Session 4, gave mandates for AICHR to "conduct study in thematic issues; to develop common approaches and positions on human rights matters of interest to ASEAN; therefore to promote full implementation of ASEAN human rights instruments."

During the process of building an ASEAN Constitution, a Human Rights Declaration was made.[5] With regard to FOE/I, ASEAN member states still face the question of how to interpret this fundamental freedom and what modalities and systems can be institutionalized to balance the freedom of individuals and national interests in preserving peace, security and democracy and human rights at the same time. In the ASEAN context, freedom of expression and access to information is a pressing issue of human rights but is increasingly interdependent with other freedoms and possible limitations on them.

Those who benefit from the silencing of dissent, the stifling of criticism and the blocking of public discussion are of course most apt to argue on the second ground. States that do not support the ideal of democracy restrict freedom of expression and access to government-held information based on domestic constitutional grounds and judicial practice. Such states may apply a broader scope of restriction to protect the state instead of protecting individual rights as per Article 19 of the ICCPR. There is substantial room created for states to limit freedom of expression which is counter to principles of Article 19(3). FOE/I is often perceived as a threat to national security or an infringement on state power.

3. Freedom of expression and its limitation

Freedom of expression and access to government-held information is taken as being a human right under international law. This is clearly stated in Article 19 of UDHR "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Article 19 of ICCPR embodies the same meaning as UDHR. Article 19(1) protects the right to freedom of opinion without interference and does not permit any restrictions to be imposed on the right to hold an opinion.[6] The national security ground has no relevance as a defence against violation of Article 19 of ICCPR. The same provision expresses the broad scope of application of Article 19(2) as 'without interference' and applied to 'ideas of all kinds' including information, facts, critical comments and ideas and opinions, news, commercial advertising, art works, political commentary, and so on, that are protected.[7] Article 19(3) allows for certain restrictions on freedom of expression, including "[r]espect [for] the rights of and reputations of others and ..[p]rotection of national security or of

5 The first meeting to discuss the preparation of a draft Declaration was held in Laos in July 2011 and included representatives of all member states. The ASEAN Human Right Declaration was passed in December 2012.

6 General Comments on Article 19 (10), 19th Session [para. 1].

7 *See* Nowak (2005) pp. 355-464.

public order, public health and morals." In many cases, where government opponents have been arrested or detained with criminal prosecution because of their political opinions, the Human Rights Council (HRC) found violations of Article 19(1).[8]

The protection of national security, and or need to respond to serious threats to a nation, are often cited as requiring restrictions on FOE/I. This extends the meaning of Article 20 to include war propaganda, national, racial and religious incitement. So Articles 19(3) and 20 can be read together. Moreover measures to protect public order or public safety overlap those concerned with national security.

Other articles of ICCPR also permit restrictions of rights on the grounds of national security and thus parallel Article 19.[9] With regard to national security and other public order grounds, Article 14(1) provides for the right to public hearings of criminal charges where the press and the public should not be excluded from the public hearing "for reasons of national security in a democratic society" except in certain strictly defined circumstances.[10] Articles 21 and 22 allow only those restrictions that are imposed by law and that are necessary "in a democratic society" in the interests of national security and/or public safety. In several cases, the Committee found violations of these articles together with Article 19.[11]

There are thus reasonable limitations on FOE/I. However, issues and concerns commonly arise around the scope of restrictions on FOE/I permissible on grounds of national security and public order. The Human Rights Council (HRC), in its General Comments on Article 19, expresses the view that any restrictions may not jeopardise the right itself.[12] Restrictions on FOE/I to protect national security are permissible but only in serious cases such as threat to the entire nation, dissemination of military secrets, calling for overthrow of a government with political unrest or propaganda of war within the meaning of Article 20.

8 *See Laptsevich v Belarus* (application no. 780/1997) ref. UN Doc CCPR/C/68/D/780/1997. Available at: http://www1.umn.edu/humanrts/undocs/session68/view780.htm. The case was made where freedom of expression was restricted for the reason of national security. Also see *Observer and Guardian v United Kingdom,* Ser A, No. 216 (1991) Available at: http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/681 (accessed on 1 November 2013) (The case was regarding restriction of FOE for the reason of state secrecy).

9 Ref. ICCPR. Article 14(1) on fair and public hearing; Article 21 on right of peaceful assembly; and Article 22 on right to freedom of association which may be read together with Article 14 (fair and public hearing), Article 21 (rights to peaceful assembly) and Article 22 (freedom of association).

10 ICCPR. General Comments on Article 14 [para. 6].

11 *See Le Lopez v. Uruguay* (Application no.8/1977 para. 16; no. 11/1977 para 17; no. 33/1978 para 12 and no. 44/1979 para 15). The HRC expresses that if a person is arrested or sentenced to prison for membership in trades union or political parties, journalism or other 'anti-regime' activities this is, inter alia, violation of freedom of expression under art. 19. Also in this case, the alleged victim, a trade union organizer, was arrested and detained under 'security measures' and charged with subversive association. The HRC found violation of Articles 22, 19(1) and 19(2).

12 General Comments on Article 19(10) 19th Session [para. 4].

There are rules for permissible restrictions on FOE/I within the meaning of Articles 19(3) and 20 of the ICCPR:

(i) Being 'provided by law': meaning the state has to show the legal basis for a restriction. The HRC[13] requires that restrictions must meet a strict test of justification.[14] In addition, HRC requires a state to provide details of the law and particular circumstance in which the law applies. Laws restricting rights codified in international covenants must be compatible with the aims and objectives of such covenants. In the case of a law that may be too broad in scope to be a justifiable restriction in itself, it may nevertheless be compatible with the Covenant.[15]

(ii) Being 'necessary': meaning that the state shows evidence for the need for a restrictive measure to protect national security and, if this is reasonable, it should be at the minimum necessary for that purpose. In this circumstance the Committee has tended to apply a more demanding criterion of democratic necessity.[16] Even though the Committee has not applied the proportionality test, it is understood that the requirement for being 'necessary' includes a standard of proportionality.[17]

(iii) Being 'legitimate' to the purpose: the criterion of 'legitimate aim' is to determine whether some restrictions or limitations of rights are pursued for a legitimate purpose, and are thus permissible. In some cases the HRC has taken the view that restrictions by state parties were necessary for one of the legitimate aims set out in Article 19(3). There are, however, cases that the Committee reviewed where the restriction of FOE/I was deemed to be impermissible.[18]

13 After replacing the Commission on Human Rights, the Human Rights Council decided to extend the mandate for another three years. *See* resolution 7/36 of March 2008.

14 E.g. *Tae Hoon Park v. Republic of Korea* (Application No. 628/1995). *See* CCPR/C/64/D/628/1995 para. 10.3: "The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification."

15 E.g. *Toonen v. Australia* (Application No. 488/1992). The view adopted on 8 March 1994 was: "Even interference provided for by the law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the circumstance."

16 Nowak, op. cit.p. 350. Also see *Mukong v. Cameroon.* (Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, 1994). A journalist and writer opposed the one party system of Cameroon and advocated for multi-party democracy. He was arrested by the Government on the grounds of threat to national security and public order.

17 Evatt, E. 1999.

18 *See Handyside v. UK.* (1976). The applicant published obscene material, an anti-authoritarian handbook on living addressed to children and adolescents, tended to 'deprave and corrupt' its intended readers and was therefore criminally obscene. The court ruled that freedom of expression may be limited for the sake of community morality. In its judgment of December 7, 1976 vol. 24, [para 52], the Strasbourg Court found no violation of ECHR art. 10 on the ground of public morals. So noted that though having differences in political cultures and ideologies, the West and East have been shown to share the same view.

In addition to the above, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles)[19] clearly state:

Expression may not be prevented or punished "merely because it transmits information issued by or about an organization that a Government has declared threatens national security or a related interest" (Principle 8) and "expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence" (Principle 6).

The case law and application of the Johannesburg Principles may be understood as:

(i) Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies.[20]
(ii) States may not extend the notion of state security so far as to penalize and suppress mere expression of opinion.[21]
(iii) Anti-state acts, or any preparations to topple a government, may likely fall under criminal acts.[22]

19 The Johannesburg Principles. (E/CN.4/1996/39.on 22 March 1996) were endorsed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The Special Rapporteurs are part of the Special Procedures of the Human Rights Council. In 1993, the United Nations Commission on Human Rights established the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Also see A/HRC/17/27 dated 16 May 2011, [para. 36], the Special Rapporteur reiterated that any restriction to the right to freedom of expression on the grounds of protecting national security is only legitimate if the Government can demonstrate that the expression is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

20 *Ibid.* para. 79 (f).

21 This view is supported in several cases against Uruguay (no.8/1977 para. 16; no. 11/1977 para 17; no. 33/1978 para. 12 and no. 44/1979 para. 15). The HRC said that if a person is arrested or sentenced to prison for participating in trades union, political parties, journalism or other 'anti-regime' activities this is, other things equal, violation of freedom of expression under Art. 19. This view is also supported in the case of Womah Mukong v. Cameroon, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

22 No. 458/1991 paras 9.6 – 9.7 and U.N. Doc. CCPR/C/51/D/458/1991,10 August 1994. For instance, in the case of Adyayom et al. v. Togo, two university teachers and a civil servant had been detained and charged in 1985 with the offence of lèse-majesté because of their minor criticisms of the Togolese Government. The Commission on Human Rights observed that they may "criticize or openly and publicly evaluate their Governments without fear of interference or punishment within the limits set out by Article 19(3)." Also, in case no.422-424/1990 and supra note. 17 (cases of South Korea). As in many similar cases in numbers of non-democratic African regimes, the Committee considered that "the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights."

HRC's General Comment on Article 19(3) states:

> Many reports of States parties confine themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression, in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression reaffirmed that cases deemed justifiable under principles of permissible limitations and restrictions "must constitute an exception to the rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights established in the Covenant or in other international human rights instruments."[23] The Special Rapporteur further stresses:

> The right to freedom of opinion is absolute and may not be limited in any way, whereas the right to freedom of expression is not absolute and may thus be subject to exceptional restrictions and limitations as defined in article 19, paragraph 3, and article 20 of the International Covenant on Civil and Political Rights. Such restrictions and limitations must be interpreted in accordance with international human rights law and the principles deriving there from.[24]

4. Limitations on FOE/I in ASEAN Member-States

Implementation of FOE/I in ASEAN states, as part of ICCPR, is constrained by common agreements on definitions and principles. The reality, however, is that many states restrict FOE/I by not accepting interpretations and principles outlined in Article 19(3).[25] The codification of FOE/I in the UDHR and the ICCPR, and in other regional human rights conventions, proves to be itself a legal principle of universal validity. However, equally important, FOE/I should also be justified on moral and political grounds under domestic rules of law to be legitimate in practice.

In general, among the ASEAN states, restrictions on FOE/I on the ground of national security are common despite differences in political ideology and adherence to democratic principles. In Indonesia and Thailand, FOE/I was recognized as part of the growth in democracy in the early 1990s. However, following the financial crisis of 1997 and major

23 *See* A/HRC/14/23, 20 April 2010. 14th Session. Special Rapporteur report. [para 77].

24 *See* A/HRC/14/23. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.51_en.pdf (accessed on 1 November 2012).

25 It is noted that up to now, no ASEAN Member-State, except the Philippines, has ratified the Optional Protocol of ICCPR which allows cases and communications to be received by HRC and thus HRC can make concluding observations regarding issues which becomes the main sources of justifying a situation non-compliance.

leadership change in the early years of the 21st century, the protection of the freedom became fragile with much evidence of backsliding. Singapore and Malaysia learnt from Indonesia's experiences and also systematically cracked down on reform movements. FOE/I has been tightly controlled in law and practice in Singapore, Vietnam and Myanmar by the one-party systems of those states. The Philippines has long established democratic institutions but this has had little impact on FOE/I. Cambodia established its supposed new democracy under the 1993 Constitution and signed various international human rights treaties. Yet it still retains strangleholds on basic freedoms and electronic media, newspapers and citizens' freedom to talk about politics.[26]

The recognition of FOE/I in the ICCPR, which some ASEAN member states have ratified, is one useful step but the battle is far from won. Since FOE/I is never absolute, and hardly defined as a rigid norm in ASEAN countries, the level of protection of, and restrictions on the right depends on a state's political system, legal system and institutional guarantees at state level. Across South East Asia, FOE/I is increasingly under threat as governments seek to control media and individual views expressed via the internet, alternative media and opposition organizations.[27] The Press Freedom Index (PFI) shows ASEAN member states ranking very low over the years.[28]

Although many ASEAN states have ratified the ICCPR and have thus committed to protecting these rights, implementation at the state level is varied and uncertain due to the Omni-presence of the political sphere. In all four country case studies, their Constitutions provide the legal basis for FOE/I. The states often, however, establish other laws and regulations to restrict those rights. The rule of law is challenged under the guise of political morality and is thus little in the hands of the judiciary. With their common history of post-colonization and authoritarian governance, ASEAN states still uphold the so-called 'Asian Way' or 'Asian Values'. By stressing the risk of political instability, leaders are discouraged from being more open to FOE/I when the exercise of these rights arguably results in defamation, and religious or political opposition contrary to the matter of national security.

Legal reviews of some ASEAN Member-States show that all states give legality to FOE/I under their constitutions – FOE/I is a constitutional right. However, other laws and regulations are made that restrict this freedom. Laws and regulations, such as Penal Code, Media and Press Law, Internal Security Acts or Computer Acts, are emplaced to restrict FOE/I in legitimate ways. Looking at the state of practice, however, FOE/I is commonly

26 Nissan, E., 1999, p.19.

27 Views shared in press event on ' Freedom of Expression - Rights Under Threat in Southeast Asia', at the Foreign Correspondents Club of Thailand on September 14, 2011.

28 The Press Freedom Index is an annual ranking of countries compiled and published by Reporters Without Borders based on the organization's assessment of their press freedom records. Based on PFI survey criteria, the 2011 survey shows that Thailand moved from Partly Free to Not Free of Press Zone while Cambodia,Vietnam and Laos remained the lowest ranked (respectively 165, 168 and 171 out of 178 countries in survey in 2010). Available at: www.freedomhouse.org (accessed on 1 November 2012).

violated as per international standards. Restrictions mostly concern expression of opposing political opinions, defamation and access to information from governments and public offices, practice of freedom of religion or expressing religious opinions. Press, religious groups, and other political dissidents are often restricted and, in some cases, trials have been conducted out of the judge's hand.

5. Challenges ahead for FOE/I in ASEAN

There are clearly strong challenges to the legitimisation and implementation of FOE/I to be legitimate at regional and state levels in ASEAN, at least as exemplified by the case study states. First, within the newly established ASEAN regional human rights mechanism, FOE/I is unattended by norms and standards. The idea of upraising collective and community interests, the exercise of fundamental human rights such as FOE/I, becomes uncertain in ASEAN because of the absence of norms and standards in implementing rights. The political culture of many member states still supports suppressing freedom of expression, not disclosing information and heavy press censorship for the sake of community morality and national security. There is, of course, the paradox of the conceptions of freedom and law where law can pose some limitations on freedom but normatively only when such freedom restricts freedom of others. The norm setting process, as stressed in the ASEAN roadmap for a Human Rights Mechanism for "crafting of the norms/standards behind the establishment of an ASEAN Human Rights Mechanism,"[29] needs to include the right 'to' freedom of speech and expression etc. as stated in Article 19 of ICCPR read together with restriction provisions in paragraph 3 of the same Article. As such, a common understanding and accepted norms and mechanisms to protect and safeguard FOE/I are yet to be endorsed at the regional level.

A second key challenge for ASEAN is weak governance and the lack of a mandate for a regional human rights mechanism. Notions of sovereignty and non-interference remain obstacles in the implementation of human rights under international law because these denote the right of a nation state to enforce its own version of human rights.[30] So in the case where there is an absence of a supra-national enforcement agency in international or regional human rights regimes, challenges can be coupled with the resistance of states for reasons of sovereignty that pose challenges for international law. It is challenging to have a powerful regional human rights mechanism that embodies "respect for the principle of exhaustion of local remedies prior to access to the regional Commission in the framework of international law" with "power to monitor and investigate allegations."[31]

29 Muntarbhorn, V., 2003.
30 Moore and Pubantz, 2002, pp. 45-46.
31 Muntarbhorn, V., 2003.

At the state level, there are also challenges and institutional constraints in the rule of law for the protection of FOE/I. Domestic laws can impose limitations to freedom, and the rule of law itself normatively cannot guarantee freedom from arbitrary restrictions. The extent to which FOE/I can be legitimately implemented depends on political commitment and openness of government.

A first consideration, in this regard, is the different political ideologies and internal politics and models of democracy in relation to political stability within each state. The end of the Cold War, fall of the Berlin Wall and Leninist ideology were catalysts for transforming world politics and also impacted in ASEAN. Many states in the region still hold strongly to nationalism from decolonization by stressing centralization enforced by political and military dictatorship as in the Philippines during 1970s, Indonesia during the 1960s and Myanmar up to 2012. Another form of political system is 'technocratic authoritarianism' as in Singapore, Malaysia and Indonesia after Suharto. In other ASEAN states, the fall of Leninism is still transformed into communism with some respect for the rule of law, as in Vietnam and Laos. Perhaps, whilst ASEAN will continue with significant political variations rather than a uniform political order, FOE/I will remain under the hand of state leaderships and prey to internal politics. Over the past 30 years, the 'Asian values' discourse has continued in Singapore, Malaysia and Vietnam whose state leaders are most vocal in resisting individual human rights. 'Asian values' thus directly influence the notion of FOE/I because governments fear that such freedoms may bring threats to national security and political stability. In practice, Singapore and Malaysia, under this claim, have established Internal Security Acts that challenge individual liberty and the sense of law in applying effective judicial systems. States like Vietnam and Myanmar, for example, strongly promote national security and political stability over FOE/I with zero tolerance, whilst states like Singapore and Malaysia set very restrictive laws on media and state security whilst contesting the concept of outlaw states.[32]

The ASEAN states uphold their authoritarian governance so that individual rights to FOE/I are often overridden in the community's name. In other words, states can impose restrictions on FOE/I based on their political moralities and ideologies.[33] This 'Asian Values' discourse continues contrary to notions of FOE/I as a human right codified in ICCPR where states have no obligation to interfere. Those states thus do not recognize rights of individuals to FOE/I, including the right to pursue communication with the human rights bodies.[34]

32 The concept of an 'outlaw state' is contested by Rawls, 1999.

33 Chan (1995) recognized the importance of political moralities which decide how political regimes recognize FOE/I as human rights.

34 Those states do not ratify the Optional Protocol of ICCPR to allow individual cases being heard and protected by the Human Rights Council.

A further challenge is the absence of legal positivism and rule of law. The case is that legal interpretation may depend on moral reasoning and purpose of law (Dworkin, 2002).[35] In the ASEAN states, it is often seen that law and morality are not separated within the argument that a positive legal system that meets the values system can function with effect. Unlike Western politics, which is based on legalism, Asian politics is often based on reciprocity. But in terms of human rights, legalism may not yet function to protect human rights because it lacks internal morality. Thus the struggle to accept legalism for human rights in its fullest dimensions continues (Scalapino 1997).[36] A critical observation is that ASEAN States have not fully established effective legal and judicial systems to meet the three main tests of freedom of expression, namely: (i) provided by law; (ii) legitimate aim; and (iii) necessity/proportionality.[37] Thus, justice, or a just society where liberties and rights are equal and secured, as contested by John Rawls, is still subject to political bargaining (Novak, 2005).[38] The challenge for application of restrictions on FOE/I relates to how states see its legitimacy.[39]

Yet another challenge is the lack of participative democracy through which FOE/I could be protected with equal concern and respect by the states (Dworkin 1986).[40] In ASEAN, over the past three decades, there has been an advance in democracy, but democracy remains fragile in different forms, such as 'monarchical people democracy' of Thailand, 'guided and pragmatic democracy' of Singapore, 'central democracy' or semi-authoritarian of Vietnam. States such as Thailand and Indonesia, with transformed but fragile democracies, gradually allow the growth of FOE/I but may still use other grounds for suppression such as religious harmony and Lèse-majesté. In reality the participation of civil society and media in the public sphere is limited by legal and judicial constraints.

Still another challenge remains participation of ASEAN states in international human rights instruments.[41] Not all ASEAN member states ratified the ICCPR, so that FOE/I is not fully recognized and protected by all ASEAN states. Although the ASEAN Charter promotes principles of human rights and justice, the Charter does not provide any specific provision for FOE/I or guidance on under what conditions such freedoms can be restricted. The Charter does not recognize any regional human rights convention as it is yet in place. This gives wide room for states to impose control and restrictions on FOE/I which range from excluding the public from policy debates to strict censorship on media from many forms of social communication, criminalized sanctions of perpetrators for expressing different political opinions or government defamation and religious blasphemy.

35 *See* Dworkin, 2003, pp. 3-15.

36 *See* Scalapino, 1997.

37 *See* Ngo H., 2011.

38 Novak 2005. It is understood that FOI is a liberal right that states are under no obligation to ensure them with positive measures.

39 The concern raised during the 1995 Conference on Confucianism and Human Rights.

40 In this regard, Dworkin (1986) offered a way of reconciling liberty and equality that should work within the institutions of participatory democracy. He argued that some freedoms, such as freedom of speech, do require special protection against government interference.

41 In addition to Article 19 of ICCPR, FOE/I is articulated in Article 10 of the Convention on Elimination of Discrimination and Advancement of Women, Article 9(1,4), in Articles 13 and 17 of the Convention on Rights of the Child, and in Articles 13(2) and 13(3) of the Convention on Migrant Workers.

In the case of Indonesia, the transition since President Habibie opened a new arena for the process of democratization in Indonesia, including new law on political parties and elections. Nevertheless the government retained Pancasila as state ideology and promoted the growth of media taking part in promoting democratic society. The Government remained worried about social unrest and imposed new law on demonstrations.[42] Many of the State's controls on FOE/I were lifted in practice when President Soeharto stepped down and ended the authoritarian regime in May 1998. The economic crisis and protest against New Order made the new government of President Habibie unable to retain the same character of its predecessor and was pre-disposed to greater openness.

In the case of Singapore, restricting freedom of expression as civil and individual rights can be viewed as political ideology in the context that Singapore after independence become a multicultural society, and thus has to maintain racial harmony through a "logics of groups." This logic helps to govern and tighten a multicultural nation and ensure ethnic equality. Restrictive policies, as is often claimed to be the case in regard to Asian Values and other cultural arguments could be reformulated. The insistence on communitarian ideology with the colonial background can be also an explanation for the PAP-led government imposing pragmatic policies and ideas of non-individualistic modernity regarding individual participation in political life.[43] The challenge from within Singapore is changes in society. The social order, based on collectivist-oriented values and pragmatism has gradually transformed into weak loyalty and appreciation within the society. The court felt that "[p] roponents of change must produce evidence of a change in Singapore's political, social and cultural values in order to satisfy the court that change is necessary.[44] There is increasing demand by young generations to live a Western life style, including demands for information and participation in public life, even engaging in political discussion. Restrictions on FOE/I via printed forms of publication cannot accommodate the increasingly availability of cyberspace information channels. Academic critics from within the State argue that, under these conditions, the process of collective consensus-building in Singapore could no longer work.[45]

In the case of Thailand, the country was heading towards a more open, pluralistic polity by rule of law suggesting that the law would not allow people to interpret laws too liberally and abuse them.[46] The Government confirmed that as a democratic country Thailand values equality and freedom, particularly freedom of expression. However, it is universally recognized that freedom of expression has limits and comes with certain responsibilities, but that such limitations must be put in place by law. As such, freedom of expression does not allow a person to verbally attack, insult or defame anyone, not to mention the

42 Law no. 9/1998 on Freedom of Express Opinion in Public.

43 *See* Wee 1999.

44 *See Review Publishing Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52 (2010), p. 178.

45 *See* Chua, 2004; Chua and Kwok, 2001.

46 Other political rights, such as right to participate in decision making (section 58), right to present petition or sue the government (section 59,60), form a political party (section 47), are not restricted on the ground of national security but with principle 'provided by law.'

Head of State. Lèse-majesté law in Thailand is not aimed at restricting the legitimate right to freedom of expression but for "the will of the majority of Thai people, Thai society, ethics and culture as a whole."[47]

In the case of Vietnam, FOE/I are considered constitutional rights but have been given little effect due to the enormous discretionary power of government. The 1992 constitution guarantees freedom of expression.[48] Even though Vietnam committed, in ratifying ICCPR, to follow international human rights standards, the means of restriction include criminalisation of offences[49] or prior censorship of media and press.[50] Restrictions on FOE/I in Vietnam are often based on defamation or dissemination of wrongful information against government policies or government officials, and expression of political opinions.[51] The practice of restriction remains in the interpretation of law by the state's judicial system. The challenge for FOE/I is based on a political idea relating to the meaning of democratic society as well as withdrawing from the double standards system in law.[52]

47 *See* http://thaipoliticalprisoners.wordpress.com/2010/06/12/un-thailand-and-lese-majeste/ (accessed on 1 November 2012).

48 Article 69 states: "Citizens are entitled to freedom of speech and freedom of press; they have the right to receive information and the right of assembly, association and demonstration in accordance with the law."

49 The Penal Code amended in 2009 retained some key provisions in Article 87 (undermining the unity policy), Article 88 (propaganda against the state), Article 89 (disrupting security) and Article 245 (causing public order). In the 2009 Penal code, increased sentences from 10 to 20 years of imprisonment was imposed, compared with from three to 12 years of imprisonment under the 1999 Penal Code.

50 *See* Human Rights Council (2009) A/HRC/WG.6/5/VNM/2. Vietnam UPR. para 40. 700 news outlets in Vietnam are state-controlled. Banning media, publication or use of the internet for communication in the name of state security and social order has been increasing and includes limiting access to social media sites like Facebook.

51 *See* case of Vi Duc Hoi (Communication sent to the Human Rights Council on 7 Jan 2011). A/HRC/18/5, 18th Session, distributed 9 September 2011; Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.51_en.pdf (accessed on 10 November 2012). He was charged for defaming the 'physical and psychological integrity' of the State under the Penal Code. The Court interpreted peaceful expression of political opinions as likely to precipitate violence and was thus a threat to national security. This understanding was nevertheless the same as the international standards.

52 For instance, article 88 of the Penal Code, which prohibits "conducting propaganda against the Socialist Republic of Vietnam," does not meet the above-mentioned criterion due to the vagueness of the types of expression or publications that are prohibited. Under article 88 of 2009 Penal Code, more specifically, it is unclear what types of expression or actions would constitute "propagating against, distorting and/or defaming the people's administration, propagating psychological warfare and spreading fabricated news in order to foment confusion among people," or "making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam."

6. Legitimising FOE/I in ASEAN

International human rights regimes have also been established and flourished over the same period. Thus, human rights are widely accepted as not solely internal matters of the state, but subject to global monitoring and enforcement, to the extent that states join international agreements. FOE/I are now more recognized under international human rights law, but not all ASEAN states have ratified ICCPR. However, even in the case of ratification, the practice of FOE/I differs from what would be interpreted by ICCPR and international human rights standards. The question that follows is, how can FOE/I be protected without illegitimate restrictions under domestic laws? The following recommendations towards an ASEAN regional human rights mechanism are designed to encourage political commitment by states to FOE/I.

First, ASEAN needs to enhance the process of regionalism for recognising human rights of expression and access to information into the regional sphere. ASEAN's structure is based on consensus and political commitment, and has not gone further toward a community law or regional regime following the cosmopolitan approach as in Europe. This process and system may take longer to grow in ASEAN, even when learning from the experiences of other regions. ASEAN, as a region, has many issues and matters of governance that must be addressed beyond the territorial sovereignty of the state. With that direction, ASEAN may also need to evolve into a constitutional and supra-national model when it becomes more mature. Nevertheless, in terms of human rights, ASEAN states are no doubt becoming closer and collectively linked to global human rights regimes in the construction of a regional human rights regime and international relations. But since the process of consensus-building is based on diplomacy, ASEAN is shown as having a weak capacity to enforce its new-born human rights mechanism. The inter-governmental regional human rights commission (AICHR) has not got power as an important community of government representatives on human rights discussions. But, in the future, it may be transformed into a more structured and empowered body to advise states as well as to monitor the human rights situation in the region.

Second, dialogues for norm setting and interpretation of FOE/I should be strengthened. States and human rights issues become both interdependent and interconnected and this leaves the ASEAN Charter as a living instrument that evolves in a process of socialization. Protection of FOE/I can only be strengthened by reconciling the legal cultures and practices of member states. This means that ASEAN will develop its norms by means of building consensus, cooperation and accommodation of political and cultural diversity. But dialogues should not only be by conduct of conventional diplomacy but by means of open discussions between states and international human rights regimes. The reports to HRC and the reports of the Special Rapporteur would be an excellent basis for building understanding on the matter. There is a gradual transition from moral concepts to a legal position on human rights. Since ASEAN has its own normative legality, standards on FOE/I and a regional mechanism, member states may feel more comfortable to adopt and comply.

Third, the exercise of FOE/I, or in other words freedom, can only be restricted in legitimate ways when a state has the political will to make constitutional responses to the issue of freedom as per international standards. As the regional system of law and its enforcement is strengthened, states will adopt and adjust in their domestic systems. In the end, states take responsibility for guaranteeing freedom at state level. Experiences from many European Union member states, as they have endorsed Community law, is that states have been required to adjust their constitutions and domestic legal systems in line with regional law. The Human Rights Commission and the Court have power to advise or to rule over cases where states should also take into account the need to adjust if their legal systems and judicial practices do not meet the standards. Over the past few decades, many ASEAN States have undertaken the constitution building process which gives rise to democracy and human rights including FOE/I. So the matter at hand is that ASEAN states can already refer to international standards to ensure the legality of FOE/I and to guarantee the legitimacy of any restrictions on freedom of expression and information, especially on the ground of national security.

7. Conclusion

The analysis shows that whilst the case study ASEAN states are variably committed to FOE/I in law and practice none yet accords with international standards and principles of jurisprudence. The major arguments made by states to justify non-compliance with international standards are based on notion of 'Asian values' and 'national security' needs. It has been argued that neither of these positions is generally justified. In order to move human rights closer to international norms, the following three recommendations were made. First, FOE/I should derive from a regional human right mechanism. Second, ASEAN needs stronger dialogues for norm setting and interpretation of rights so that states can collectively link to the global human rights regime. Third, ASEAN states should undertake the constitutional building process in line with international standards in the process of developing regional laws and human rights mechanisms that confer the right to FOE/I at the state level.

Whilst the research on which the paper is based focused on Indonesia, Singapore, Thailand and Vietnam, reference was also made to the situations in other ASEAN states. Nevertheless, to generalize findings, and thus recommendations, to ASEAN as a whole requires detailed research on nations note examined in detail for the present study. Also needed are more detailed investigations, based on interviews with relevant actors in the various states, together with on-going monitoring and reporting of the human rights situation in general and access to FOE/I in particular.

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THE RESPONSIBILITY TO PROTECT IN ASEAN AND THE INCONSISTENCY OF HUMAN RIGHTS ENGAGEMENT

I Gede Wahyu Wicaksana

This article analyses ASEAN's response to the emerging norm of responsibility to protect (RtoP) and the context within which the response is made possible to come about. It is argued that the response of ASEAN member states to RtoP demonstrates their willingness to recognize the form of RtoP, but not to undertake its function. This position is influenced by the association's steadfast obedience to the principle of non-interference governing interactions between member states, and consequently it arises out the inconsistency of the engagement with human rights norm and practice. The argument is explored in four sections. The first section outlines the message of RtoP. The second section examines ASEAN's response to the principle of RtoP and sets out the discussion of foreign policy background of the response. The third section explains the constraint of non-interference on human rights protection in Southeast Asia by looking at the inconsistency between the institutional commitment to enforcing human rights agenda and its real practice in the national level. The last section is conclusion which presents a brief view to support the effort to enhance human rights protection in the region.

This article is about the norm of responsibility to protect (RtoP) and the practice of human rights protection in Southeast Asia. For those actively engaging with human rights agenda in the region, RtoP implementation is nothing but crucial for the effort to improve human rights situation of the ASEAN countries. Meanwhile, ASEAN countries governments demonstrate different attitudes toward the RtoP obligation. Over the last decade ASEAN has been entrapped into a dilemmatic human rights issue mainly caused by Myanmar's disobedience to the international demand for democratization in the country. When the association is trying to keep its international credibility, does the rising popularity of RtoP within ASEAN mean to be a good sign of greater human rights protection, and not only promotion, for Southeast Asians?

This article also addresses the above question by arguing that ASEAN member states are willing to recognize the form of RtoP, but not to undertake its function. This position is influenced by the association's steadfast obedience to the principle of non-interference governing interactions between member states, and consequently it arises out the inconsistency of the engagement with human rights norm and practice. The argument is explored in four sections. The first section outlines the message of RtoP. The second section examines ASEAN's response to the principle of RtoP and sets out the discussion of foreign policy background of the response. The third section explains the constraint of non-interference on human rights protection in Southeast Asia by looking at the inconsistency between the institutional commitment to enforcing human rights agenda and its real practice in the national level. The last section is conclusion which presents a brief view to support the effort to enhance human rights protection in the region.

1. The Message of RtoP

The principle of RtoP has been widely endorsed to become a global norm and practice. The endorsement was declared by the United Nations General Assembly at the World Summit in New York, September 2005. The principle of RtoP was, then, unanimously reaffirmed by the Security Council one year later, issued in the Resolution 1674. The principle of RtoP soon gained international legitimacy and significant diplomatic actions were carried out to realize its function. The Security Council referred to the language of RtoP in the international peace-building task-force's mission for Darfur, stated in the Resolution 1706 in 2007, mandating the UN-African Union mixed operation to overcome humanitarian disaster in that war-torn society. Both Secretary General Kofi Annan and Ban Ki-moon had mentioned the principle of RtoP in their diplomatic endeavours for the settlement of the postelection conflict in Kenya (Bellamy and Beeson, 2010: 262). A more controversial case of RtoP practice is noticeable in NATO's intervention over the political conflict between the legitimate government of Mu'ammar Gaddafi and the Libyan opposition movement. The military action was undertaken even without the consent of the sovereign administration of Colonel Gaddafi. It was just under the reason of the failure of the peace negotiation (Bellamy and Williams, 2011: 825-850).

As approved by the member states of the United Nations, the RtoP principle consists of three equally important and non-sequential duties. First, every state has the obligation to protect their people from the threat of genocide, war crimes, ethnic cleansing, and crimes against humanity. Second, the international community has the responsibility to assist states to protect their people. And third, the international community, in collaboration with regional organization, is obliged to take efficient and effective peaceful diplomatic measures to deal with humanitarian crises in a particular state, and if this does not take effect, other more coercive means can be applied in a manner consistent with the United Nations Charter Chapter VI on pacific measures, Chapter VII on enforcement measures, and Chapter VIII on regional arrangements, in situations where the state's government has been unable to fulfil its responsibility to protect population from the aforementioned mass atrocities (United Nations, 2005; Ki-moon, 2009).

The implementation of the RtoP duties signifies two emergent tendencies in the post-Cold War world order. The first tendency is related to the status of the state as the main actor in world politics and the second tendency is visible in the coming of the reinterpretation of, or the apparent shift in, the norm of sovereignty which since the Westphalia Peace Agreement of 1648 had been governing interstate interactions, and that had become so immune to either internal pressures or external factors.

In the orthodox thinking of international relations, the role and position of sovereign states are pre-eminent. They shape the anarchic characteristic of the international system, determine stratification between states based on power; set out the categorization of the great, middle, and weak powers, and subsequently direct global issues to an artificial preoccupation of high and low politics. Within these features of world politics, the most important agenda of diplomacy is the struggle for political power and economic welfare of the state (Booth, 2010). Other agendas, such as human rights, environment and human security, are placed in the lower scale of priority. The orthodoxy has, however, altered in parallel with the growing influence and popularity of the liberal notion of world politics illustrating all actors, varying from national, regional to global levels which have an equal qualification to participate in international affairs. This idea matches the practice of diplomacy in post-Cold War world order, where humanitarian intervention is justified to become the instrument for international engagement in complex situations of internal humanitarian problems (Gismondi, 2007). It opens up the space for human rights protection to emerge as one of the standard governance in international relations nowadays (Forsythe, 2006).

The view on the nature and implication of sovereignty in international relations has been reviewed as well. In the classical insight of world politics, the concept of sovereignty is monopolised by the territorial state. According to this view, states can claim a package of rights over territory, which can be divided into three basic elements. First, states can claim territorial jurisdiction which enables them to make and enforce a particular system of law within their borders. Territorial jurisdiction is defined as the right to establish and maintain the functioning system of law throughout the parts of the state's geography. When the sovereign possesses this right, no foreign entity is legitimized to exercise an alternative authority or build other institutions in its boundaries. Second, the territorial state has the right to utilize and control all extractable natural resources within its territories, and to reap economic benefit from their sale. And finally, sovereignty gives the state the right to control its borders and to regulate the movement of people and goods across their territory (Miller, 2012: 252-268).

The view on sovereignty which vindicates the rights of the territorial state is rearticulated to become sovereignty as responsibility. The idea draws upon the realist political tradition, describing the state's sovereignty comes up as the contract between the government and the people. Thomas Hobbes, in this stream of theory, had argued that the sovereign state would lose its sovereignty automatically when it could not do the functions for which the people give it power. Moreover, Hobbes had pointed to the action of the sovereign which threatens its people with death, and in this situation, the sovereign has no longer owned the legitimacy to govern, indeed it is no longer a sovereign (Bellamy and Drummond, 2011: 181-182). Recent theoretical developments have shown that the concept of responsible sovereignty brought with RtoPcomprises three positive images; popular, spontaneous, and indivisible sovereignty (more detail in Pliparinen, 2012: 405-424).

However, the view on sovereignty as responsibility is reacted differently, suggesting disagreement about the concept at large. The contentiousness with regard to the meaning of sovereignty as responsibility to become the basic tenet of intervention and non-intervention has focused almost exclusively on the argument between proponents of the flexibility of *de jure* sovereignty against those who believe in the sacrilege of *de facto* sovereignty. The difference of the two is centred on the way in which sovereignty is considered as discursive processes involving social interaction and political achievement on one side, and the understanding about sovereignty which is a constant attribute of social and political entity and can be construed in terms of coercive power (Moses, 2013: 114).

2. The Southeast Asian Response

Despite the fact of the RtoP's duties have been accepted by the United Nations General Assembly, and taken its practice by the Security Council, controversy remains particularly existing respect to the potency of RtoP to be abused by outsiders for the interest of forced regime change. This wary was derivedmostly from the Third World countries concerning the inclination of the great powers to act unilaterally when pursuing their foreign policy goals (Sukma, 2012: 136). Therefore, the international commitment to embrace the RtoP duties, in this context, is not solid, and the world is not in a single voice for RtoP. Every region and specific sub region expresses a distinct attitude towards the implementation of RtoP.

A region is formed by a group of states for some reasons, such as collective security arrangement, advancement of economic development and cooperation, mutual trade expansion, and more importantly, the feeling of being in a geostrategically interdependence condition (Fawcett and Hurrell, 1995). Essentially, the regional environment is an extension of the state's local political, cultural, and economic practices. Historical factors also play an important role in determining the way states envision international relations within their region. Hence, the formation of a region is closely related to the sub region's foreign policy behaviour (Hemmer and Katzenstein, 2002: 575-577). Another important thing is that each regional setting is quite dissimilar. There is a region which shows greater influence on the state. On the other hand, there is a state which exerts more influence on its regional institution. In the latter quality of regional politics asymmetry, issues related to the national interest - the most important of which is national security and consolidation – are perceived by the state government as most critical as to restrict authorities of regional organization to absorb external value, norm, and practice. Southeast Asia is typical of this regional portrait, institutionalized in the organization of ASEAN (Goh, 2008: 113-157). As a result, it is understandable when ASEAN governments are less receptive to the global norm and practice of RtoP.

Southeast Asia was born as a region of post-colonial nations. Both periods of European – and another Asian power, Japan – colonization and decolonization were hard histories for Southeast Asians. Thailand is the only country which has never experienced colonialism,

and therefore it did not undergo a revolutionary phase of the struggle for independence and heroic moment like what people in the Philippines, Indonesia, Malaysia and the whole part of Indo-China did. Developmental process of post-independence was also not easy for most Southeast Asian nations. The colonial stronghold over the various free ethnic groups in the region left latent communal frictions that led to protracted social and political fragmentations, which in most extreme line erupted to secessionist movements. The efforts of the national government to promote integration throughout the country were often faced by disintegrative responses of the local people. This, intently contributed to the making of governance's trait with two predominant propensities: the continuing unresolved problem of nation-building which gives rise to the perpetuation of national security and consolidation to become the major political agenda of the ruling elite, and the emergence of political structure filled by the alliance amongst nationalist politicians, the military, and to some extent religious fundamentalists (Lau, 2012). The polity built in the post-independence Indonesia and Philippines was the true representation of such a bureaucratic authoritarian regime (Hoadley, 1975). It is also important to argue that there was a connected history between decolonization and the subsequent surge of the Cold War order in Southeast Asia in which the military found significant momentum to ascend to, and further to defend the state's political leadership role over civil society (Goscha and Ostermann, 2009).

Besides the historical context, the local values have influenced Southeast Asian leaders' worldview grasped in the conception of the so-called Asian values. Malaysian Prime Minister Mahathir Mohamad and his successors are the immense articulators of this discourse. Mahathir is convinced that Asian countries in general and Malaysia in particular can succeed in economic development while subscribing to a different reference of developmental policy. The heart of the Asian values rhetoric is visible in the reluctance to acknowledge the superiority of the Western culture. Mahathir points out that Western's way of life founded upon the value of secularism, individualism, and neo-liberalism, does not apply to Malaysians. Being a Muslim in the modern world, Mahathir believes that Islam, democracy, and modernity can be practiced altogether, with reference to local culture (Schottmann, 2011: 255-270). Likewise, Indonesia's political economic thinking pronounced by both Sukarno and Suharto manifested in alternative sets of policy. The Indonesian leaders did have experiences with Western capitalists, yet consciously averted the overriding impact of the liberal system on local community's tradition (Hadiz, 2013: 208-220). Even though the 1997/1998 East Asian financial crisis used to weaken the regional imaginaries for Asian pre-eminence, the important elements of national leadership in Jakarta and Kuala Lumpur keep on believing that the reliance upon the West not only would erase their national identifying practice, but also undermine their national resilience (Yaakub, 2009).

Moreover, in the awakening of Asian powers, China, and India, the idea of Asia provides a different developmental policy is coupled with the agenda of new geopolitics. Asia is assumed to be the central locus of international economic, political, and security relations

of the 21st century. Ample evidence supports this claim. However, the most compelling trend is that the decline of the two-hundred-year long European dominance in world politics and economy, which for one caused by the persistent economic crises plaguedin the European economies. The same pattern happens in the United States where the American government is unable to retain its hegemonic control over the major Asia-Pacific actors. In parallel, the world sees the emergence of the so-called 'BRIC' powers of which China is thriving to become the driving force of East Asian geopolitics and geo-economy (Beeson, 2013: 234-236). In the changing of global and regional leadership position, the Chinese elites and most of the Southeast Asian leaders admitted the growing influence of China, are moving forward to spend larger amount of energy for national necessities such as economic advancement and social harmony rather than political liberalization (Halper, 2012). This trajectory marks many regionalism schemes arising especially in East Asia, with most analysts and policy makers in the region are in favour of their good prospect (*The Economist*, 8 May 2010: 41).

Against this backdrop, most Asian leaders are getting more confident with local politics and normative preferences, and at the same time they demonstrate hesitant attitude towards the implementation of the duties conceived in an external norm like RtoP. It makes the accommodation and localization of RtoP in the region become so difficult. An exception, however, can be encountered in the aspiration of RtoP application. For example, it was revealed by Pakistan and Singapore. They expressed the support for global humanitarianism for separate reasons. Since the 1990s, Islamabad has attempted to localize humanitarianism and invite international intervention to Kashmir on account of the alleged weighty human rights violations which have been done by the Indian military. On the contrary, India has invariably objected the Pakistani claim, and opposed foreign party's involvement in that two countries' territorial dispute (Pattanaik, 2002: 199-225).

In Southeast Asia, Singapore is the only ASEAN pioneering member that was very vocal in endorsing the adoption and enforcement of RtoP. With more than enough capacity to execute the policy effectively and high competence in administrative management as well as transparent bureaucracy infrastructure, the Singaporean government can claim to have truly effective governance, and more importantly, the state is able to shield itself from the potential political setback due to international pressure upon an undemocratic polity (Bellamy and Beeson, 2010: 267). Singapore's special relationships with regional and global powers – the United States, Australia, and the European Union – beyond ASEAN regionalism, to some extent are followed simultaneously by the city-state government's readiness to adjust foreign policy to external changes, even though those are still sensitive for the Southeast Asian context (Leifer, 2000). To show its favour for RtoP, Singapore, together with the principal of RtoP advocate in the Asia Pacific, such as Australia and Republic of Korea, enlisted the 'Group of Friends of RtoP', which was established by the Canadian government as an international forum for discussion and information sharing amongst members at the level of permanent missions to the United Nations in New York (Ballemy and Davies, 2009: 552-553).

However, Singapore's engagement with the RtoP agenda should not be understood as a view that the international society, the United Nations and especially the Security Council, have to take on a tougher method to handle humanitarian crisis and protect human rights. Acknowledgement to the principle underpinning RtoP does not necessarily mean to consent on the use of military intervention. This attitude can be discerned in the way the Singaporean government reacted to the Myanmar authority's crackdown on Buddhist protestors in September 2007. Foreign Minister George Yeo depicted it as 'brutal', condemned the forced seize of demonstrators, and insisted on the release of the pro-democracy leader Aung San Suu Kyi. Even though expressing concern about the Myanmar's junta, Singapore has never approved any Security Council's resolutions denouncing Myanmar, and has persistently believed that the most suitable approach to address the problem is by employing the Secretary General's good offices mechanism in cooperation with the Myanmar government, though Singapore stated eagerness to launch diplomatic pressure on the junta (Bellamy and Davies, 2009: 560).

Other pioneers of ASEAN, the Philippines and Thailand have signalled approval for RtoP, but they never developed a solid position whether ASEAN as collectively or its member individually has to carry out the RtoP's obligations fully in the regional affairs. Thailand used to invoke the concept of flexible engagement in ASEAN, with the purpose to cope with international pressures faced by the organization's members in the aftermath of the Myanmar's human rights case. It broke the regional silent attitude towards the controversy over Myanmar. However, the rhetoric has not taken a real shape this far. The Thailand's initiative on Myanmar has, on the contrary, caused incoherence amongst the association's member states. Yet, the disagreement ended up with a conservative decision; keeping the consensus style of decision-making on top of the efforts to promote individual interest (Haacke, 1999: 581-611).

The government of the Philippines, perhaps, was the earliest supporter of the RtoP in Southeast Asia, although later on, it expressed the endorsement in a soft manner. At the 5015th meeting held by the Security Council in July 2004, which discussed the situation in Darfur, the Philippines' representative stated that Manila stood by the principle of sovereignty as responsibility and the authority of the Security Council to undertake necessary measures to overcome severe humanitarian problems in situations where the national government was manifestly failing to protect its people (United Nations Security Council, 2004: 10-11). This position was reaffirmed at the Security Council debate on Darfur in September 2004. However, since the World Summit held one year later, Manila's advocacy for the RtoP implementation has waned (Bellamy and Davies, 2009: 553). Moreover, in dealing with international conflict in distance, the Philippines government might articulate a strong position on the side of RtoP follower. However, within the ASEAN's forum, such a stance was muted. Manila chose to return to the idea of good-neighbourly policy with the lack of tenacity to interfere in other's internal affairs. It also means that the regional security and stability maintenance in Manila's foreign policy remains as the most crucial agenda, especially in the age of terror following the 9/11 tragedy (Banlaoi, 2009).

Indonesia has always turned out to be the strong opponent of the idea and practice of external intervention in the sovereign state's internal affairs. Although Jakarta participates in various peace-building and peace-keeping operations, it stresses that the United Nations must be the principal operator of such missions, otherwise Jakarta will not take part. Jakarta's foreign policy on the issue of the West and Third World relations is closely related to two entitlements deriving from the belief in the country as the largest archipelago in the world, so that it has important geopolitics determination, and the notion that the nation possesses the legacy of great past symbolized in the roles of its two major kingdoms Majapahit and Srivijaya. They contribute to form Indonesia's aspiration for leadership role, at least in its immediate region of Southeast Asia, and strengthen the elite's resistant character to outside interference (McMichael, 1987: 2-3).

The traumatic experience with the lost of East Timor, as a result of foreign involvement led by Australia, accelerates the nationalist sentiment of the Indonesian elite and the people (Smith, 2000: 498). At the 2005 World Summit, President SusiloBambang Yudhoyono outlined Indonesia's position on the RtoP principle to include two important elements: the first is the requirement for international consensus to clarify the true meaning of RtoP before any action is taken to fulfil the responsibility to protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity, and the second is that the enforcement measure can only be used if other diplomatic devices have failed (Indonesian Ministry of Foreign Affairs, 2005: 21). This cautious stance implies a subtle rejection to the full implementation of RtoP. In fact, there is no practical evidence proving that Jakarta has every respect referred to the RtoP principle in its external official conduct. Jakarta stands in the position that is necessary to illuminate to which situations RtoP legitimate to utilize, and the agenda must be approached carefully. Even when NATO was prepared to intervene in the 2011 crisis of Libya, Jakarta urged the coalition forces to cancel the plan, and return to dialogue with full of respect of Libyan sovereignty (*The Jakarta Post*, 29 March 2011). In practice, it means that Jakarta considers sovereignty as the state's right, not responsibility, as the unchallengeable norm in the international community.

Objection with resentment to RtoP was indicated by ASEAN's new members especially Myanmar. Vietnam did the same when it first responded to the principle in 2004. It was not convinced that the RtoP principle is an emerging norm of international law deserving obedience by the international community. It concerned that RtoP would merely become the catalyst for the world's more powerful states to impose their interests on other states and potentially be abused as the right to punish. Yet surprisingly, a change took place in the Vietnamese attitude particularly during the 2005 World Summit. Hanoi declared its support for RtoP, especially noting the importance of the first two pillars. On that occasion, Vietnam must be reassured that the RtoP could not be applied without further deliberation of the General Assembly, and consistent with the United Nations Charter, and most importantly, could not have the effect worried previously (Bellamy and Davies, 2009: 563-564). Besides this, Vietnam keeps on opposing foreign intervention to the state's domestic affairs. This stance is also held by Cambodia, Laos, and even the older members of ASEAN such as Malaysia and Brunei (United Nations, 2009).

3. Non-interference as Constraint on Human Rights Protection

The discussion on the Southeast Asian responses to RtoP suggests that the governments in the region could accept the spirit of, but not undertake the function of, RtoP. They indicate a reluctance to accommodate, localize, and more determinedly implement human rights protection through the scheme of RtoP's action. Human rights, in the form of the fundamental rights of the people to get free from threat of mass atrocities, have received recognition in ASEAN. However, the discourse is translated into vertical relationship between the national government and its population, without the involvement of third party. In dealing with human rights issues, ASEAN is determined in perceiving the domain of enforcement with a particularistic perspective, pointing to no universal standard that can be applied. Therefore, the association tends to be resistant to actions of interference in states' domestic affairs. Likewise, the principle of the sovereignty as territorial right is consistently referred to by ASEAN members as the unchallengeable code of conduct of international relations for Southeast Asians, manifested in the value of 'ASEAN Way.'

The ASEAN Way leads all ten members of the association to practice non-interference, consensus style of decision-making, and peaceful means to settle dispute and conflict. The existence of the ASEAN Way has, for many, been linked to the success of ASEAN in preserving a relatively stable region for about thirty years since the organization was established in 1967 (Ramcharan, 2000). However, critical views about the efficacy of the ASEAN Way say that the stability and security have been constructed as a result of conflict avoidance rather than conflict resolution. In addition, the internal as well as regional circumstances under which ASEAN was given birth, have transformed into so much different developments today. The process of decolonization had been completed in Southeast Asia. The Cold War has ended, and the new nation-states in the region find themselves trapped in their distinct nation-building problems, liberated from the influences of the former external great players engulfing Southeast Asia in extensive conflict (Beeson, 2009: 335).

In fact, the ASEAN way, more pointedly the principle of non-interference, is maintained. Non-interference has been enshrined in every ASEAN's monumental agreement, thus, allowing for its incessant practical implication for human rights agenda. The ASEAN Declaration on the Zone of Peace, Freedom, and Neutrality (ZOPFAN) of 1971 affirmed all states, large or small, have inalienable rights to determine national existence which is free from external interference to their domestic affairs, because such an action could adversely affect the states' independence, freedom, and integrity, and announced that Southeast Asia as a neutral zone was enviable objectives (ASEAN Secretariat, 1971). The Treaty of Amity and Cooperation, which was adopted by ASEAN's heads of government meeting at Bali in 1976, stipulated in article 2 of the treaty some principles governing interactions amongst the association's member states, including mutual respect for the independence, territorial integrity, sovereignty, equality, and national identity of all nations; the right of every state to lead its national existence free from foreign intervention, subversion, and coercion; and

non-interference in the internal affairs of others. The important position of the principle of non-interference was further emphasized in the article 11 of the treaty, revealing that all member states of ASEAN was required to direct effort to the strengthening of their respective national resilience in the political, economic, socio-cultural and security fields in conformity with their aspirations for the maintenance of national identity, free from external interference and internal subversive activities (ASEAN Secretariat, 1976).

From this evidence, it is clear that the primary objective of ASEAN's regional arrangement is that they must be secured from the exertion of external party's influence and interest. ASEAN defines its region as an independent system of politics, economy, social life, and culture. In practice, independence means that the ASEAN's governments want to take the entire control over external factors influencing them. When human rights issues become a more popular agenda in the international society of the 1990s, ASEAN was aware of its potential impact on the cohesiveness of the organization. Hence, it decided to keep silent on the issue, whilst facing external pressure by invoking their stand for non-interference policy. The case in point is discernible in ASEAN's hesitancy to follow international criticism of the Indonesian military's heavy handling on mass demonstration in Dili East Timor, November 12, 1991. None of the other five members of ASEAN brought up the issue of human rights violation in Dili to the association's forum thereafter (Mauzy, 1995: 279). Moreover, Jakarta–which at the time was the *primus inter pares* of ASEAN–did not want to give the pretext for other ASEAN's colleagues to interfere in the East Timor issue.

However, non-interference is actually not an ASEAN's original creation. The concept originated in the Western's political tradition conceived with the 1648 Westphalian peace agreement premised that the foundation for the European rules of relations between states is based on three pillars: non-intervention, sovereignty equality, and the equal legal status of the sovereign states. Thus, with the norm of non-interference in practice, the sovereign state has the right to exclude external actors from its internal affairs. The pillar of non-interference is also at the heart of some of the United Nations' foundational doctrines, which are prepared in large by Western notions (Funston, 1999: 5). For example, the preamble of the United Nations Charter in 1945 equates faith in the fundamental human rights, in the dignity and worth of human person, the equal right of men and women, and of nations, large and small. Article 1(2) of the charter says that the main purpose of the organization is to develop friendly relations amongst nations based on the respect for equal rights of self-determination, and this is strengthened by article 2(1) which stipulates that the United Nations is based on the principle of sovereignty equality. On the nature of the General Assembly, stated in article 4 paragraph 1, the United Nations recognizes the membership is open for states, and they all have the right of one vote (United Nations, 1945).

ASEAN's strong embrace of the norm of non-interference is never followed up with a clear understanding about the extent to which non-interference is applied. There is, then, no attempt by ASEAN's governments to make the definition of interference. Yet, the general foreign policy practice of Southeast Asian leaders displays that interference encompasses the act of mild political commentary on other's domestic affairs through the coercive action of economic sanction, diplomatic pressure, and military intervention. Furthermore, it implies that ASEAN's meetings, including the summit of heads of state/government, ministerial conferences, and auxiliary forum, at least until 1997, had never discussed about member states' internal affairs. Instead, regional agenda was focused on issues related to common peace and security, enhancement of economic cooperation, social and cultural collaboration, as well as technical assistance. Even the initiative to expand the good office service of the chair of the ASEAN Regional Forum (ARF) was refused on account of the concerns it would potentially lead to interference in member states' domestic affairs (Bellamy and Drummond, 2011: 185). It means that ASEAN is also allergic to the notion which says that governments can influence each other's behaviour through the established diplomatic channels only.

Nonetheless, non-interference for ASEAN does not necessarily imply the act of non-cooperation. ASEAN develops various cooperation between governments in the political, economic, and social affairs including such intensive schemes for free trade area, military training, intelligence information sharing, narcotics and human trafficking eradication, regional counterterrorism cooperation, and management of environmental issues. These are not prohibited according to the principle of non-interference, even though such activities impinge on national boundary. Unfortunately, the human rights protection of the people is somehow excluded from the lists. It raises an argument that ASEAN has not become an effective agent for human rights socialization; furthermore the institutionalization of human rights within ASEAN is very incremental.

Over the last decade, ASEAN has been constructing institutional infrastructure to pursue human rights agenda. In October 2003, ASEAN announced the plan to build a security community. One of its objectives is to promote human rights and democracy throughout the region (ASEAN Secretariat, 2003). The initiative was reaffirmed in 2004 in the formation of the ASEAN Political and Security Community whose common goal and shared value is to create a democratic region. It was mentioned in the declaration of the security community that ASEAN is determined to create Southeast Asia as a just, democratic and harmonious environment; to advance democratic institutions and people participation; to implement good governance in both public and private sectors; to protect vulnerable groups, including women, children, people with disabilities, and migrant workers; and to promote education and public awareness on human rights. ASEAN, too, added a commitment in its action plan for the security community to develop elements of conflict prevention, conflict resolution, and post-conflict peace-building. Thus, they will be compatible to the purpose of dealing with humanitarian crises (ASEAN Secretariat, 2004). In this respect, Noel Morada (2006: 59-70) has argued that ASEAN is ready for, and heading towards, the application of RtoP.

ASEAN was designing an active mechanism for human rights protection in the region. The ASEAN Charter, signed on November 20, 2007, says clearly in its preamble article 1.7 that the association's member states promised to employ the principle of democracy, the rule of law and good governance, and the respect for human rights and fundamental freedoms. In addition to this commitment, in the article 14 of the charter, ASEAN stated that it has planned to establish a regional human rights body (ASEAN Secretariat, 2007). This plan is indeed parallel with the initiative of four members–Indonesia, the Philippines, Thailand, and Malaysia–which have created their national human rights commission to link up those national level institutions to shape the regional human rights mechanisms. They are also working with various civil society organizations (Katsumata, 2009: 623).

The ASEAN's regional human rights mechanism finally came true in October 2009 when the ASEAN Intergovernmental Commission on Human Rights (AICHR) was inaugurated. The AICHR aims to promote and protect human rights and fundamental freedoms of the people in Southeast Asia (Tan, 2011). ASEAN went on a further impressive step in engaging human rights agenda by releasing the ASEAN Human Rights Declaration when the association's heads of states convened in Phnom Penh on November 19, 2012. In the declaration, ASEAN presents its most comprehensive commitment to engage human rights norms at the regional level. It consists of promises to obey to the universally-adopted rights for people in the social, cultural, civil, political and developmental field. Principally, ASEAN acknowledges the right of personal liberty, the right to be free from servitude or slavery, the right to get protection from torture and other lawless treatment, the right of movement and residence, the right of privacy and personal protection, the right of freedom for thought, conscience and religion, the right to freedom of expression, the right of people to participate independently in political processes governed by democracy and to control their government, and other rights which suggest an accommodation of various international human rights covenants (ASEAN Secretariat, 2012).

In contrast, the ever-growing achievement of ASEAN's engagement with human rights agenda–which has been expressed through formal programmes and institutions–does not match with the real situation of human rights in its member countries. In other words, there is an inconsistency of the ASEAN's regional recognition for human rights and the implementation at national milieu. ASEAN's governments have just shown the commitment to human rights promotion, however, they have not demonstrated resolute actions to protect human rights. This claim is supported by Mathew Davies' survey (2013: 214-215) of the compliance of ASEAN's member states with the agenda of the civil and political rights protection. The survey takes illustrative explanatory examples of human rights standard in ASEAN countries released in academic publications and the Universal Periodic Review of the United Nations Human Rights Council.

According to the survey (Davies, 2013: 214), in spite of the fact that member states have proclaimed their concern with human rights issues on the ASEAN Human Rights Declaration of 2012, not all of them has ratified the International Covenant on Civil and Political Rights as one of the important global standards for compliance with human rights agenda. Brunei, Malaysia, Myanmar, and Singapore are of the non-signing and non-ratifying the covenant, and thus it is not hardly surprising, in Davies' words, if the situation of civil and political rights enjoyment in those countries is highly concerning. In Brunei, non-Muslims have to face various kinds of discrimination against their religious freedom. The Malaysian government is reported to have prohibited plenty of publications only on account of an allegation of threat to national stability and security. Myanmar, perhaps, indicates the most serious violations of human rights seen in the junta's intent repression on the people's social, economic and political rights. The report exemplifies the evidence that the members of the democratic parties were disallowed to hold public meeting, and the military government is failed to ensure provision of the basic needs of the people. A wide array of cases also demonstrate that Myanmar lacked the conditions for democracy and the enforcement of the rule of law. Both Malaysia and Singapore were criticized on the ground of their application of the law affecting freedom of expression straightaway.

Moreover, the other ASEAN's member states that have signed and ratified the International Covenant on Civil and Political Rights also do not enforce those rights in a meaningful way. Davies (2013: 215) notes that the Cambodian government has significantly attempted to curtail the people's rights to assemble, to launch protest to the government, to express opinion in public space, and to obtain independent information. Indonesia is in particular criticized for the failure to retain and protect the rights of minority religious freedoms. Some events, namely unlawful detention, mistreatment of prisoners, and torture are reported to have been done by the government's security officers. This is equated to the act violating fundamental rights such as freedom expression and assembly. The Philippines is reviewed as having severely infringed on the rights of the people to life, liberty, and personal safety. It is visible in the pervasive act of arbitrary killings, kidnapping, torture, and forced disappearances done by the army and police.

Findings on the above survey are enriched by the approach presented by the Freedom House's investigative report on the actual situation of human rights protection in ASEAN member countries compared to their on-paper commitment. A rating is made from one which informs the atmosphere of full freedom, to seven that represents high suppression. Indonesia was scored two, the Philippines three, Singapore and Thailand four, Brunei and Cambodia six, whilst Laos, Myanmar and Vietnam seven (Davies, 2013: 215).

Here, it can be safely argued as well that with the existing mismatch between ASEAN's official commitment to protecting human rights and the real implementation, the prospect for RtoP to occur in ASEAN is surely problematic. As the principle obligating states to completely be in favour of human rights agenda and in particular with the effort to safeguard citizens from mass atrocities, RtoP needs not only formal acceptance, but also

the instrument for application. None of the important ASEAN forum discusses the RtoP topic, although civil and political rights in general have been entailed explicitly in the ASEAN Human Rights Declaration. The AICHR also is not given the authority to become the agent for RtoP conduct. ASEAN does not have relevant institutional tool to undertake the RtoP duties. Expecting the ASEAN Political and Security Community to carry out the mandate is something misleading. This is because the ASEAN Political and Security Community is not equipped with the mechanism to enforce sanction upon member states breaking the responsibility to protect their population. The community is set up as a framework of cooperation in political and security issues within ASEAN, with too general scope of attention, whereas the agenda of RtoP is specific on the effort to end genocide, war crimes, ethnic cleansing and crimes against humanity. The most important thing is that the scheme of conflict prevention, conflict resolution, and post-conflict reconstruction designed in the ASEAN Political and Security Community is placed in the context of interstate relations, whilst, RtoP focuses on internal humanitarian crises (Sukma, 2012: 141-144). The irrelevance of RtoP for ASEAN is paralleled by the fact that the association remains too tightly hold the code of conduct of non-interference, suggesting every action to interfere with domestic affairs is illegitimate.

4. Fostering Human Rights Protection in Southeast Asia

The principle of RtoP has been declared by the international society as a global norm. Its implementation undeniably has controversy specifically for Developing Countries that are worried about the prospect of forced regime change interest on the part of the foreign powers through the claim of the former's inability to protect their citizens from crimes against humanity, war crimes, ethnic cleansing, and genocide. This concern is understandable to the extent that although the duty of RtoP has been legitimized by the United Nations General Assembly and endorsed by the Security Council – with its political authorities, there has been no universal agreement on the ground upon which RtoP will be embraced and more pointedly implemented. What, who, when, and with what ways to intervene is the major contention between the proponents and oppositions to RtoP.

ASEAN's member states have approved to accept the principle underlying RtoP. However, at the level of action, the association is continuously doubt about and half-hearted over RtoP. It does not indicate a solid position towards RtoP. Member countries keep the application of RtoP away from having a concrete legal anchor. They have not formulated certain normative institutional mechanism and tools to support the universal humanitarianism agenda of RtoP. Such organizational irrelevance has been complicated by the weak political will entailed, and evinced in the preservation of the norm of non-interference to become the regional main code of conduct in order to prevent the potency and actualization of foreign intervention in the name of human rights protection.

Looking at this situation suggesting the inconsistency between ASEAN's on-paper-commitment to human rights protection and the concrete application of the agenda, it is important to say that the prospect for complete implementation of RtoP in Southeast Asia requires more active participation of non-governmental organizations, intellectual communities, and media concerned with human rights issues to advocate innovative ideas and produce effective framework for the enforcement of RtoP in the region. This is very crucial because the established characteristics of state-centric diplomacy of ASEAN has gradually changed in practice to the more democratic manner with a larger room rendered for people participation. It is the ripe time for human rights activists to democratize and humanize ASEAN.

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RELIGIOUS FREEDOM IN PLURALISTIC SOCIETIES: CASES OF INDONESIA AND MALAYSIA

Dian Shah

In plural societies – societies with politically salient ethnic, religious, linguistic or regional differences – identities are not just important sources of trust and protection of interests; they also form a basis for inter-group competition.* These social endowment features, combined with existing public policies that may be skewed in favour of a dominant ethnic group, may raise distinct challenges to the tasks of respecting, ensuring, and fulfilling rights, especially if those rights implicate race and religion.

This paper exposes and compares the controversies, trends, and challenges to human rights in two plural societies – Malaysia and Indonesia – by focusing on two inter-related rights: freedom of religion and expression. By analysing judicial policies and governmental practices, it seeks to reveal the extent to which these rights are protected and enforced in both countries. This paper then discusses the difficulties of protection and enforcement and explains why certain policy paths are taken. In doing so, it focuses on two issues: 1) the application of rights limitations, and 2) the interplay between human rights treaty ratification and domestic rights mobilization. Beyond these arguments, this piece argues that given the special characteristics of plural societies, ethnic politics is instrumental in determining the parameters of human rights and can pose a significant obstacle to their enforcement. This paper challenges its readers to rethink the problems faced in upholding fundamental rights in societies where ethnicity is socially and politically salient. More broadly, it invites greater scrutiny on the conceptions of human rights and democracy in Southeast Asia's plural societies.

* Donald L. Horowitz, "Democracy in Divided Societies," Journal of Democracy 4 (1993): 32.

1. Introduction

In a plural society, various groups divided across national, ethnic, racial, religious or linguistic lines live in a single polity. Such societies exist across the globe, although the degree to which the co-existence is peaceful varies. In plural societies where ethnic identities have a high degree of salience socially and politically, ethnic identities and affiliations are not just important as a source of trust and protection of interests; they also form a basis for competition with other ethnic groups.[1] In extreme scenarios, such contests can lead to inter-group antipathy and violent conflict.

Given these social endowment features, the task of protecting and enforcing fundamental rights may also be a delicate and challenging affair. Several other factors may further complicate the situation. First, in plural societies with a dominant ethnic group, nation-building and public policies may well be skewed in favour of the majority, and thus there are bound to be oppressive elements in matters implicating fundamental rights. Second, because maintaining peace and controlling the triggers for conflict are key goals, a dilemma might exist in addressing competing rights claims. Despite these issues, the existing human rights discourse still lacks both comprehensive and comparative analysis on rights in plural societies.

These considerations form the core foundations of this paper. It seeks, broadly speaking, to uncover how human rights are protected, enforced, and implemented in plural societies and how competing rights claims are addressed. To that end, this paper exposes and compares the controversies, trends, and challenges to human rights in Malaysia and Indonesia by focusing on the clash between freedom of religion and of speech and expression. Because rights issues involving religion or ethnicity can be particularly sensitive in plural societies, this paper highlights the issue of religious expression. Case studies include Indonesia's contentious blasphemy law and its impact on non-mainstream religious sects such as the Ahmadiyah, as well as restrictions on publications and speech implicating religion.

The objectives of this piece are decidedly modest. I do not attempt to provide a cogent solution to the problems highlighted in this paper, nor do I seek to present a theological analysis of religious freedom. Rather, the central question is this: in a setting where religious or ethno-religious identities are socially and politically salient, where rights issues involving race, religion, or ethnicity are sensitive, and where inter-group contests on rights can pose a threat to peace, how do states confront the problem of upholding the right to freedom of religion and expression? By tracing the paths of judicial decision-making and governmental practices, this paper discusses the difficulties of protection and enforcement. In doing so, it highlights several critical and common issues: 1) constitutional restrictions on rights and their application, and 2) the interplay between human rights treaty ratification and domestic rights practices.

1 Donald L. Horowitz, "Democracy in Divided Societies," Journal of Democracy 4 (1993): 32.

Beyond these arguments, this paper seeks to explain why certain paths are taken, despite the problems that they raise. In doing so, it advances an alternative proposition: given the special characteristics of plural societies, ethnic politics is instrumental in determining the parameters of human rights and can pose a significant obstacle to their enforcement. With this in mind, this paper challenges rights advocates to rethink the problems faced in upholding fundamental rights in societies where ethnicity is socially and politically salient, as well as the strategies to call for greater rights protection and enforcement. Owing to the nature of these societies, the human rights discourse must be conscious of and evaluated with due regard to the challenges that they face, so that more efficient and effective means of rights protection can be achieved.

2. Freedom of Religion and Expression: International and Domestic Human Rights Protection

Freedom of religion, as Scolnicov argues, is a contradition in terms: on the one hand, 'freedom' implies the absence of constraint, but because religion is a comprehensive system of values that govern every aspect of a person's life, religion and the exercise of religious freedom, can become a self-imposed constraint on freedom.[2] This dilemma pretty much characterizes the challenges in shaping the metes and bounds of religious freedom in both international and national spheres. Central to the discussion in this paper is also the idea of a dual conception of religious freedom: as an expressive activity of belief, criticism, and inquiry, and as identity which entails equality between religions.[3] Both originated from the Enlightenment era of liberal thought, where religious freedom is justified in the idea of individuals as autonomous, rational, free-thinking citizens, and that every person has the right to equal liberty.[4]

In the modern human rights discourse, the right to religious freedom is firmly protected in several international human rights instruments. The International Covenant on Civil and Political Rights (ICCPR), which carries binding obligations upon its ratifiers, provides the right of every individual to freedom of thought, conscience and religion.[5] The right to religious expression is protected in article 18(1) which provides the freedom to manifest one's religion or belief in "worship, observance, practice and teaching," either individually or in community with others and in public or private. This includes, according to the Human Rights Committee (HRC), ritual or ceremonial acts giving direct expression to

2 Scolnicov, A., 2011. *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights*. Oxon: Routledge, 1.

3 *Ibid*., 31.

4 *See* Scolnicov, 35-41. Another justification is based on the principle of minimal intervention by the state in matters of individual choice and liberty.

5 Article 18 of the ICCPR.

belief,[6] and the freedom to prepare and distribute religious texts or publications.[7] To be sure, limitations are allowed on manifestation of religious beliefs in order to "protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[8] However, they may be applied only for their prescribed purposes and must be directly related and proportionate to the specific need on which they are predicated.[9] Any other restrictions beyond those specified in the Covenant are also are not allowed.[10] With respect to religious expression, the HRC also goes further by citing article 20 "no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[11]

Article 19 enumerates the right to freedom of expression and may also provide an additional basis for the protection of religious expression. As with religious freedom, there are approved limitations – as provided by law and are necessary – to protect public order, health or morals.[12] But this article goes further: freedom of expression may be subject to restrictions for the protection of national security, and respect of the rights or reputations of others.[13] One point of special relevance to the subsequent discussions in this paper is the fact that the exercise of this rights "carries with it special duties and responsibilities."[14] Within this context, the HRC has noted that "certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole."[15]

In the domestic realms, Malaysia and Indonesia appear to afford extensive protection to freedom of religion and expression in their constitutions. For the most part – perhaps more so in Indonesia than Malaysia – the guarantees provided are similar to those found in the international human rights instruments such as the ICCPR. In Malaysia, the first provision indicating religious freedom guarantee is article 3. While it establishes Islam as the religion of the Federation, it also provides that other religions can be practiced in

6 UN Human Rights Committee, "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience, and Religion)," 30 July 1993, UN HRC, Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument *see* para. 4 concerning manifestation as 'worship.' (accessed on 17 August 2012).

7 *Ibid.,* para. 4, concerning manifestation as practice and teaching of religion or belief.

8 Article 18(3) of the ICCPR.

9 UN Human Rights Committee, *supra* note 6, para. 8.

10 *Ibid.,* para. 8.

11 *Ibid.,* para. 7.

12 Article 19 (2) of the ICCPR.

13 Article 19 (3) of the ICCPR.

14 *Ibid.*

15 However, this does not mean that the specified tests and conditions are inapplicable. The HRC has made it clear that any restrictions must be necessary, prescribed by law, and fulfil the conditions set out in paragraphs 3(a) and (b). *See* UN Human Rights Committee, "CCPR General Comment No. 10: Freedom of Expression (art. 19)," 29 June 1983, UN HRC, Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument_(accessed on 19 August 2012).

"peace and harmony"[16] and that such establishment shall not affect other provisions in the constitution, including those of fundamental liberties.[17] Although Malaysia is not a party to the ICCPR, this provision comports with the HRC's view that an establishment of a state religion shall not result in any impairment of the enjoyment of any of the rights under the Covenant.[18] Article 11 enumerates the right of every person to profess, practice and – subject to article 11(4) – to propagate his religion.[19] The freedom of religion is subject to several important restraints on grounds of public order, public health or morality.[20] Thus, any religious act deemed contrary to general laws relating to these grounds is unsustainable under Article 11. Similar restrictions are in place for the right to freedom of speech and expression provided in article 10. However, article 10(2) goes further by establishing restrictions to protect Parliamentary privileges, or to provide against contempt of court, defamation, or incitement to any offence.

Even before ratifying the ICCPR, Indonesia embarked on a series of constitutional amendments which inserted rights provisions inspired by the international human rights corpus. Tim Lindsey argued that the human rights provisions are "lengthy and impressive, granting a full range of protection extending well beyond those guaranteed in most developed states."[21] Religious freedom in Indonesia is now explicitly guaranteed through several provisions in the Indonesian Constitution. Article 29(2) "guarantees all persons the freedom of worship, each according to his/her own religion or belief." This provision is bolstered by Article 28E, following an amendment passed in 2000. Of relevance to this paper is article 28E (2) which further guarantees the right of a person to freely believe in his or her faith, and to *express* his or her views and thoughts, in accordance with his or her conscience. Paragraph 3 of the same provision also entrenches the freedom to express opinions.

It is noteworthy that here are important textual differences between the two constitutions. Indonesia's guarantee of religious freedom is textually broader given the guarantee that a *person shall be free to choose and to practice the religion of his/her choice.*[22] The constitutional limits to the exercise of religious freedom in Indonesia also differ slightly. Article 28J (2) is a general restriction clause which states that "In exercising their rights and freedom, every person is subject to limitation set by law *solely* for the purpose of guaranteeing the recognition and respect over the rights and freedoms of others and to meet the demands of justice in accordance with morality, *religious values*, security and public order in a democratic society."

16 Article 3 of Federal Constitution of Malaysia.
17 Article 3(4) of Federal Constitution of Malaysia.
18 UN Human Rights Committee, *supra* note 6, para. 9.
19 Article 11 of Federal Constitution of Malaysia.
20 Article 11(5) of Federal Constitution of Malaysia.
21 Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting Rule of Law" *in* Peerenboom, R. (ed.), 2004. *Asian Discourses on Rule of Law*. London: Routledge, 301.
22 Article 28E(1) of The 1945 Constitution of the State of the Republic of Indonesia [hereinafter "1945 Indonesian Constitution"].

3. Religious Expression as Manifestation of Religious Freedom

In a plural society where various groups are protective of their respective interests, competing rights claims are bound to surface. Striking a balance between those rights is not always straight-forward. The following case studies highlight not only the tension between freedom of religion and freedom of expression, but also opposing religious freedom claims by different groups in the society. This paper mentions several relevant cases, but it devotes special attention to two cases – the Indonesian Blasphemy Law case[23] and the "Allah" controversy in Malaysia.[24]

3.1 Laws Against Blasphemy and 'Deviant' Religious Teachings

Debates on the exercise of free speech and expression that is deemed insulting and blasphemous have dominated the international human rights discourse in recent years. This was fueled by international events, such as the Catholic community's objections to the *Da Vinci Code,* the backlash against Danish cartoons portraying Prophet Muhammad in a degrading manner, and more recently, an American-produced film which was deemed insulting to Prophet Muhammad and Islam. Where freedom of expression amounts to blasphemy or religious denigration, religious adherents claim a violation of their right to freedom of religion, mainly because blasphemy is prohibited in certain religious doctrines and because such expressions denotes the lack of respect for the targeted religions and their followers. On the other hand, it is argued that these works are protected by freedom of expression, which is the core of a democratic, rights-conscious society.

This paper focuses on cases that are slightly different in nature than the aforementioned examples. Those examples appear to implicate a contest between 'secular' expressions and religious freedom as a right to be free from offense to religious sensibilities. They also do not necessarily involve intra and inter-religious contests on rights. In this piece, I emphasize blasphemy and 'religious deviance' cases which implicate the right to religious expression as manifestation of religious freedom.

An important and instructive case is the Indonesian Blasphemy Law. Enacted through a Presidential Decree in 1965, it prohibits a person from publicly advocating or seeking support for religious interpretation or activities that deviate from the core doctrines of that religion.[25] It empowers the President to outlaw any organization that promotes 'deviant' teachings of a religion.[26] Based on this decree, article 156a of the Indonesian Criminal Code was enacted to criminalize deliberate acts which spark "hostility, insulting,

23 Constitutional Court of Indonesia, Decision No. 140/PUU-VII/2009, Examination of Law No. 1, Year 1965 on the Prevention from Abuse of and/or Desecration of Religion (Arts. 1, 2(1), 2(2), 3 and 4(a)), April 19, 2010 [hereinafter "Blasphemy Decision"].

24 Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor., Current Law Journal 2 (2010).

25 Article 1 of Law No. 1, Year 1965 on the Prevention from Abuse of and/or Desecration of Religion [hereinafter "Blasphemy Law"].

26 Article 2(2), Blasphemy Law.

or abusive views towards religions with the purpose of preventing others from adhering to any religion based on God." This provision is placed in context of regulation of crimes against public order.[27] However, there are two important observations regarding the wording of the blasphemy law. First, the law does not explicitly mention that acts must be prejudicial to public order.[28] Thus, one could imagine a situation where the provision will be enforced even when an insult does not cause any public disturbance or injure the feelings of religious adherents.[29] Second, the purported 'protection' that the law confers appears to be religion-neutral, that is, it protects all religions across the board from any insults or abuse.

The blasphemy law has been a useful tool for the regulation of minority religious doctrines. In 2006, leaders of a spiritual community called the 'Eden Community' were sentenced to three years imprisonment for violating the law.[30] Many members of traditional religious communities in Java, Sumatera, Borneo, and Sulawesi have also been prosecuted. The latest controversy involves the government's response to the Ahmadiyah movement, which saw the issuance of a Joint Decree in 2008 calling for the Ahmadiyah to disband and cease all religious activities that deviate from the principal teachings of Islam.[31] The diverging views between the Ahmadis and mainstream Muslims on the fundamental question of Prophet-hood has caused considerable tension among the two groups, as the Ahmadiyah's teachings are deemed an insult to Islam. The Decree prohibits any support for an interpretation of religion that deviates from the fundamental teachings of that religion.[32] It also bans any unilateral action from the general public against Ahmadiyah members.[33]

Several Muslim and Christian NGOs, Human Rights, and Women's organizations challenged the law's constitutionality before the Indonesian Constitutional Court. In 2010, the Court upheld the blasphemy law to maintain public order and defend religious values,[34] emphasizing that the Indonesian constitution does not allow the promotion of

27 Al Afghani, M. M., "Religious Freedom in Indonesia Before and After Constitutional Amendments," *in* Yuksel, E. et. al (eds.), 2009. *Critical Thinkers for Islamic Reform: A Collection of Articles from Contemporary Thinkers on Islam*. Brainbow Press, 103.

28 *Ibid.*

29 *Ibid.*

30 "Indonesia: Court Ruling a Setback for Religious Freedom," 19 April 2010, Human Rights Watch, Available at: http://www.hrw.org/news/2010/04/19/indonesia-court-ruling-setback-religious-freedom (accessed on 13 January 2012).

31 Joint Decree of the Minister of Religious Affairs, the Attorney General and the Minister of the Interior of the Republic of Indonesia, KEP033/A/JA/6/2008, Second and Third articles [hereinafter "Joint Decree"]. The Ahmadiyah is an Islamic sect whose central teachings recognize Mirza Gulam Ahmad as a prophetic figure. This belief is contrary to mainstream Islamic teachings (and indeed, contrary to the Islamic articles of faith) where Prophet Muhammad is the last prophet.

32 Joint Decree, First article.

33 Joint Decree, Fourth article.

34 Blasphemy Decision, 280. The court stressed that its reasoning is not based solely on the religious freedom issues, but that it also takes into account the rule of law, democracy, human rights, public order, and religious values in Indonesia.

anti-religious ideas or any insult or contamination of religious teachings and doctrines.[35] In effect, criminal penalties prescribed for those who express religious beliefs that deviate from the central tenets of the six officially recognized religions are lawful restrictions against minority religious beliefs. The Court also acknowledged that although religion is a private matter with which the state should not interfere, the restriction is justified because religious minorities could become targets of violence by extremists who reject religious pluralism.[36]

Nonetheless, the court's belief that sustaining the blasphemy law would steer the Indonesian society away from the dangers of widespread disorder now appears unfounded. The Ahmadis continue to face many attacks against their existence. In just ten months after the decision, Ahmadis in the village of Cikuesik, West Java were brutally attacked by extremist vigilantes.[37] Twelve people stood trial but none faced murder charges. Even more disturbing was an Indonesian court decision that sentenced the perpetrators to three to six months in jail. A youth who smashed an Ahmadi victim's skull with a stone escaped with a mere three month's sentence in jail for manslaughter. This outcome sends a chilling message about the extent of religious freedom and protection of minorities in Indonesia.

Malaysia has not escaped the controversy on blasphemy and religious deviance. Critics have long argued that laws are enacted to ensure that only certain state-backed versions of Sunni Islam are advanced in the country.[38] Any versions that fall outside this scope may, in practice, be deemed "deviant," although there are no definitive guidelines on what is defined as deviant and non-deviant.[39] One problem with such extensive state power is that it may be used to suppress religio-political groups that are perceived to pose some form of political or electoral threat to the existing political landscape. Scholars contend that this was in fact the case with respect to the Al-Arqam sect, which gained widespread attention in the 1990s,[40] and whose leader had declared his intention to lead the country.[41] But apart from the perceived political threat, there were also suggestions that the ban against this sect was justified to protect public order and security. Persecution against other heterodox

35 *Ibid.*, 275.

36 *Ibid.,* 304.

37 "Court Hands Two Muslim Killers Light Sentences." South China Morning Post 29 July 2011: A10.

38 Saeed, A., and Saeed H., 2004. *Freedom of Religion, Apostasy, and Islam.* Hants: Ashgate, 128. *See also* Marshall, P., and Shea N., 2012. *Silenced: How Apostasy & Blasphemy Codes Are Choking Freedom Worldwide.* Oxford: Oxford University Press, 164.

39 *Ibid.*

40 *See ibid.*, 129 The founder of *Al-Arqam* was Ashaari Muhammad, a member of PAS. This movement preached for an Islamic way of life through adherence to Islamic teachings and rejection of secularism. Members of this movement were by and large middle-class Malay professionals.

41 "Al-Arqam's Abuya dies." 14 May 2010, The Malaysian Insider, Available at: http://www.themalaysianinsider.com/malaysia/article/al-arqams-abuya-dies/ (accessed on 13 July 2012); *see also* An-Naim, A. A., "Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia" *in* Bauer, J.R., and Bell, D. K. (eds.), 1999. *The East Asian Challenge for Human Rights.* Cambridge: Cambridge University Press, 161. (quoting then Defence Minister Najib Tun Razak,"[o]bviously they [Al-Arqam leaders] have a political agenda, kept secret all this while, to gain political power).

Muslim groups such as the Shias and the Ahmadis are also not unknown.[42] Although these groups have not faced vigilante threats to their existence as is the case in Indonesia, they have been declared deviant, barred from practicing their religion in public, and face the threat of a fine and/or imprisonment.[43]

3.2 Restrictions on Religious Teaching and Publication

Another area where the freedom of religion and expression overlaps is in religious teaching and publication. Indeed, these activities – while aptly considered as instances of speech and expression – are also manifestations of religious freedom. In most cases, restrictions on religious teaching and publications have some relation with states' efforts to curb religious deviance or ideas that challenge state-approved views on religion.[44]

In Malaysia, the Printing Presses and Publications Act of 1984 has been utilized to ban publications believed to be contrary to the 'official' version of Islam.[45] Well-known cases include the ban on a Muslim women organization's (Sisters in Islam, or "SIS") book, "Muslim Women and the Challenges of Extremism" and on Irshad Manji's "Allah, Liberty, and Love." The bases of the ban are all too familiar – that they are misleading, contrary to Islamic teachings in the country,[46] prejudicial to morality public order,[47] and are insulting Islam.[48] Despite efforts to suppress exchange of ideas and expression related to religion, the responses of the Malaysian courts show a glimmer of hope. With regard to the ban on SIS' book, a recent decision by the Court of Appeal dismissed the state's appeal challenging a 2010 High Court decision which lifted the ban. According to the court, the state's public order justification was "outrageous,"[49] given the absence of any clear evidence of prejudicial events.

The two foregoing cases are examples of an intra-religious contest on religious expression. With respect to inter-religious issues, perhaps one of the most divisive cases to date is the tussle between Muslims and Christians on the use of the word 'Allah' as a reference to God. There, a weekly Catholic publication ("Herald") was granted publication permit by the Ministry of Home Affairs, but subject to: 1) the prohibition on the use of the word

42 Marshall and Shea, 169.

43 *Ibid.*

44 *See ibid.*, 164 (arguing that the Malaysian government restricts and bans certain publications as part of its efforts to prevent Muslims from being exposed to non-approved religious beliefs).

45 *Ibid.*, 164.

46 "Ban on Irshad Manji's Controversial Book Gazetted." 14 June 2012, The New Straits Times, Available at: http://www.nst.com.my/latest/ban-on-irshad-manji-s-controversial-books-gazetted-1.94435# (accessed on 19 July 2012).

47 "Malaysia: Reverse Book Ban." 31 May 2012, Human Rights Watch, Available at: http://www.hrw.org/news/2012/05/31/malaysia-reverse-book-ban (accessed on 3 June 2012).

48 *Ibid.*

49 Terence Toh, "Court of Appeal: Banning of Book 'Outrageous, Irrational'," 27 July 2012, The Star, Available at: http://thestar.com.my/news/story.asp?file=/2012/7/27/nation/20120727130848&sec=nation (accessed on 1 August 2012).

"Allah" in the Malaysian language issue until the court makes a determination on the matter, and 2) the endorsement of the word "*Terhad"* ("Limited" in English) on the front page of the publication. The latter meant that the publication is restricted to distribution in churches and to Christians only. The publisher of the Herald sought judicial review of the ministerial decision arguing, *inter alia,* that it violated the constitution's articles 3 and 11 on religious freedom, and article 10 on freedom of speech and expression.[50]

The state's reaction to the Herald's claims was somewhat expected. It argued that the prohibition was intended to avoid religious confusion which can threaten public order and ignite religious sensitivities in the country.[51] It was also thought that the Herald could have used alternative words to refer to "God" in its Malaysian language publications.[52] The court, however, disagreed. In a landmark decision declaring the ministerial prohibition unconstitutional, Justice Lau argued that there is uncontroverted historical evidence, including from Christians in Arab-speaking nations and in Indonesia, that the use of "Allah" is a Christian practice and is integral to the practice and propagation of their faith to Malay-speaking Catholics.[53] The state's public order justification was also rebuffed by the court as "without merit."[54]

While the High Court decision is significant and instructive in terms of fundamental rights, further dialogue must take place between the opposing religious groups. Because matters implicating religion are highly sensitive in plural societies like Malaysia, a long term solution lies not only in the legal realms, but it must also transcend social boundaries. In religious contests where particular religious understandings may come into conflict, as the "Allah" controversy has shown, religious and civil society groups must promote intellectual exchange and understanding, especially in societies where rights consciousness have not fully matured. To complicate matters further, this case has also shown signs of deep inter-group distrust and antagonism. Despite diverging Muslim opinion on whether Christians can use the word "Allah," those who oppose question the necessity and motives of Christians insisting on "Allah."[55] Part of this unease is attributable to perceived Christian missionary and proselytizing activities among Malay Muslims.[56]

50 Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor., Current Law Journal 2 (2010): 223 [hereinafter the "Herald case"].

51 *Ibid.*, 224.

52 *Ibid.*

53 *Ibid.*, 236.

54 *Ibid.*

55 Baradan Kupusamy, "Can Christians Say 'Allah'? In Malaysia, Muslims Say No," 8 January 2010, Time Magazine, Available at: http://www.time.com/time/world/article/0,8599,1952497,00.html (accessed on 26 April 2012).

56 *Ibid.*

How Indonesia has dealt with religious publication is worth noting, especially as it provides interesting contrasts with practices in Malaysia. For instance, while Irshad Manji's controversial book has been banned in Malaysia, the Indonesian authorities have not resorted to a similar course of action. There, were, however, local protests in both countries on Manji's book promotion tour. In Malaysia, Manji's scheduled talks in a bookstore and a university were cancelled due to concerns over security and alleged pressure by a State religious department.[57] A week earlier in Indonesia, Manji's book discussion in Jakarta was disrupted by local residents who claimed to have been unhappy with the event being held in their area[58] and by intimidation from hard-line groups.[59] In Yogyakarta however, things took a turn for the worse as a mob attacked Manji's book launch, leaving Manji and several others injured.[60] The upshot of these incidents highlighted strong criticisms of what is perceived as police inaction when dealing with attacks by hard-line groups. Apart from the fury on the failure to protect the public and to name and prosecute attackers in the Yogyakarta incident, critics have also deplored police inaction in other religious violence cases such as those involving the Ahmadis. Members of Indonesian civil society organizations have even suggested that the crucial difference between religious violence incidents in Malaysia and Indonesia lies in law enforcement – the police in Malaysia is seen as comparatively better responders to anticipated attacks and victims.[61]

4. Challenges to Protection and Enforcing Rights in Plural Societies

4.1 Constitutional Arrangements and Restrictions on Rights: A Misapplication?

A cursory view of the aforementioned cases in Malaysia and Indonesia suggests that there are similar doctrines of rights restrictions that operate across both legal systems. It is quite obvious that public order and religious values justifications form the basis of judicial policies and governmental practices that adversely affect freedom of religion and expression in both countries.

57 Sita W. Dewi, "Irshad Manji's Malaysian Events Cancelled," 17 May 2012, The Jakarta Post, Available at: http://www.thejakartapost.com/news/2012/05/17/irshad-manji-s-malaysian-events-canceled.html (accessed on 19 June 2012).

58 "Irshad Manji's Jakarta Book Launch Disrupted," 5 May 2012, The Jakarta Post, Available at: http://www.thejakartapost.com/news/2012/05/05/irshad-manji-s-jakarta-book-launch-disrupted.html (accessed on 19 June 2012).

59 "Groups Denounce Irshad Manji Incident," 5 May 2012, The Jakarta Post, Available at: http://www.thejakartapost.com/news/2012/05/05/groups-denounce-irshad-manji-incident.html (accessed on 19 June 2012).

60 "Irshad Manji Injured in Mob Attack in Yogya," 10 May 2012, The Jakarta Post, Available at: http://www.thejakartapost.com/news/2012/05/10/irshad-manji-injured-mob-attack-yogya.html (accessed on 19 June 2012).

61 Interview with various civil society organizations, in Jakarta, Indonesia (27 June 2012).

In the Blasphemy Decision, the court repeatedly pointed out that religious interpretation or activities that deviate from the core doctrines of a particular religion will ignite restlessness among adherents of that religion, and disturb public order.[62] According to the standards in the ICCPR, an instrument which Indonesia is a party to, restrictions on rights must be necessary and proportionate to the specific need on which they are based.[63] In the Blasphemy Decision, the necessity aspect is less problematic, given Indonesia's history of battling organized hostile movements against the Ahmadis and other religious minorities. However, whether the law satisfies the proportionality requirement is a more difficult issue. The law, when read as a whole, does not seem to be specifically geared towards maintaining public order: article 1 appears to suggest that any religious activities, once deemed 'deviant' by the authorities, can be curtailed regardless of whether those activities disrupt public order.[64] The lack of clarity in the law may open the door for its abuse.

The deficiency in the necessity and proportionality assessment was also clear in the Malaysian cases where authorities sought to restrict religious publication on grounds of protecting public order. The necessity aspect was alluded to by the courts in the Herald case and in a more recent decision on SIS' book ban, highlighting the lack of clear evidence that a public order threat exists.[65] In the former, while the court did not fully assess the proportionality of the law in the context of public order, it did suggest that upholding the ban (which applies affects Muslims and non-Muslims alike) is disproportionate to the State's objective of restricting propagation among Muslims.[66] The trend of invoking limitations to fundamental rights is not necessarily worrying per se. To be sure, concerns over public order are perfectly legitimate especially in plural societies susceptible to inter-group conflict. However, when restrictions are applied too liberally and lack meaningful standards, they may well become a significant obstacle to the protection and enforcement of fundamental rights.

Another discernible pattern is the reliance on religious values to restrict the exercise of fundamental rights. This was very explicit in the Blasphemy Decision and less so in the Malaysian examples, although one could deduce that in the latter, the State's arguments that banned publications are contrary to teachings of a certain religion appear to prioritize the values, sensitivities and particular understandings of a religion or religious doctrine. The reasoning given for the bans in Malaysia also seems to suggest that the exercise of fundamental rights must give due regard to the position of Islam as the religion of the Federation. This argument, however, fails because article 3(4) makes it clear that the status of Islam shall not affect other constitutional provisions. With respect to the Indonesian

62 Blasphemy Decision, 292-3.

63 UN Human Rights Committee, "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience, and Religion)," 30 July 1993, UN HRC, Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument (accessed on 17 August 2012).

64 Al Afghani, 103 (arguing that it is quite possible that the provision might be enforced even when an insult does not cause any public disturbance or injure the feelings of religious adherents.).

65 *See e.g.,* The Herald Case, 247.

66 *Ibid*., 244-5.

case, the use of "religious values" to limit the exercise of human rights is constitutionally-sanctioned, although this raises questions on Indonesia's ICCPR obligations. The HRC has stated that any other limitations to religious freedom beyond what is provided in the covenant is not allowed.[67] It is noteworthy that Indonesia did not enter any reservations, understandings or declarations with respect to the limitation provision.

Beyond the application, or misapplication, as it were, of constitutionally-approved rights limitations, peculiarities of the Malaysian constitutional arrangements with respect to religion are also worth mentioning. One that has been especially significant is the fact that religious matters – Islamic matters, in particular – are under state as opposed to federal jurisdiction.[68] This is different from Indonesia, where the central government has jurisdiction over religious affairs. The Malaysian scheme makes rights issues implicating religion more challenging and complex for two reasons. First, different states may treat the same matter differently. Second, there is a lacuna in the system where a contested issue lies at the intersection of the civil and Syariah jurisdictions.[69] This is particularly true of conversion cases where state-enacted Islamic laws regulating conversions are not always consistent with the right to religious freedom. A thorough analysis of this issue is beyond the scope of this paper but it is sufficient to say at this juncture that judicial policies do not seem to provide a definitive answer to the question of which court has the final, authoritative word in cases where there is a jurisdictional overlap between the civil and Syariah branches.[70]

4.2 Ratification of Human Rights Instruments and Domestic Rights Protection

One of the central strategies of human rights advocacy is to push for greater rights protection by committing states to international human rights treaties. The basic argument is that states participating in international legal instruments for human rights protection are "embedded in larger institutional structures that seek to constrain and limit their behavior to protect the sanctity of the rights of individuals and certain collectivities."[71] Nevertheless, we should pause to ask this question: does treaty ratification have a positive

67 UN Human Rights Committee, "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience, and Religion)," 30 July 1993, UN HRC, Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument (accessed on 17 August 2012); *see* para. 8.

68 The Parliament, however, legislates for such matters in the federal territories of Kuala Lumpur, Labuan, and Putrajaya.

69 Article 121 (1A) of the Federal Constitution states that the civil courts were to have no jurisdiction in matters within the Syariah courts' jurisdiction. In certain matters involving Islamic personal and family law, as well as offences against the precepts of Islam, Muslims are subject to the Syariah jurisdiction.

70 For a deeper discussion of this issue, *see* Dian Abdul Hamed Shah and Mohd Azizuddin Mohd Sani, "Freedom of Religion in Malaysia: Debates on Norms and Politico-legal Issues" in Sharom, A. et al (eds.) 2011. *Human Rights in Southeast Asia Series 1: Breaking the Silence*. Bangkok: Southeast Asian Human Rights Network.

71 Landman, T., 2005. *Protecting Human Rights: A Comparative Study*. Georgetown: Georgetown University Press, 3.

impact on domestic human rights records? Does the existence of rights guarantees in constitutional documents or through binding international commitments ensure that those rights are protected?

Scholarly work linking the proliferation of the international human rights regime and domestic rights protection are abound. A study by Beth Simmons argues that treaty ratification may affect a country's domestic politics in three ways: 1) it can influence the executive's policy agenda, 2) it can be used as a strategic tool to support rights mobilization, and 3) it can increase the possibility of domestic litigation to enforce rights.[72] By raising questions of ratification and subsequently, implementation, treaties influence national policy which can then push ruling elites to initiate compliance.[73] The prospect of litigation can also raise political costs of government non-compliance.[74] In the sphere of religious freedom, Simmons' findings are enlightening: she finds that in transitional/partial democracies, ICCPR ratification is associated with an 11 percent increase in average religious freedom score.[75] Her evidence also suggests that ICCPR ratification has empowered religious groups to seek less governmental interference on religious thought and practice.[76]

What do these findings mean for plural societies like Malaysia and Indonesia? Malaysia is not a party to the ICCPR. Given the outcomes of Simmons' research, one might conclude that ICCPR ratification could be positive for domestic human rights mobilization and protection in the country. The prospect of international accountability and increase in rights consciousness in Malaysia might eventually persuade governing elites to adopt rights-friendly policies. Nevertheless, without discrediting Simmons' findings, we should still be cautiously optimistic. In Indonesia, trends and cases in recent years, suggest that protection and enforement of religious freedom may well be on the decline, despite Indonesia's ICCPR ratification.[77] This is backed by a recent report by various Indonesian civil society organizations on the condition of freedom of religion and beliefs in Indonesia, highlighting the continous discrimination against religious minorities and inaction by the State in calling rights violators to account.[78]

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72 *See* Simmons, B., 2009. *Mobilizing for Human Rights: International Law in Domestic Politics*. New York: Cambridge University Press, chapter 4.

73 *Ibid*., 14.

74 *Ibid.*

75 *Ibid*., 174. Simmons states that this result is statistically significant on average only five years after ratification.

76 *Ibid*., 357.

77 Margareth S. Aritonang, "Rights Groups to Highlight Religious Prosecution," 23 May 2012, The Jakarta Post, 15 July 2012 Available at: http://www.thejakartapost.com/news/2012/05/23/rights-groups-highlight-religious-prosecution.html. (accessed on 15 April 2012).

78 *See* Alternative Report of The 2008 UPR Recommendation Implementation for Indonesia as A State Concerned, On the Freedom of Religion and Beliefs Issue in Indonesia, Submitted on the 1st Session of the 2nd Cycle of the HRC's UPR Review in 2012, November 2011, Human Rights Working Group Indonesia, Available at: http://www.hrwg.org/en/un/charter/human-rights-council/upr/item/3556-alternative-report-of-the-2008-upr-recommendation-implementation-for-indonesia-as-a-state-concerned-on-the-freedom-of-religion-and-beliefs-issue-in-indonesia (accessed on 15 April 2012).

But we should not be too quick to discount the effect that international human rights commitments may have on domestic rights protection. Various factors may affect this dynamics, and as Simmons argues, international law itself is not "a panacea for all ills."[79] A study by Landman found that over time, the gap between rights in principle and in practice has narrowed,[80] giving rights advocates some hope that protection and enforcement will improve in due course. Landman's study also shows that internal conflict consistently has a negative impact on human rights protection.[81] Similarly, Simmons has suggested that countries with religious fractionalization tend to have more official state oppression.[82] In newly democratized countries or transitional democracies, one has to consider the strength of rule of law, governance, and other institutional factors including courts and their relationship to other branches of the government. These findings and challenges should inspire human rights stakeholders in plural societies to rethink their strategies to bridge the gap between rights in theory and in practice.

4.3 The Impact of Domestic and Ethnic Politics on Rights Protection

Sceptics might argue that the reliance on questionable restrictions on fundamental rights may be more of a window-dressing than genuine fear of widespread disorder. While this is a matter of speculation, one cannot help but notice that there appears to be significant gravitation towards judicial policies and governmental practices that are perceived to appeal to the dominant ethnic group in the country. Hence we find cases where public manifestations and expression of religious practices for minorities are circumscribed and in much worse cases, where attacks against religious minorities are not seriously dealt with. From a human rights perspective, the latter is a crucial issue because the state's obligation to "protect" a fundamental right involves ensuring adequate investigation and punishment of perpetrators. The socio-political salience of ethnicity in plural societies is thus both a trend and challenge for freedom of religion and expression. Because ethnic divisions are reflected in political affiliations, racial and religious matters are politically charged to the extent that they might affect public policies and practices involving fundamental rights.

In Malaysia, the uneasiness of the Malay-Muslim community to proselytism – as was evident in the Herald case – or anything implicating ethnic identity issues might appear unfathomable to those unfamiliar with the delicate socio-political fabric of the society. Thus, the competing claims for rights between different groups must be understood in the context of the interrelatedness of Islam as a religion and the Malay identity. Generally, the Malays are deeply attached to their religion and any attempt to weaken a Malay's faith may be perceived as an indirect attempt to erode Malay political power, identity and their status in the country.[83] The relationship between Islam and the Malay identity goes back

79 Simmons, 350.
80 Landman, 7.
81 *Ibid*., 8.
82 Simmons, 174.
83 Shad Saleem Faruqi, "Freedom of Religion under the Constitution," 18 May 2006, The Sun, Available at: http://www.sun2surf.com/article.cfm?id=14147 (accessed on 10 January 2012).

to the thirteenth century when Malays were converted to Islam through propagation by missionaries and Arab traders.[84] Through the years, both elements became strongly fused, to the extent that the Constitution defines 'Malay' as one who professes the religion of Islam.[85]

These issues permeate the political sphere, thus defining the way in which rights and religion are regulated in public life. Underlying this is the political contest between two major political parties – United Malay National Organization (UMNO) and the *Parti Islam Se-Malaysia* (PAS) – who are historically fierce rivals in competing for support from the Malay-Muslim electorate. The former began as a nationalist party and has dominated national politics since the colonial period. It has never – until about a decade ago – associated itself with the establishment of an Islamic state in Malaysia.[86] The latter, however, has always vowed to form an Islamic state where only Muslims would hold political power.[87]

The rise of PAS and political Islam in the 1970s and 1980s prompted various Islamization initiatives by the ruling *Barisan Nasional* ("BN") coalition.[88] While government policies leaned towards Islamic values, subsequent PAS electoral successes had put the federal government under considerable pressure to maintain its electoral support.[89] These events shaped the emergence of the "Islamic State" rhetoric and, subsequently, the expectations of the majority Malay-Muslims on the role of Islam. Conscious over its power, practices and policies on religion and religious freedom are geared towards maintaining State control over religion and religious institutions.[90] Against a background where religion is heavily politicized, excessive State-control over religious expression might also be misused as a means for silencing or weakening other political parties. For instance, some scholars argue that the power to gazette certain religious teachings or movements as deviant has been used against religio-political opponents.[91]

84 Saeed and Saeed, 124.

85 Article 160 (2), Federal Constitution of Malaysia.

86 Saeed and Saeed, 136.

87 Harding, A., "Sharia and National Law in Malaysia" in Otto, J. M. (ed.), 2010. *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present.* Amsterdam: Leiden University Press, 502-3.

88 *Ibid.*, 503. UMNO is a component of the BN coalition of political parties.

89 *Ibid.*, 504-6.

90 Saeed and Saeed, 128. Islam is a state matter. However, most states in Malaysia are controlled by the same political coalition ("*Barisan Nasional*" or "BN") that governs at the federal level. Although this is a multiracial coalition made up by various component parties representing different ethnic groups, UMNO remains the dominant party.

91 *Ibid.*, 129. Saeed and Saeed argue that this was the case with respect to the Al-Arqam movement, whose founder was a member of PAS. This movement preached for an Islamic way of life through adherence to Islamic teachings and rejection of secularism. Members of this movement were by and large middle-class Malay professionals. Apart from the apprehension towards Al-Arqam's political agenda, it has been argued that the ban on this group was also justified on the basis that its teachings are anti-modern and contrary to Islamic tenets. *See* An-Naim, 161-3.

There is also a growing sense, especially in scholarly circles, that instilling and perpetuating a culture of insecurity among the dominant ethnic group is a political game plan to maintain power. Thus, anything that is deemed as a potential challenge to such plan may be suppressed under the guise of protecting security or public order. The end result of the interplay between ethnic identity, politics, and religion in Malaysia is that it leaves little room for a vibrant religious and rights discourse that is open to different opinions and meaningful debate. Although Islam's role was initially thought as merely ceremonial, the change in political climate and intensive Islamization initiatives arguably changed this.[92] Electoral politics thus have pertinent consequences on policy outcomes for religion and fundamental rights in Malaysia.

In contrast to Malaysia, Indonesia has historically been more accommodating to diverse forms of Islamic movements, with different perspectives on Islam, the Islamic state and the way Islam is translated into public life.[93] This may, in part, be attributable to the greater variance of culture in Indonesia: religious interpretation and practices have not always been uniform because they are intertwined with local culture. This is especially true in Java, where the initial permeation of Islam in the fourteenth to early nineteenth century was entangled with the prevailing Hindu-Buddhist culture, resulting in an acculturated version of Islam which included various Javanese concepts as well as mystical and local spiritual elements.[94] These, however, were contested in later periods by figures who sought to fight against religious heresy and 'purify' Islam from the "degeneration of religious belief and Islamic practices."[95]

The role of political Islam is also more limited in Indonesia through the propagation of non-state Islam and restricting the role of religion to the realms of social, ethical, and cultural dimensions.[96] Suharto's (Indonesia's second President) suspicion of political Islam meant that political parties were only allowed to adopt the *Pancasila* as their guiding ideological foundation.[97] He also banned any advocacy of an Islamic state.[98] But the Suharto regime's preoccupation with strengthening control and eliminating communism saw religion – especially the Islamic bond – being invoked to confront atheistic communism. As part

92 Harding, 502-3.

93 Othman, N., "Islamization and Democratization *in* Malaysia" in Heryanto, A. and Mandal, S. K., 2003. *Challenging Authoritarianism in Southeast Asia.* Oxon: Routledge, 122. Othman also argues that Islam in Indonesia thus differs remarkably than that in Malaysia, and that the Muslim intellectual culture has been far more active and democratic in Indonesia. *Ibid.*,122.

94 For an explanation of the different Islamization phases in Indonesia, *see* Salim, A., 2008. *Challenging the Secular State: The Islamimzation of Law in Modern Indonesia.* Honolulu: University of Hawaii Press, 46-50, and Picard, M. (ed.), 2011. *Politics of Religion in Indonesia: Syncretism, Orthodoxy, and Religious Contention.* Oxon: Routledge, 8-9.

95 *Ibid.*, 48.

96 Othman, 124.

97 Salim, 49.

98 Nadirsyah Hosen, "Religion and the Indonesian Constitution: A Recent Debate," Journal of Southeast Asian Studies 36 (2005) 427.

of its religious 'building up' program, Atheism was prohibited and citizens are obliged to affiliate themselves with any of the recognized religions.[99] The government also regulated religion in Indonesia's social life through the Ministry of Religious Affairs. Some policies in this area appeared to favour Islam and facilitate Islamization in the society,[100] especially in the 1990s when the regime began to lean towards Islamization.[101]

The policy of controlling religion in society through the Ministry of Religious Affairs paved the way for heavy government involvement in religious affairs and efforts to centralize Indonesia's Islamic discourse.[102] The latter may be seen as detrimental to the traditionally plural Islamic discourse in Indonesia, especially since the Ministry is dominated by those dedicated to the unification of Islamic affairs throughout Indonesia.[103] Because politics and society are interrelated, the government's desire to achieve political mileage and electoral support among the majority mainstream Muslims might have led to the adoption of social policies that amount to discrimination against religious minorities or groups that do not subscribe to mainstream Islam.

In Indonesia's many religious freedom controversies, it has been argued that many influential public figures have distanced themselves from strongly (and openly) supporting the rights of minorities to practice and manifest their religious beliefs. In the case of the Ahmadis, for example, politicians have been extremely careful not to assert the right of the Ahmadis to religious freedom as guaranteed by the constitution. Hefner's argument that Islam in Indonesia is now more standardized in accordance with mainstream Sunni models[104] might explain why political parties – even those with nationalist tendencies – have failed to rally behind the Ahmadis. Because the vast majority of Indonesian Muslims subscribe to mainstream Sunni Islam, parties may well be attracted by political expediency, that is, to appeal to a broader base of Muslim support. Studies have shown that parties are increasingly vying for the political centre, and are nowadays subscribed to a "normatively standardized Sunni Islam."[105] The fact that the Ahmadiyyah movement does not conform to this standard renders it susceptible to being excluded from the religious and fundamental

99 Picard, 14. *See also* Hefner, R. W., "Where Have All the Abangan Gone?" in Picard, M., and Madinier, R. (eds.), 2011. *Politics of Religion in Indonesia: Syncretism, Orthodoxy, and Religious Contention,* Oxon: Routledge, 71-85 (arguing that even in schools, children who were not professing any particular religion were obliged to choose one).

100 Picard, 16. For instance, while there were decrees forbidding proselytism among religious adherents, the Ministry also launched Islamic propagation campaigns to attract the Javanese who had converted to Christianity, Hinduism or Buddhism.

101 Salim, 75.

102 *See ibid.* ("[P]erhaps as an unintended consequence of depoliticizing Islam, the state apparatus, through the Ministry of Religious Affairs, had transformed itself into an official agent of Islamizaton by initiating the incorporation of some aspects of sharia into the national legal system").

103 *Ibid.*, 72.

104 Hefner, 72. Hefner also argued that non-standard, syncretic varieties of Islam were once widespread in Indonesia but these have collapsed in the last five decades.

105 *Ibid.*

rights discourse as a whole. Even where cases have proceeded to the extremes – such as the light punishment passed on the attackers in the Cikuesik incident – the Indonesian Minister of Religious Affairs has remained largely ambivalent, arguing that he was not in a position to judge the fairness of the decision.[106]

5. Conclusion

This piece has provided some insights into several key aspects of how plural societies deal with freedom of religion and expression. The comparative inquiry is useful given Malaysia and Indonesia's contextual similarities as societies where religious or ethno-religious identities are socially and politically salient. Despite the shortcomings in both countries, the inquiry into how similarly-situated nations have managed and accommodated contesting rights principles is useful in developing the contours of a country's domestic jurispridence on rights.

The developments (or lack thereof) on religious freedom in Malaysia and Indonesia suggest that these are nations at a crossroads. The quest to become respectable, Muslim-majority democracies appears to be hampered by policies and practices that are claimed to protect the survival of their delicate, plural societies. In this respect, the patterns in both countries are strikingly similar. First, they opted for paths that are thought to appeal to the majority with the hope of securing social order. The notion of 'public order' in such societies can become a double-edged sword: on the one hand they promote religious harmony by protecting religious sensitivities and inter-group relations, but on the other undermine fundamental rights for minorities. When public order is invoked liberally without proper assessment of established standards, the fundamental right to freedom of religion and expression is rendered illusory. Second, the policies appear to lean towards primacy for religious values although these choices risk minority exclusion and are rife with problems from both constitutional and international human rights standards. Finally, ethnic politics may also have an impact in domestic rights practices, despite constitutional entrenchment of fundamental rights and international human rights treaty commitments.

For rights activists, strategists and academics, one way of making sense of these outcomes is to accept that the courts and policy-makers are merely acting preventatively, and are constrained by their social and political realities. Nevertheless, should the trends in both countries persist, inter-ethnic relations could be jeopardized in the long run? Poorly justified restrictions on fundamental rights, coupled with inaction on the part of the authorities in preventing and investigating rights violations, can breed intolerance and extremism. They also undermine the whole scheme of constitutionalism and democracy, and risk entrenching ethnic polarization as these decisions will tend to instil a sense of exclusion among the minorities.

106 Emily Rauhala, "In Indonesia, Murders by 'Lynch Mob' Go Lightly Punished," 29 July 2011, Time Global spin Blog, Available at: http://globalspin.blogs.time.com/2011/07/29/in-indonesia-murders-by-a-lynch-mob-go-lightly-punished/ (accessed on 20 June 2012).

Perhaps it is time to rethink the ways in which human rights can be protected and enforced more effectively in plural societies. Efforts to increase rights consciousness through grassroots education and mobilization, as well as to strengthen rights accountability through litigation are standard, bottom-up mechanisms which should continue. However, there is a need to pay closer attention to how identity politics shape the parameters of rights in practice and how this, in turn, may affect the roles of other political branches in protecting and enforcing those rights. This involves a solid understanding of the various electoral designs and how they might incentivize politicians to act in one way or another, as well as the mechanics of the relationship between the judiciary, legislature, and executive and how each branch is configured. The importance of constitutional structures and design, therefore, should not be overlooked.

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LONG PROCESS OF TRUST BUILDING IN SOUTHEAST ASIA: ASEAN, CIVIL SOCIETY AND HUMAN RIGHTS

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The Association of Southeast Asian Nations (ASEAN) has launched a long-awaited process of a regional human rights mechanism, following the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) since 2009, and adopted the ASEAN Human Rights Declaration (AHRD) at its 21st Summit in 2012. This paper claims that the novel initiatives of regional human rights politics are a long process of regional trust-building measures to harness ASEAN to the people of the region and vice versa. Yet it remains unexplored as to how this mutual engagement is taking place and how effective it is. This study illuminates the networking cooperation among track 2: think-tank- and university-based networks and track 3: civil society organizations (CSOs) within the context of the multi-track style of human rights governance in ASEAN. The concept of "horizontal dialogue" among them is employed in this study to help us understand this networking style of trust-building measures. This horizontal networking encapsulated the social life of these actors: they simultaneously engage with contention and deliberation to achieve their objectives of engaging ASEAN with regional CSOs to promote human rights cooperation. This paper empirically traces and compares pedagogical and advocacy measures of the most influential track 2 and 3 civil society actors, against the backdrop of the AICHR and AHRD processes. This paper then articulates an ASEAN style of "Trojan Horse" trust-building measures in human rights cooperation that draws the expertise and skill mobilized by these influential track 3 human rights CSOs into AICHR. It concludes that the mutual engagement by both ASEAN and CSOs as a medium of an ASEAN Trojan Horse may hold the key to sustaining trust-building measures in human rights in ASEAN.

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1. Long Process of Trust Building in Human Rights in ASEAN

Is a people-oriented ASEAN as stipulated in the ASEAN Charter likely to emerge? Have civil society organizations (CSOs) for promoting this aim been prying the once-closed door ajar? (Collins, 2008). At least, to speak about "human rights" in ASEAN is no longer a taboo. Looking back at its history over the past 30 years, there have certainly been critical phases in advancing the "democratic moments," that contributed to a long-awaited human rights mainstreaming in ASEAN (Acharya, 1999). They first took place in the 1986 EDSA "people's revolution" in the Philippines; then were triggered by the Asian financial crisis which swept over ASEAN countries in the late 1990s that resulted in the ending of the 32-year Suharto regime and the mushrooming of various proactive civil society organizations in Indonesia (Kraft, 2010; Sukma, 2010). The latest phase saw the adoption and ratification of the ASEAN Charter. Article 14 of it and subsequent establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, and the drafting and adoption of the ASEAN Human Rights Declaration (AHRD) are exemplary of these moments (ASEAN Secretariat, 2010; AICHR, 2013).

Common to these critical movements involved vociferous movements from the "people" side. Although ASEAN, as a track 1 intergovernmental body, attests to be "people-oriented," i.e. "for the people," according to Article 1 of the Charter, the engagement processes of the people by ASEAN leading up to the ratification of the Charter and the establishment of AICHR demonstrated that it was "of the government," and "for the government." The viewpoints of people - their interests, representation and advocacy for the betterment of regional human rights - are still void of ASEAN's modality of engaging and enhancing human rights schemes. These people-oriented CSOs are pursuing the "struggle for recognition" (Fukuyama, 1992: 143-4) with ASEAN in this regard, but their networking and multi-varied strategies for their advocacy remain understudied. Can the Association change itself? This paper argues that CSOs and non-governmental organizations (NGOs), especially in the human rights realm, hold a critical role in making ASEAN human rights politics more people-oriented, by engaging with trust-building measures vis-à-vis ASEAN and vice versa.

However, trust-building is much easier said than done, and it is difficult to check and evaluate any substantive effects against real political situations. In ASEAN politics, the ASEAN Regional Forum (ARF), the only multilateral political-security dialogue mechanism, somehow draws criticism in that the body is a mere "talk-shop," or proves to be incapable of dealing with real regional security concerns (Leifer, 1999; Jones and Smith, 2006). Likewise, trust-building measures in human rights cooperation in ASEAN remains underdeveloped. It posits that regional human rights NGOs and CSOs have embarked on a never-ending engagement with ASEAN by creating horizontal networking. The concept of "horizontal dialogue" among them is employed in this study to help us understand this networking style of trust-building measures. This horizontal networking encapsulated the social life of these actors: they simultaneously engaged with contention and deliberation

to achieve their objectives of engaging ASEAN with regional civil society organizations to promote human rights cooperation.

This paper is divided into three parts: first we look at the expanding roles of human rights NGOs and CSOs in ASEAN by examining the disparate nature of multi-track bodies within ASEAN, and at the same time illuminates the fusion of engagement mechanisms between track 1 and track 2 and 3 channels. I then will propose the horizontal dialogue modality of mutual engagement as a new type of human rights trust-building measures. It empirically traces and compares advocacy measures of the most influential non-state actors such as the Working Group for an ASEAN Human Rights Mechanism, the Solidarity for Asian People's Advocacy and others, against the backdrop of the AICHR and AHRD drafting processes as proof of the horizontal trust-building measures. Finally this study proposes some advocacy strategy applicable for human rights cooperation, drawn from precedents in multilateral cooperative schemes in the Asia-Pacific region.

2 Examination of State-Civil Society Relations in ASEAN

2.1 ASEAN reluctantly engaging civil society

Every actor sympathetic to human rights development in ASEAN has her own daily life. International relations scholars and practitioners utilize a category of track 1, 2 and 3 entities to refer to the disparate characteristics of each daily life (Capie and Evans, 2007). ASEAN is considered here as a track 1 body, research-oriented think-tanks and universities, as well as a network among them, i.e. the ASEAN Institute of Strategic and International Studies (ASEAN-ISIS), are regarded as prominent cases of track2; while track 3 communities and organizations are "largely marginalized from the centre of power, and intent on challenging mainstream government positions and priorities" (Camilleri, 2003:298). The question here is how to address the mutual engagement of these disparate entities, whose human rights promotion and protection objectives do not necessarily coalesce into a unified vision.

ASEAN's history shows a reluctance to move forward on human rights issues, after ASEAN foreign ministers first mentioned consideration of the establishment of an appropriate regional mechanism on human rights at the 26th AMM joint communiqué in 1993.[1] However, it was not until the adoption of the Charter in 2007 that the establishment of an ASEAN human rights body gained momentum. The gap between 1993 and 2007 illuminates ASEAN's lack of willingness to pursue the issue – partly because of ASEAN foreign ministers' anxieties over a novel human rights institution, and partly due to the increase in new members since 1995, ASEAN continued to turn its back on the issue

1 Para. 18, Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993, Available at: http://www.asean.org/news/item/joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993 (accessed on 15 January 2012)..

(Ginbar, 2010:506-7). Moreover, ASEAN continued to provide fledgling human rights CSOs with "benign neglect" on those issues that could accelerate human rights promotion and democratization in ASEAN (Kuhonta, 2006: 304). The 2006 version of Guidelines on ASEAN's Relations with Civil Society Organization is another example of this reluctance. Accordingly, only such organizations and associations performing functions and activities that are *governmental or quasi-governmental in nature,* but not part of the formal structure of ASEAN are eligible to have dialogue with ASEAN.[2] Only QUANGOs and/or GONGOs could apply for accreditation. In 2012, the Committee of Permanent Representatives modified this 2006 version and updated the Guidelines on Accreditation of Civil Society Organizations. Under the latest guidelines, ASEAN eliminated the phrase "governmental or quasi-government in nature" from the CSO definitions.[3] But a list of registered ASEAN-affiliated CSOs represents a majority of those accredited as business-oriented or vocational associations, making them look like guilds for ASEAN. Human rights CSOs and NGOs have not been accredited, except for the Working Group for an ASEAN Human Rights Mechanism in the subsection of other stakeholders in ASEAN in the Charter's Annex 2, "Entities associated with ASEAN."

Critics claim that the Association is a "community of ambivalence" (Jones and Smith, 2007: 177-180). On the issue of human rights, this ambivalence can be found in the organization's past record: the 1993 AMM decision to consider the establishment of an appropriate regional human rights mechanism and the subsequent delay in implementing it. For non-state human rights actors, ASEAN decided not to carry out or was unable to give the 1993 consideration when it should have acted to implement it. The membership expansion that brought CLMV states into rank is a plausible reason for ASEAN's reluctance. Together with CLMV, ASEAN's corporate image was still that of a group of authoritarian states. Rule by law, not rule of law, prevailed among some member states. Rule by law posits that the general population obeys the laws of the land, but the rulers remain above and are not subject to those same laws (Mahbubani, 2013:84).

2.2 Civil society capitalizing on the window of opportunities

A critical situation for ASEAN emerged when the Association began drafting the Charter in 2006, set up the High-Level Panel (HLP) to write the Terms of Reference (TOR) for AICHR in 2009, and then tasked AICHR to write the AHRD, as stipulated in 4.2 of the TOR from 2011 onwards. They contained one common thread: the window of opportunity - more political space allowed by ASEAN for track 2 and 3 actors to intervene. At the same time, this euphoria raised the question on the non-state actor side: how to participate in and influence ASEAN's policy-making. As the following section shows, this was not an

2 Guidelines on ASEAN's Relations with Civil Society Organisations Available at: http://www.asec.org/18362.htm, emphasis added, (accessed on 12 September 2010).

3 Guidelines on Accreditation of Civil Society Organisations (CSOs), Available at: http://www.asean.org/images/2012/documents/Guidelines%20on%20Accreditation%20of%20CSOs.pdf (accessed on 15 May 2013).

easy task for them. Although ASEAN state-actors increasingly recognized the potential role of CSOs to complement the ASEAN activities, there remains the intention among state elites to determine, direct and control the future of ASEAN (Chandra, 2009). The HLP held a total of thirteen meetings to reach a consensus for the TOR; upon their request, non-state human rights actors had only two occasions to talk directly with the HLP over the nature of a regional human rights body. Invited for the talks were the Working Group for an ASEAN Human Rights Mechanism (WGAHRM), Solidarity for Asian Peoples' Advocacy (SAPA), National Human Rights Institutions in Southeast Asia, and Women's Caucus for ASEAN human rights body.

The last-ditch efforts by non-state actors to influence the contents of an AHRD demonstrated a still limited scope of engagement between track 1 and track 3 actors. Up to the 45th AMM, when AICHR submitted a draft AHRD, there had been only two regional AICHR consultations on AHRD with CSOs, with fixed criteria allowing two representatives from four NGOs/CSOs in each member country to participate, as well as some from regional and international organizations.[4] After the 45th AMM, foreign ministers, especially Indonesian foreign minister Marty Natalegawa, urged the AICHR representatives to hold more regional and national level consultations on AHRD with CSOs. The AICHR's 2nd regional consultation took place in Manila in September 2012 in tandem with the 9th Meeting on the AHRD, resulting in only a very minor correction to the previous draft. At this occasion, AICHR discussed and considered the inputs received from CSOs to further refine the AHRD draft to the ASEAN foreign ministers and also met with Regional Experts from Indonesia, Philippines and Thailand to seek their views and inputs on the AHRD (ASEAN Secretariat, 2012). At the national level, there were only five countries that had had consultations with domestic constituencies: Cambodia, Indonesia, Malaysia, Philippines, and Thailand. Some AICHR representatives presented some 'key elements' of the draft, others translated an 'outline' of it to the public, and went so far as to release the draft itself for public scrutiny (Author's interviews with Forum-Asia, 2011, 2012).

The adoption of the AHRD at the 21st Summit instigated public criticism from CSO side, in contrast to the commemorative well-wishing by ASEAN leaders (Loy, 2012). A group of more than sixty concerned CSOs, for instance, issued a joint statement to denounce the flawed AHRD.[5] They articulated the AHRD as flawed because it failed to incorporate several key basic rights and fundamental freedoms, such as the right to freedom of association (that was mentioned in Article 24 of Kuala Lumpur Draft as of 23 June 2012), and the right to be free from enforced disappearance (SAPA Working Group on ASEAN, 2012). Moreover, the AHRD included three controversial articles: Article 6

4 Although AICHR did not hold regional consultations with CSO/NGO representatives before 22 June, then Secretary-General Surin Pitsuwan had had several meetings with national/regional CSO/NGOs at Regional Workshop on ASEAN Forum and Human Rights Dialogue between the ASEAN Secretariat and Southeast Asia's CSOs since 2009.

5 For immediate release 15 November 2012, Civil society rejects flawed ASEAN Human Rights Declaration.

mentions the balance between rights and responsibilities; Article 7 stipulates national and regional particularities; and Article 8 involves the limitations of rights and fundamental freedoms that are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others (AICHR, 2012). The attitudes of ASEAN human rights stakeholders in this event were more nuanced. They accepted the Declaration with a compromise (having something was better than having nothing); contended with the components of it with possible improvements; and totally disregarded it with disdain. These varied stances deserve further analysis.

3 Cases of ASEAN-ISIS, WGAHRM, and SAPA

3.1 ASEAN-ISIS's engagement through APA and AICOHR

The modality of the track 2 channel is multi-functional: think-tank researchers affiliated with governments have an ear to listen to state-officials and to be easier aligned with them, thereby making their voices, ideas, and inputs better transmitted to the track 1 arena. Track 1 officials likely think the inputs from them deserve attention. At the same time, track 2 actors may provide local and regional CSOs with knowledge in the areas where they have much expertise. They may organize forums, seminars and workshops to teach, educate, and enlighten these CSOs. In reality, regional and national CSOs have yet to establish good working relationships with their governments, partly because of mutual estrangements. Therefore, they lack a pathway of communication aimed at reaching track 1 officials. Here, track 2 channels can play a crucial role by serving as the conduit between track 1 and track 3 actors. ASEAN-ISIS brought together not only their like-minded peers or state officials in their private capacities, but also those CSOs that tended to criticize ASEAN governments' policies, such as FORUM-ASIA and Focus on Global South, and so forth (Author's interviews with HRWG, 2011, 2012).

The ASEAN People's Assembly (APA) and ASEAN-ISIS Colloquium on Human Rights (AICOHR) are prominent examples of this conduit. APA continued from 2000 to 2007 with the conclusion of its assessment conference in 2009; AICOHR continues from 1994 onwards. Both APA and AICOHR shared common characteristics and platforms: ideas and modalities were originated from the Centre for Strategic and International Studies (Indonesia) and the Institute for Development and Strategic Studies (Philippines) within ASEAN-ISIS; sensitive issues such as human rights could be freely discussed among participants from both progressive democratic states and repressive states, under an informal track 2 structure (Caballero-Anthony, 2006; Kraft, 2006). The AICOHR process is still going, but APA concluded with the assessment conference in 2009.

The contents analysis of the APA process, from 1st APA through 6th APA, identifies four common themes: ASEAN community-building (from the revamped ASEAN way proposal, to ASEAN three pillars, and ASEAN of caring and sharing societies; democratization; human security as non-traditional security, and human rights (CSIS for ASEAN-ISIS, 2000;

CSIS for ASEAN-ISIS, 2001; ISDS, 2003; ISDS, 2005; ISDS 2006). Human rights NGO activists from WGAHRM and Forum-Asia broached two ideas - establishing a regional human rights body, and creating an ASEAN human rights scorecard. The latter did not reach a consensus over who might create this scorecard and what the human rights index would include. The former gained more attention because WGAHRM already submitted to ASEAN bureaucrats a draft version of a regional human rights body in 2000, which the ASEAN Secretariat had requested, and because human rights violations in ASEAN should be remedied first, by establishing such a regional body. Human resources such as Carlos Medina, director-general of WGAHRM and international law professor of Ateneo Law School, Philippines; Sriprapha Petcharamesree, international law professor of Mahidol University, Thailand; and Rafendi Djamin, then director of Human Rights Working Group (HRWG), Indonesia, advocated the need to put more energy on the former. WGAHRM, in tandem with the APA process, began to organize its workshop on ASEAN regional mechanisms on human rights since 2001.[6] It also aimed at holding dialogues from participants from all track 1 through track 3 channels.

3.2 The Impetus from WGAHRM to the APA/AICOHR processes

The AICHOR process matched with this APA-WGAHRM synergy since its 10th meeting in 2003. The AICHOR began to ponder the active human rights observance method, i.e. a human rights scorecard since 2004. Somewhat synchronized advocacy among these track 2 venues could be made possible, because key human resources were active in these venues, they tended to attend both venues and their ideas became dominant. These track 2 enterprises on regional human rights helped to accelerate human rights promotion (not the more ambitious protection side) mainstreaming on the ASEAN agendas.

A joint managerial stance is illustrative in the cases of ASEAN-ISIS and WGAHRM. This is a pattern by which the activity of NGOs lends themselves to some type of institution-building with governments (Cooper and Hocking, 2000:373). In this case, the best illustration of the new ASEAN political arena can be found in the work of the WGAHRM. It comprises of national working groups in ASEAN capitals, and it has been consistently advocating the establishment of an intergovernmental human rights commission in the region. To achieve this objective, the WGAHRM adopted a step-by-step gradual approach to a regional human rights commission. The human rights NGOs such as the WGAHRM and the ASEAN-ISIS based AICOHR are rather prone to a cooperative stance toward track 1 actors.

Yet the NGO and CSO participants did not satisfy the entire engagement modality of these activities. They expressed dissatisfaction that the number of track 1 participants decreased, presumably because they reached the "fatigue level" of the APA process (Morada, 2008).

6 Working Group for an ASEAN Regional Mechanism on Human Rights, Available at: http://www.aseanhrmech.org/conferences/1st_workshop_for_asean_human_rights.html (accessed on 12 January 2012).

With interface with state officials decreasing, the APA process was a one-off event.[7] There were no follow-up or intersessional meetings before the next APA. Track 3 participants also levelled their criticism against track 2 bodies: the selection of themes, those discussed at plenary or other sessions were selected up to the latter's discretion, without sufficient consultations with them (Author's interviews with Forum-Asia, Human Rights Working Group and People's Empowerment Foundation, 2010-11). Even so, the lowest common denominator for these critical CSOs was that they learnt how to engage with ASEAN officials, and how to share their concerns with them from these track 2 processes.

A closer explanation of the regional CSOs in the human rights area requires a more complex categorization that dichotomizes "consensus-prone" CSOs, that acknowledge "tacit understanding" of a convergence of their interests and values with those of an authoritarian state and "confrontation-prone" CSOs whose interests and advocacy represent the marginal groups (Banpasirichote, 2004; Chong, 2012). The human rights issues for regional CSOs to intervene in both track 2 and 3 channels deal with so many diverse ones such as armed conflict, refugees and internally displaced persons, globalization, incomplete democratization, corruption, empowerment of civil society, national security laws, political instability, and violations of the rights of women, children and disadvantaged people (Jemadu, 2004:158).

Regional CSOs, by and large, began to assume multifaceted advocacy contents with the emergence of the critical situations in ASEAN politics described earlier. Increasingly the more CSOs that participated in the track 2 venues to seek interface with track 1 state officials, the more they turned critical of the track 1's rather reluctant modality of engagement, and spearheaded criticism of a delayed pace of human rights mainstreaming on the ASEAN agenda. Instead, they hoped to generate a human rights discourse against the backdrop of the critical junctures of ASEAN politics that began with ASEAN's decision to have the Charter in 2005, and reached high expectations for ASEAN, when the Eminent Persons' Group drew up a bold and visionary report that envisaged a progressive future. However, the High-Level Task Force, mandated with writing the Charter, only met with WGAHRM once, and virtually shattered the CSOs' participation from the beginning, and disappointed the latter. Local NGO and CSO actors appeared to realize that the more useful advocacy way was through the regional route that could form a network or a coalition among like-minded (contentious and confrontation-prone altogether) groups, and then deliver their advocacy campaigns down to the local level. They also came to see advocacy as a powerful tool, to cause an effect on the regional level.

7 The then Secretary-General of ASEAN attended the first two APAs, and his assistant attended the last APA. There were each two participants from the financial contributors the Canadian International Development Agency, and Konrad Adenauer Stiftung, as well as 11 Diplomatic Corps out of the total 240 participant list at the last 6th APA.

3.3 The Emergence of SAPA and ACSC/APF in the mid-2000

Multi-sectoral networks among local CSOs, with the background of the multifaceted advocacy contents surrounding them, made it easier to form SAPA in 2006. The SAPA Task-Force on ASEAN and Human Rights, one of the most influential entities, involves more than 50 CSOs, with several "national focal points" hub-centres in seven ASEAN member countries.

SAPA launched a series of campaign shifts, from "watchdog to advocacy," similar to that employed by international human rights bodies such as Amnesty International and Human Rights Watch (Bogert, 2011: 173-6). It not only tracked human rights violations on the ground, and lobbied for improvements, but also reported to the media via internet websites (perhaps the most popular is ASEANcats), published its own assessment on the ASEAN Charter and on AICHR activities (Forum-Asia, 2009; SAPA, 2010, 2012). More critical advocacy directed to the track 1 entities such as the ASEAN heads of governments, foreign ministers, Secretary-General, and the AICHR representatives, by submitting various kinds of proposals and recommendations to seek more engagement, and request transparency in decision-making processes (see footnote 9). In some cases, such as an AHRD, SAPA utilized 'naming and shaming' those backward states that would water down the declaration below international human rights standards, a provocative method that ASEAN states cannot employ, due to its sacrosanct non-intervention principle and consultation and consensus decision-making practices, as stipulated in articles 2 and 20 of the Charter. The proposed inclusion of 'public morality' in the AHRD draft by Laos and others was a case in point of contentious advocacy campaigns during the AHRD drafting process.[8]

The formation and development of the ASEAN Civil Society Conference (ACSC) deserves another merit in explaining the state-civil relations in the region.[9] Originating in 2005 with the Malaysian government's support, the 1st ACSC came into existence as a GONGO. The Malaysian government held the ASEAN chair at that time, and commissioned the ASEAN Study Centre of the University Teknologi Mara to organize this conference, in parallel to the 11th ASEAN Summit. Pretentiously, the GONGO, whose majority of participants were selected by the foreign ministries, though, the Malaysian government allowed CSO representatives to directly interface with the ASEAN heads of government for its first 15 minutes. The 2nd ACSC was organized by the Philippines CSO initiatives, thanks to the previous experiences and expertise gained at the APA process, and the preceding

8 What 'Public Morality'? Women's Groups Ask Available at: http://www.aseannews.net/what-public-morality-womens-groups-ask/ (Accessed 12 September 2012), Malaysia maintains "public morality" in the ASEAN human rights declaration: SEA Women to appeal again to foreign minister, Available at: http://www.sea-globe.com/Regional-Affairs/public-morality-outrage.html (accessed on 12 September 2012).

9 I am indebted for the discussions on the ACSC/APF to Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights, HRWG for her Experiences in Organizing ACSC/APF and its Development: From Regional Perspective, *mimeo*, and Human Rights Working Group, "Regionalism and Civil Society in ASEAN Region: Executive Summary" *mimeo*.

ACSC. Since the 3rd ACSC in Singapore, where the ACSC process tended to present distinctive state-civil society relations: when the conference was held on such ASEAN soil, where robust CSO movements were not welcomed, host countries tended not to allow engagement with them, or worse, GONGOs formed "another ACSCs" simultaneously, in an apparent effort to dilute the CSO-led ACSC initiatives. The 4th and 5th ACSC/1st and 2nd ASEAN People's Forum (Thailand 2009), and the 7th ACSC/4th APF (Indonesia 2011), represented direct interface engagement with ASEAN track 1 officials and the involvement of Indonesian president Susilo Bambang Yudhoyno. By contrast, CSO representatives for 3rd APF (Vietnam 2010) did not have interface with ASEAN leaders. The Cambodian case that demonstrated the two simultaneous, but not synchronized, ACSCs/APFs this year is illustrative of the host government's reluctance (The Phnom Penh Post, 2012; The Cambodian Daily, 2012).

These brief anecdotes remind us of the intricate balancing act among track 1 through 3 channels towards human rights advocacy. ASEAN track 1 entities continue to view the involvement of CSOs in its public realm as largely problematic, and they resist any devolution of human rights authority to them. International Relations literature on private authority may be of use in explaining the expanding NGOs/CSOs' roles. Private authority, the concept used in opposite to public authority, such as government, or track 1 intergovernmental entities, draws attention to the multi-functional advocacy employed by NGOs and CSOs. Serving as *moral authority* in their private sphere, at informal ACSCs, NGO/CSO groups attested to an *authorship* role (providing expertise as shown in publications); *referee* (mobilizing universal human rights values to the reality check against ASEAN's human rights practices); and *normative transmitter* (delivering a socially progressive message to both track 1 officials as well as the local people at various fora) (Bierstecker and Hall, 2002). Authorship takes place when track 1 actors face new environment, but demonstrated insufficient knowledge and skills or an inattentive stance to public policy the public regards as imperative. ASEAN-ISIS submitted its memorandum title "A Time for Initiative" to the ASEAN Summit in 1992 (Soesastro et al., 2006). In it they urged ASEAN to capitalize on the ASEAN-PMC, to develop it into a new multilateral security cooperation framework, later known as the ARF. ASEAN-ISIS also broached the idea for a "people-oriented" ASEAN during the ASEAN Charter's drafting period. In its 2006 memorandum, it authored a Charter draft to advocate ambiguous principles that would introduce a two-thirds majority decision-making procedure if a consensus decision fails, and sanctions for rule-violating states – exclusion from participation in ministerial-level meetings, and suspension from all ASEAN meetings (Soesastro et al., 2006: 177-91). It also urged the Association to establish an ASEAN Court of Justice to ensure timely resolution that may arise from the ASEAN Free Trade Agreement or inter-state disputes between two or more ASEAN member states.

In the drafting processes of an AHRD, SAPA launched a series of this authorship advocacy in an attempt to alert the track 1 officials, for fear of their documents not meeting the standard of international human rights laws. It then tried to ameliorate what they thought flawed articles and clauses in the draft ASEAN Human Rights Declaration, revealed after the AICHR's first regional civil society consultation at Kuala Lumpur in June 2012.[10]

Channel	Actors	Engagement modality	Schemes
Track 1	Summit(Heads of government) Coordinating Council/ AMM Sectoral Ministerial Body AICHR ACWC SOMS member country national governments ASEAN Secretariat	reluctant liberalism selective engagement primacy of sovereignty and non-interference in other country's domestic issues	• decision- making guidance, and direction of human rights promotion and protection as stipulated in the Charter and TORs for AICHR and ACWC • occasional national and regional consultations with stakeholders, including CSOs, NGOs
Track 2	ASEAN- ISIS network Working Group for an ASEAN Human Rights Mechanism Human Rights Resource Centre, etc.	bridge- building between Track1 and Track 3 actors serving as a regional epistemic community proffering: authorship, kick-starter, and joint-manager	• ASEAN People's Assembly (APA) • ASEAN- ISIS Colloquium on Human Rights (AICOHR) • occasional joint seminars with CSOs
Track 3	national/ regional CSOs coalition of national human rights NGOs (Solidarity for Asian Peoples' Advocacy, its national focal points, members, Forum- Asia, Southeast Asian Committee for Advocacy), etc.	critical engagement alternative, 'bottom - up advocacy human rights gatekeepers and watch dogs; normative transmitter lobbying refereeing authorship	• CSO/ NGO networking (ACSC/APF) • occasional direct dialogue with Track 1 • publications of assessment report', proposals for modified (or alternative) submissions • public education through internet communication

Table.1 ASEAN's multi - track structure over human rights issues

10 Civil Society Organisations and people's movements participating in the First Regional Consultation on ASEAN and Human Rights, 22 June 2012, "Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration," and "Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration" 12 September 2012.

4 Horizontal Dialogue and the ASEAN "Trojan horse"

4.1 Contention and deliberation – The varied advocacy of civil society in ASEAN region

On the part of non-state human rights actors, they share a common approach in their advocacy nature: challenging and contending the existing status of human rights conditions. Under this situation, they aimed at reaching a decision-sharing relationship with their track 1 counterparts. They do not only contend with track 1 entities, but also share responsibilities and duties to better improve human rights situations as joint stakeholders. In a nutshell, they both contend to collaborate with one another. The examples of these intricate advocacies may be found against the backdrop of the critical situations described in this article. Yet, when and under what conditions non-state actors may stage contentious campaigns to advance human rights may depend on the nature of issues involved and the advocacy strategies they employ.

Contention, as shown in the literature of social movements, is of great relevance in ASEAN human rights politics, too. Contention involves making claims that bear on someone else's interests; contentious politics involves interactions in which actors make claims bearing on someone else's interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims, or third parties (Tilly and Tarrow, 2007: 4). The social movements' literature shows that the success of contention depends fundamentally on the dynamic and framing of protest and the cycle of contention that develops between social movements and states. As was explicated in the preceding sections, social movements initiated by non-state actors, largely by track 3 actors, resonated *against* ASEAN's reluctant liberal stance toward its engagement modality in the making of the Charter, the TOR for AICHR, and the AHRD. They substantiated claims that called for more civic engagement in the consultation processes, mobilized sizable human resources into a myriad of public performances, including having public meetings, making public statements, petitions, open letter writing and lobbying (Author's interview with Forum-Asia, 2011). Since 2010 onwards, more and more CSOs at the national level realized the important role of domestic pressures as the game changer in ASEAN's negotiation (Human Rights Working Group, 2013). Human rights claims, according to Goodhart, are not merely about moral claims, but also entail struggle against power, privilege, domination and oppression (Goodhart, 2013: 32).

The schemes and tools that CSOs mobilized appear to resist a politics of *fait accompli* by ASEAN, rejecting the status quo altogether, and instead presenting distinct alternatives to the current order. Thus, human rights claims, as contentious politics, can function as demands for recognition of alternative norms and values or individual or group identities (Goodhart, 2013). The power of track 3 networks, being based solely on legitimate arguments of human rights advocacy, arose from the opposing principles to that of ASEAN. The power to resist enables them to act. However, power holders denounce the

new 'imperialism of human rights,' insisting on 'cultural difference' – in other words, the right to cultural difference – but use this as a weapon in their domestic battles to eliminate political opposition and freedom of opinion (Beck, 2011: 33). In their last-ditch effort, many CSOs spearheaded criticism on the latest AHRD draft because their inputs from the regional consultations with AICHR representatives did not affect it and the draft did not satisfy the demand of international human rights standards. They contend that the draft was 'high-jacked' by narrow-mined national interests of such backward countries as Laos and Vietnam; draft Article 7 considers rights within the context of political, cultural and religious sensitivities of member states, and draft Article 8 includes the limits of rights and freedom under the laws of individual countries.[11]

By contrast, deliberative aspects of advocacy should not be underestimated. Deliberation occurs whenever participants are amenable to changing their minds as a result of reflection induced by non-coercive communication (Dryzek, 2006: 27). Ensuing deliberations among the parties concerned in the public sphere may induce the reconstruction of relationships. Associative network of CSOs can be regarded as the generator of this social capital: trust and reciprocity. It purports to suggest that public trust is an important bridge from CSOs to the state actors. But enlarging civil society 'from within' deserves a caveat: this can be better applied to democratic politics. Thus, the diverse polities of ASEAN need careful consideration of this application. By associating with one another, individuals engage in comradeship, cooperation, dialogue, deliberation, negotiation and self-sacrifice (Guan, 2004: 6). CSOs may capitalize on the areas where track 1 actors have not seriously been deliberated, but have much skill and expertise: they can employ public-private partnerships (PPP) to expand this associational space. The hallmark of this approach is working within the system, attempting to persuade key actors within track1 actors and the private sector to change the rules for the better (Collingwood, 2006: 442). Under PPP advocacy, the traditional hierarchical relationship between government actors as "subjects of control" and private actors as "objects of control" is diminishing. Transnational PPPs institutionalize transnational interactions between public and private actors, which aim at the provision of collective goods (Schaferhoff et al., 2009).

A precursor of this PPP advocacy in ASEAN human rights politics has been demonstrated in the WGAHRM for its engagement and corporatist philosophy (Hsien-Li, 2011a). The WGAHRM helped the ASEAN Secretariat to graft a template and a roadmap for a regional human rights body that involved four issue-areas - awareness of human rights, rights of children and women, migrant workers' rights and the networking of the existing human rights institutions, onto the latter's schemes that ushered in the 2003 Vientiene Action Programme. Exceptional in the only accredited other stakeholders in ASEAN written in the Charter's Annex 2, the WGAHRM's status may be different from other non-state human rights actors. Yet the broad-based participants at the group's series of workshops and

11 ASEAN urged to rethink rights charter [http://www.ucanews.com], Civil groups reject 'flawed' human rights declaration draft, Available at: http://www.bangkokpost.com/news/asia/313856/civil-groups-reject-flawed-human-rights-declaration-draft (accessed on 1 April 2013).

meetings brought together those from critical CSOs, as well as government officials. We benefit from a kind of emulated advocacy campaigns here in the light of both theoretical and pragmatic inquiries.

4.2 The horizontal dialogue among multi-track actors

Slaughter envisaged a disaggregated world comprised of a set of horizontal networks among national governments officials in their respective issue areas, ranging from high-level to lower level national regulators. Accordingly, horizontal relations among them rely on the power of information, deliberation, socialization and exclusion. Although her scope is limited to the governmental dimensions, the concept of horizontal relations – modified here to include all tracks involved in ASEAN human rights discourse – merits our further exploration (Slaughter, 2004).

With both rejectionist and accommodative actors involved, the horizontal relations prioritize building social bond. Dialogue nurtures trust, henceforth, mutual reciprocity. Horizontal networks can be considered as 'resources' i.e., channels for 'bonding' capital within movements and 'bridging" capital between these movements and larger civil society, while vertical ones purport exchanges across the public and policy domains, connecting movements to the state actors (Cinali, 2007: 89). According to Putnam, dense but segregated horizontal networks sustain cooperation within each group, but networks of civic engagement that cut across social cleavages nourish wider cooperation (Putnam, 1993: 175).Thus, the horizontal dialogue entails the non-coercive communicative domain where the participants, albeit with differences in their belongings, are supposed to enjoy the diminishing hierarchical relations, and to discuss their mutual concerned issues with a shared commitment to reach a common understanding. It may differ from mere problem-solving practice in that the horizontal sphere may prioritize dialogical and argumentative discourse rather than instrumental purposes that may result from power dominance or power inequalities among the participants. This communicative turn in the CSO literature allows us to view the horizontal dialogue as "transnational discursive opportunity structure" (Olsen, 2011: 10-1). Non-state actors, especially those entailed private authority resources as mentioned beforehand – have representative power in knowledge provision, moral reputation, and public outreach.

The issue that needs to be addressed is how we reify or materialize this transnational discursive opportunity structure under which the reluctance of ASEAN and rejectionist CSOs altogether are intermingled. There is some justificatory evidence to forge these horizontal ties from both sides. In Southeast Asia, some transnational CSOs liaise with governmental institutions, such as the relationship between the ASEAN-ISIS, WGAHRM and the ASEAN Secretariat and national governments. Rejectionist in orientation, though, some CSOs like HRWG had participated in this transnational dialogue. From the track 1 perspective, working closely with non-state actors could add a veneer for legitimacy of institutions with an estranged public image. A category of "newly established democracies"

in ASEAN – Indonesia, the Philippines and Thailand (Munro, 2009) – witnesses the formative horizontal relations. They sustain a proposition that the degree of democracy in a country influences the capacity of activists in that country to engage in transnational activism (Piper and Uhlin, 2011: 13-4). At one of the critical situations for ASEAN human rights politics, when the HLP was in the midst of drawing the TOR for AICHR in 2009, these three countries went so far as to insist that a new human rights body could have the mandate to monitor and review human rights situations in every member state and to conduct country visits. These proposals were rejected by other members such as Myanmar (NTS Alert, 2009).

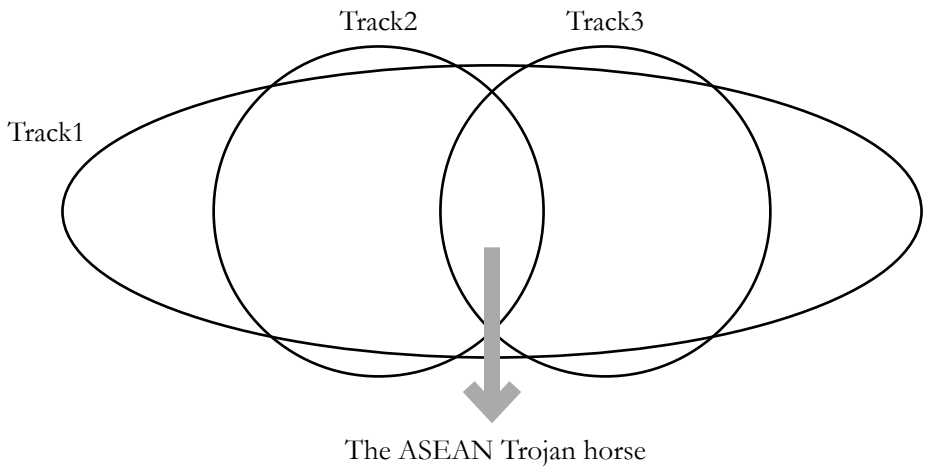
4.3 The ASEAN Trojan horse and trust-building

The "ASEAN Trojan horse" refers to the formative track 1 'built-in mechanism' in this horizontal dialogue (Shigemasa, 2012). State representatives to AICHR from these countries serve as a social bond to connect between insiders (ASEAN at large) and outsiders (CSOs). The new critical situations took place when the national selection process for AICHR representatives – democratic and due-processed – was held in the case of Indonesia and Thailand; the Philippines selected its representative, who was heavily involved from the HLTF of the Charter to the HLP of the TOR AICHR. Rafendi Djamin, once director of HRGW and convener of SAPA Taskforce on ASEAN and Human Rights, and Sriprapha Petcharamesree worked with WGAHRM. Those who energized their efforts at track 2 and 3 channels entered into track 1 decision-making circle. The TOR AICHR may circumvent each individual's capacity. Individuals are not to be equated with international institutions. However, without human agency, there is no such thing as an institution. In this sense, agency and structure of institutions are mutually constituted: they need both elements.

The ASEAN Trojan horse thus connotes the introduction of these CSO/NGO empathetic distinguished individuals inside the AICHR, to try to implement the mandates stipulated in the TOR from within. Under the TOR, the AICHR, as an intergovernmental commission, proceeds based on consultation and consensus. To think of all the representatives from those countries which have not satisfied international human rights standards, and who hate CSOs altogether might be a daunting reality for international community. With the ASEAN Trojan horse, CSOs can build bridges to ASEAN, which can be juxtaposed horizontally with non-state actors. The mandate of TOR 4.8 stipulates "to engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organizations and other stakeholders, as provided for in Chapter V of the ASEAN Charter." Likewise, TOR 4.12 allows AICHR to gain information from member countries to prepare studies on thematic issues of human rights. To do this, the AICHR may consult with CSOs over which thematic issues they should work. Under TOR 6.2, AICHR could capitalize on its regular meetings together with CSOs, to get feedback from their work, or resort to CSO's private authority capacities.

These strategies to be employed by the ASEAN Trojan horse may externalize the human rights concerns, thereby enlarging the transnational discursive structure wide so that CSOs could wield more influence. Those employed by CSOs may internalize local and regional human rights concerns, thereby giving AICHR early warning signs. Therefore, the long process of trust-building within the horizontal dialogue goes some way for providing the AICHR, as the overarching human rights institution within ASEAN, with 'a tongue and first teeth' (Durbach et al., 2009). Relatively powerless actors may be transnationally empowered when they are recognized as relevant actors within a governance regime (Piper and Uhlin, 2011:10). The horizontal dialogue may be one avenue of building confidence building among all stakeholders, and make non-state actors bearers on creating a *co-governance regime in human rights*. Yet, while the AICHR published out Guidelines on the Operation of the ASEAN Intergovernmental Commission on Human Rights, it has yet to establish the guideline to engage CSOs that was initiated and drafted by Thailand (HRWG, 2013). The majority of AICHR representatives have not been susceptible to discussing the engagement guideline with CSOs.

Fig.1 The Horizontal Dialogue Networking in ASEAN's multi-track structure



The ASEAN Trojan horse is one of the plausible mechanisms within multi-track governance networking in Southeast Asia human rights politics. Utilized wisely, it may loosely couple the insiders (those within like-minded ASEAN track 1 people, plus those NGOs/CSOs eager to share common objectives with them) with outsiders who may be non-like-minded others. An extrapolated trajectory for this promotion may be demonstrated against the background of an AHRD, and latent human rights schemes within ASEAN, which might reveal both human rights contention and deliberation among those stakeholders. The horizontal dialogue here is a process that bridges domestic and international politics in a sustained way, without displacing one or the other or homogenizing the two: this dialogue would sustain further development between states, non-state actors and international institutions (Tarrow, 2010: 174).

In order to sustain and develop this trajectory of the horizontal confidence-building, one needs to take this scheme more seriously. Series of consultations among track 1 and 3 actors are important in this regard, not only serving as mutual confidence-building measures (Hsien-Li, 2011b), but also may help "affect" those reluctant track 1 actors, by elevating their comfort level in their understanding of international human rights norms and regional human rights politics. Trust arises out of affective emotions and cognition, and the interaction between expectations and experience with groups and individuals (Jasper, 2006:163). This language often appears in the ARF's engagement modality: the pace of developing relatively new agendas should be not too fast, nor too slow; the dialogue environment should be comfortable for all participants, thereby creating a conducive environment for latent cooperative enterprises; and all stakeholders may think it comfortable to join, without owing too much commitment and obligation. Unlike the multilateral security schemes, the human rights cooperation within ASEAN could constrain the member states to devolve some rights to the AICHR if the TOR's protection areas are to be executed. The question that needs scholarly attention is how track 1 actors could launch this schematic modality without incurring sovereignty costs, constraining their behaviour by associating with this multi-track horizontal dialogue. Those state actors appear to emerge that put brakes on further institutionalization of human rights promotion and protection. They would not like to be scrutinized on their human rights situations even by their peers, much less by non-state actors.

Under the horizontal dialogue scheme, strengthening the nexus between the ASEAN Trojan horse within AICHR and non-state actor ties is crucial. It should seek to demonstrate to ASEAN that human rights cooperation binds all tracks – all stakeholders. Often criticized as "toothless" (Durbach et al., 2009) though, progress on the human rights promotion side, as stipulated in the TOR AICHR, may be the comfortable level-raising effort. More than occasional regional/national meetings between AICHR and CSOs, as the experience of track 2 enterprises demonstrated, workshop-style venues, such as an "AICHR-People's Assembly (APA II)" could provide better transnational discursive structures with all stakeholders. This APA II might contain some important elements stated in mandates and functions of the TOR. To support more energetic activities, the establishment of an AICHR secretariat should be important.

From the perspective of AICHR, it further opens its democratic accountability to the CSO side, if it is to execute its mandates and to be welcomed by them. More member countries need to adopt an open, transparent, and accountable national selection process for state representatives. Trustworthiness matters both for this selection process and respective state representatives. The increasing number of these due-processed states might lead to the expansion and deepening of the ASEAN Trojan horse, and as a result, the horizontal ties among track 1 and 3 channels could be more solidified. For the CSO side, their contribution to provide normative and epistemic foundations for human rights knowledge is of paramount importance. Yet they need to keep one step ahead of the track 1 actors, so that their existence and foundational knowledge remains firmly grinded in the regional human rights discourse and continues to deserve critical attention as legitimate co-governance stakeholders.

Affective advocacy is just one of the candidates that all stakeholders could enjoy to cause acculturation in ASEAN's human rights record. If acculturation is effective, we might reason that ASEAN states followed what they believed is appropriate to do so, induced by just status-maximization, or mimicking international moral standards, without transforming their corporate identities (Munro, 2009: 22-3). The process of an AHRD itself proves to be a norm-setting practice for all ASEAN stakeholders, but what can be done next to elevate the comfort level to surpass acculturation is as equally imperative as the creation of AHRD for ASEAN.

5. Conclusion

This paper has advanced the confidence-building measures in the area of human rights by examining the operative interface among multi-track actors that involved track 1 and non-governmental track 2 and 3 actors. ASEAN's history is often regarded as one of trust-building among member states. It is also a history of dialogue not just among multi-track actors, but a dialogue among national, regional and international norm setting on human rights. Likewise, a similar process is progressing on the human rights issues. Human rights NGOs and CSOs are no longer marginalized entities vis-à-vis the Association; they can contend and cooperate by engaging with ASEAN through a multitude of advocacy campaigns and tactics. Galvanized by the pro-democracy movements that surged over the once-authoritarian states like Indonesia and the Philippines, these non-state actors have been gaining legitimacy by making themselves represented at regional and national consultation processes at ASEAN's critical human rights movements, namely, the ASEAN Charter, AICHR, and ASEAN Human Rights Declaration. They have also gained recognition from the track 1 sources, both as co-workers and as critical advocators.

The possible transformative dimension that can encompass the multi-track human rights actors in ASEAN is a Trojan horse proposed in this study. Yet as the AICHR enters into the second term, it seems quite early to evaluate this transformative dimension at a face value. AICHR is now launching on making a convention on Human rights of women

against violence, and this is evidence that ASEAN's human rights are being mainstreamed. Challenges lie ahead in this transformative dimension among multi-track actors. How the Association would become cooperative to non-state actors remains the latter part's further efforts to employ effective engagement schemes and affective advocacy.

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BUILDING PEACE IN POST CONFLICT STATES: OVERCOMING THE IMPASSE

LEAVING CONFLICT BEHIND? AN ANALYSIS OF THE SECURITY SECTOR REFORM (SSR) AND (IN)STABILITY IN TIMOR-LESTE

Mathias E. Valdez Duffau*

In post conflict Timor-Leste the United Nations were presented with an opportunity to take part in a state building experiment. This was carried out by the UN Transitional Administration (UNTAET). One of their missions was to develop an independent Timorese Security Sector. This process known as Security Sector Reform (SSR) has been praised as a successful example for peace keeping and state building in post conflict situations.

This paper explores this premise and argues that the SSR was not as successful as has been claimed. Poor strategic planning and slow delivery of technical requirements meant that that the plan was not "bought into" by the main stakeholders. These factors plus the debatable demobilization of Timorese guerrilla forces and a lack of proper oversight of the indigenous armed forces led to them being involved not in peace building but violence and instability. This paper argues that the actions of UNTAET in Timor-Leste contributed to the violence between 2002 and the crisis of 2006.

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1. Introduction

For almost five centuries, while development and modern civilization were spreading around the globe, the Timorese had no choice but to fight for their survival and self-determination. Resistance to different outside powers' interventions and occupations took place in a historical continuum that can be divided into three periods: Portuguese colonial rule (for four centuries), Japanese occupation (during World War II) and the later Indonesian annexation (1975-1999). In 1999 a United Nations (UN) supported popular consultation was about to put an end to Indonesian rule.[1]

Once the vote for independence became public, the situation in Timor-Leste worsened. The Indonesian military had been supporting local militias which, through attacking indiscriminately the civilian population, intending to punish the majority of Timorese that had chosen independence instead of upgrading its status within the Republic of Indonesia by becoming an autonomous region. The destruction caused by the "scorched earth operation" carried out by the pro-Indonesian militias and the Indonesian Military motivated the UN to negotiate an intervention in Timor-Leste. As a result, an Australian-led military coalition The International Force for East Timor (INTERFET) was allowed to enter Timor-Leste territory in order to restore peace and enforce internal security. A few days later, on 25 October 1999, the UN Transitional Administration in East Timor (UNTAET) a peace-keeping operation with a broad state-building mandate plus full executive, legislative and judicial authority, was created by the UN Security Council (UNSC) Resolution 1272.

In its early stages, the UN's role in Timor-Leste may have appeared to the world as a successful endeavour of peace-keeping and nation-building. Indeed Timor-Leste offered a unique opportunity to prove that the UN and international donors had the commitment, the capacity and the knowledge to 'create' a modern state based on democratic values respectful of the human rights and accountable to its people. In order to implement the process UNTAET exerted power in a favourable political scenario for a peacekeeping operation in which the Indonesian army had withdrawn and INTERFET faced no armed resistance or opposition while local people openly welcomed them. Instead of a variety of antagonistic armed groups, the UN only had to deal with a single political actor, the National Council of Timorese Resistance (CNRT). Compounding to the favourable situation, by 2000 UNTAET was the second largest peace keeping operation in the world involving many nations. As Collier (2008: 125) put it in simple terms "the highest ratio in the world of foreign peacekeepers to population was in East Timor." However, "four years after Timor-Leste gained independence, its police and army were fighting each other in the streets of Dili," and as a result of the 2006 crisis both institutions were in ruins and Timor-Leste's security was once again "in the hands of international forces" (ICG 2008: 1).

1 For an alternative perspective on this 500 years process there is a previous article by the author (Duffau 2012).

This paper studies the implemented polices regarding the creation of the security forces during the UNTAET period and their outcome. It also provides an analysis of the process using qualitative variables which are based on what the UN Secretary General understands the SSR is intended to produce. In other words, UNTAET's period will be studied based on UNSG 2008 SSR principles. Moreover, since the SSR largely remains an area dominated by technical analysis of donors' reports and still largely uncontested regarding the political implications of binding security and development in the hands of external actors, this qualitative perspective intends to provide a methodological platform for future academic discussion on this topic.

By investigating the several factors that conditioned the creation of a security apparatus that is effective, accountable and respectful of human rights, the objective of this analysis is to assess to what extent UNTAET succeeded (or failed) in developing a security sector conducive to political stability and by so doing to the reduction of the risk of further conflict. After a brief explanation of what the SSR is about for the UN and how the Police and the Defence Force were developed, five qualitative aspects will be analysed:

1. Disarmament, Demobilization and Reintegration of Former Combatants (DDR) - Recycling the Aftermath of the Conflict;
2. Planning, Strategy and Implementation - Operatives Aspects;
3. Local Ownership - External / Local Actors Equation;
4. Tailored to the Needs of the Country - Security Against What? Security for Whom?
5. Rule of Law and Civilian Oversight - What are Security Actors Supposed to be Doing and Who Controls Them?

These five layers of analysis are the result of narrowing down the principles expressed in the UNSG 2008 Resolution on SSR. In this sense, this study identifies five basic pillars of the SSR in a post-conflict scenario and uses them as a framework of analysis of the process during UNTAET period.

2. What is the SSR for the UN?

Ebo and Powell (2010: 45) remind us that SSR is not a new activity for the UN. By 1989 the UN was already assisting the Government of Namibia in creating a new national army. Since then, the UN has been involved in a variety of SSR efforts in different regions of the world. These includes also the peace operations in Angola, Mozambique and Rwanda in the 1990s where the UN was involved in DDR and armed forces training (UNSG 2008: para 23).

Until very recently the UN lacked a framework on this subject. It is only from October 2004 that the term "security sector reform" is explicitly mentioned by the UN Security Council[2] "as an umbrella concept for defence and police reform as well as DDR" (Hanggi and Scherrer 2007: 6). In January 2008, the Secretary-General published the report "Securing Peace and Development: the Role of the United Nations in Supporting Security Sector Reform" (UNSG 2008) in which it is established that the UN's main task is "to support national actors in achieving their security, peace and development goals. To that end, the development of effective and accountable security institutions on the basis of non-discrimination, full respect for human rights and the rule of law is essential" (UNSG 2008: 1).This UNSG report is the basic guidelines for all UN SSR involvement. Within this framework, the UN states that in this respect, two related central themes have emerged. The first is that "security, human rights and development are interdependent and mutually reinforcing conditions for sustainable peace." The second is the "recognition that these fundamental elements can be achieved only within a broad framework of the rule of law" (UNSG 2008: para 1).

In paragraph 11 the report al warns that: "Security forces that are untrained, ill-equipped, mismanaged and irregularly paid are often part of the problem and perpetrate serious violations of human rights" and that "longer-term development demands a sufficient degree of security to facilitate poverty reduction and economic growth." The UN recognized that each country defines 'security' in accordance with its own "particular contexts, histories, cultures and needs. No single model of security sector exists. Effective and accountable security sectors, however, have a number of common features" (UNSG 2008: 15).

Paragraphs 17 and 18 SSR explain what the SSR is for the UN:

> Security sector reform describes a process of assessment, review and implementation as well as monitoring and evaluation led by national authorities that has as its goal the enhancement of effective and accountable security for the State and its peoples without discrimination and with full respect for human rights and the rule of law. As the Security Council noted, security sector reform "should be a nationally owned process that is rooted in the particular needs and conditions of the country in question (S/PRST/2007/3)." (UNSG 2008: para 17) "Security Sector Reform underscores that effectiveness; accountability and democratic governance are mutually reinforcing elements of security. Thus, security sector reform offers a framework to assist national actors, the United Nations and other international partners in implementing a shared vision of security" (UNSG 2008: para 18).

To summarize, the SSR is intended to be a process led by national authorities to deal with the accountability and the effectiveness of the security for the state and its people while respecting human rights and the rule of law and according to the particular needs and

2 In Security Council Resolution 1565/2004 the term 'Security Sector Reform' is mentioned twice (para 7 (b) and 12).

conditions of each country. Given the above, it should be understood what the SSR meant during the UN Transitional Administration in the post-conflict Timor-Leste?

3. SSR by a Peace-keeping Operation?

The question might be asked whether there were any indigenous security actors in Timor-Leste before the establishment of UNTAET. The answer depends on how we look at history and local politics. The fact that the territory had been a colony for the last 400 years cannot be ignored. During the 24 years of the Indonesian occupation both the Indonesian Army[3] (TNI) and the Indonesian Police[4] (POLRI) were the only actors dealing with security (ICG 2008: 4). By the time the UN arrived after the Indonesian forces had pulled out there were no indigenous security institutions in Timor-Leste. That said, looking deeply into local politics and history, it could be claimed that there was one single indigenous Timorese security organization, the resistance guerrilla army or 'Forças Armadas da Libertação Nacional de Timor-Leste (Falintil)'[5]. From the Timorese perspective, "one of the few intact institutions was the armed resistance movement, Falintil, which despite huge provocation, had remained in cantonment at Aileu in the run-up to the referendum" (ICG 2008: 4).

After the consultation in 1999, and by the time the Indonesian forces were starting to withdraw, the INTERFET, an Australian-led force, entered the territory to enforce security and disarmed both the pro-Indonesia militias and Falintil. In this way, INTERFET first and then UNTAET's peace-keeping force were two other foreign security forces handling Timorese security. By January 2000, the International Civilian Police (CIVPOL) was deployed by the UN (Hood 2006: 62).

UN Security Council Resolution 1272 mandated UNTAET to carry out "capacity-building for self-government" and to "establish an effective administration" authoring it "to take all necessary measures to fulfil its mandate." However, there was no express mandate regarding any security-development related initiatives. In practice, the process of state building in Timor-Leste started after the withdrawal of Indonesia in September 1999, and from early 2000 UNTAET began dealing with the security sector as an extension of its peace-building powers. During the UNTAET period, the UN and donors had to answer the most significant question concerning the future SSR in Timor-Leste: What to do with the former resistance army of Falintil? Would they become part of a domestic security sector? Under uncertainty and with a large composition of military personnel and UNPOL officers, UNTAET was going to experiment in the creation and the establishment of Timorese security actors, the Policia Nacional de Timor-Leste (PNTL) and the Forças de Defesa de Timor-Leste (FDTL).

3 TNI means Tentara Nasional Indonesia, hereinafter TNI.

4 POLRI means Polisi Republik Indonesia, hereinafter POLRI.

5 In English, this means "The Armed Forces for the National Liberation of East Timor."

4. Policia Nacional de Timor-Leste (PNTL)

During the period 2000-2002, the UN kept a multinational police presence of around 1,600 officers under the command of a UN Police Commissioner. The UN police (UNPOL) was composed of officers from a variety of nationalities and with a double mission. The UNPOL in Timor-Leste, also known as UN Civilian Police (CIVPOL), was comprised of police officers of more than 40 nationalities "most of whom had received only three to five days of training" on the background of the country (ICG 2008: 4). Furthermore UNPOL was in charge of internal security and law enforcement and it had to deal with PNTL recruits' training at the same time. Even after UNTAET's period the following UN Mission of Support to East Timor (UNMISET)[6] was going to continue retaining power over internal (also border) and external security (ICG 2008: 4; UNSC 2002).

By March 2000, the CIVPOL created the Police Assistance Group (PAG) and started training Timorese recruits. This group was composed of Timorese born people who had served for the Indonesian Police (POLRI). In the beginning, around 800 Timorese were recruited into the PAG and their role was to assist UNPOL but not to carry out police duties. Later, around 350 of them became the core of the East Timor Police Service[7] (ETPS) (King's College 2003: para 74). By the time of independence in May 2002, over 1,700 PNTL officers had been trained at the Police Academy.

Police development initiatives also took place on a bilateral basis. For example Australia, supported also with UK funds, established the Timor-Leste Police Development Program (TLPDP). Starting in 2004 until the 2006 crisis, and then continuing after until 2010, the program was independent from both the CIVPOL and the UN missions and it is was under the Australian Federal Police (AFP) auspices (Chopra 2002: 990).

5. Forças de Defesa de Timor-Leste (FDTL)

A King's College London research group was invited by UNTAET to produce a report on how to deal with Falintil, DDR and the creation of the army. The team's report (King's College 2000) identified three options for a Timorese military. The first option was based on Falintil's preference for a relatively large and heavily armed military of 3,000–5,000 personnel. The second option was for a force of 1,500 regulars and 1,500 conscripts, and the third option was for a force of 1,500 regulars and 1,500 volunteer reservists. The study team recommended the third option as being best suited to Timor's security needs and economic situation. This recommendation was accepted by UNTAET in September 2000 and formed the basis the Timorese defence plan. The plan was also accepted by donor countries contributing to peace-keeping in the country. Some of those donors, but not the UN, were ultimately responsible for implementing both DDR and the creation of the Timorese Army.

6 After the declaration of independence, UNTAET's mission ended and UNMISET was launched.
7 ETPS was the first name given to what it was going to later the PNTL.

Practically speaking, the UN allowed bilateral donors to handle SSR (including the DDR and army creation). The development of the FDTL was delegated to an *ad hoc* group of military officers from donor countries. The Office for Defence Force Development (ODFD) was not part of UNTAET itself. It was composed of retired US army generals and military personnel from donors countries like Australia, UK, Malaysia, Thailand, and Portugal among others (Hood 2006: 71).

UNTAET left to the former Falintil high commanders the decision about which members of Falintil were eligible to become part of the FDTL. Those selected were entitled to integrate into FDTL's first battalion. Those who were rejected had to be demobilized through the Falintil Reinsertion Assistance Project (FRAP).The FRAP program was implemented by the International Organization for Migration (IOM), USAID, World Bank and Japanese Government funding. It was composed by demobilization and reintegration activities for ex-combatants. The program that only lasted one year had four stages: "registration, discharge from cantonment, initial reinsertion with a grant disbursement; and reintegration, providing tools, training and assisted sub-grants to help beneficiaries establish sustainable income-generating activities" (King's College 2003: para 51).

6. Evaluation of the SSR process during UNTAET

6.1 DDR of Falintil

The UNSG2008 report underlines how disarmament and demobilization activities, if undertaken in the early transition process, can produce relevant impact on longer-term peace and security process (UNSG 2008: para 8). Regarding the case of Timor-Leste, the UNSC Resolution 1272 neither made no reference to disarmament, demobilization, reintegration or SSR and "left the future of Falintil undefined" (King's College 2003: para 58). Consequently, UNTAET did not intervene as the primary actor in the DDR process. Decisions and policies for DDR were made by the abovementioned *ad hoc* group. On the other hand, UNTAET let Falintil leaders chose those who would integrate the new defence force, and by doing so avoiding taking an active role in DDR. Since not all Falintil were going to become part of the defence force this split paved the road for instability.

According to Bellamy (2003: 115), Falintil's original intention was Timor-Leste to constitute a state with no armed forces after independence. Furthermore, it is argued that some Timorese leaders were reluctant to create a National Army but favoured a unique security force, a strong police like a gendarmerie. The Nobel Peace Prize laureate and Timorese Leader Jose Ramos Horta was the main supporter of the idea of a single gendarmerie for the country. In this sense, Falintil supreme commander, Xanana Gusmão "envisaged a UN-organized territorial police force but no army because Timor-Leste does not want any more war" (ICG 2008: 4). The question about the role of the resistance fighters in the core of the security sector arose.

The former Ministry of Defence, Roque Rodrigues, explained that the events of September 1999 required the reconsideration of the original idea about having a single gendarmerie force. In case an army would be needed, Rodrigues explained the role of the veterans in this way: "Falintil are our heroes. It is unacceptable to disarm them. Falintil offered to become the core of the army" (ICG 2008: 4). Trying to dismantle Falintil but also keeping veterans aside from any role in the future army or police could also become a major threat to stability in itself. Former fighters were not going to go back home without having a significant role in the future of the incipient nation. Instead, "armed Falintil veterans would use force to further their own political objectives" (Bellamy 2003: 115).

UNTAET's neglect in dealing with the future of Falintil fighters increased the uncertainty among veterans. It was already January 2000 when UNTAET began worrying about the issue. The uncertainty in addition to the poor living conditions in the cantonment broke down the discipline. This initial negligence divided the veterans separate groups, losing internal cohesion, and leading a large number of them to leave the cantonment. In practical terms, the Falintil fighters remained simply waiting for the decisions concerning their future to be made, but they were "increasingly fractious, for another seventeen months while the UN wondered what to do with it" (ICG 2008: 4). Incidents involving veterans started taking place in the following months. This situation became so serious that on 23 June 2000, Xanana Gusmão expressed that Falintil was "almost in a state of revolt" (cited by King's College 2003: para 49).This indifference by UNTAET also impacted on their role in Timorese society. In this respect, Hood (2006: 64) stated that: "There was popular dismay in East Timor that UNTAET would treat the nation's revered and venerated embodiment of armed resistance so shabbily."

The Demobilization aspect of the DDR process was also part of the controversy.[8] The fact that only 650 former Falintil members were included and 1,300 were excluded came as a shock to many combatants who had the understanding that all Falintil members would become F-FDTL (Rees 2003: 2). As for Reintegration those who were rejected from the FDTL had to be demobilized through the Falintil Reinsertion Assistance Project (FRAP). The fact that FRAP was functioning on a multilateral and bilateral basis showed another aspect of the lack of commitment by UNTAET to address DDR[9]. The program was limited to only 1,000 in beneficiaries and took place for only a year. Apart from those veterans that went through the FRAP "thousands of others remained unhappy with their treatment and with the way the army was set up" (ICG 2008: 19).

The incomplete registration and the selection criteria for FRAP inflated differences among the combatants concerning loyalties and origin and created the roots of further conflict and instability (Hood 2006: 72). While those loyal to Xanana Gusmão had positioned

8 The controversy can be seen in the name of the new force itself: first The East Timor Defense Force (ETDF) was then renamed Falintil-FDTL in February 2001 and became F-FDTL after independence.

9 International Organization for Migration (IOM) by USAID, World Bank and Japanese Government funding.

themselves in the FDTL, those who were rejected looked for a place in the police force, created paramilitary gangs or became politically confrontational towards the UN and the Government. By the year 2002, the Australian Strategic Policy Institute was already warning that the "establishment of the ETDF[10] had not succeeded in solving the problems posed by disgruntled Falintil veterans." They emphasized that "the selection of recruits for the ETDF's first battalion may even have exacerbated them, because veterans from eastern districts and with loyalties to particular commander were strongly favoured" (ASPI 2002: 25).

Veterans felt robbed of their independence dividend (Rees 2003). As a result "this left other factions of Falintil veterans angry, and spurred the growth of organized gangs" (ASPI 2002: 26). It caused an increase in paramilitary groups (involving disaffected former Falintil and clandestine activists) operating throughout the country. Under the umbrella of the Association of Ex-combatants 1975, and other factions some of the groups were politically oriented. Others were a threat to security and oriented towards criminal activities (Rees 2003).

The UN states that DDR is one of the most delicate aspects of SSR and a key element in order to guarantee stability in a post-conflict scenario (UNSG 2008: para 8). Therefore, if the process fails in its goals, it is highly likely to become the cause for future conflict and instability. The case of Timor-Leste proves that the belated inaction posed by the UNTAET provided an improvised solution in the short-term that at the same time it undermined the long-term goals of stability. Those who were rejected from the FDTL later became the "driving force" behind the growth of 'ex-Falintil' veterans groups which began to appear around January 2001 and started to become an ongoing and fundamental threat to internal security in the post-independence period (Hood 2006: 72). The outcome of the DDR process was also a result of the delayed formation of the FDTL. In fact, failing to implement DDR in the "early transition process" the belated decisions about who would become part of the army and who would be demobilized influenced the unnecessary politicization of the security sector, creating spaces for challenging the legitimacy of the army and the regime itself. In other words, the whole the process was a turning point in the UN challenge and its committed partners from where the seeds of future instability and conflict will begin to grow.

6.2 Planning, Strategy and Implementation

The UNSG 2008 Report states these two principles by saying that: "(f) a security sector reform framework is essential in the planning and implementation of post-conflict activities. Ideally, security sector reform should begin at the outset of a peace process and should be incorporated into early recovery and development strategies" and requires a "(g) A clearly defined strategy, including the identification of priorities, indicative timelines

10 East Timor Defense Force (ETDF) was the first name given to the Timorese army.

and partnerships" (UNSG 2008: para 45). In Timor-Leste, regarding the design of an indigenous security force it is relevant to note that the process did not start at the outset of the peace process and was not incorporated into early recovery and development strategies. Essentially and on the contrary, SSR was seen as a part of the Peace Operation exit strategy rather than entrance strategy (Rees 2006: 10).

Regarding the police force, Rees (2006) stated that the PNTL suffered what he called developmental problems because of decisions made in the first year of their creation. Lack of strategic planning and timelines resulted in improvisation regarding the training of the police recruits. The original goal of recruiting and training a large number of officers proved to be a mistake in terms of planning and timelines. The objective to achieve the number of 2,800 officers by the end of the UNTAET mission[11]appeared to be too ambitious and difficult for the following reasons.

In the first place, the absence of trainers was a decisive point. During the 2000-2002period, out of the 1,600 CIVPOL officers that were sent, none were specifically assigned to police development. Until mid-2000 no international policemen had been recruited either to work neither as trainers nor as capacity building advisers. Following the above mentioned UN principle, trainers should have been hired long before the deployment of the mission as part of the UN priorities plan. Because no trainers were recruited even "at the early recovery of the development strategy," the UNPOL officers had to fulfil a double task: policing and training.

In this regard, the 2nd Commander in Chief of PNTL, Afonso de Jesus,[12] expressed that although International Cooperation through the role of the UN missions was essential for the PNTL, not all the UNPOL provided useful training. While highlighting Australia, Singapore, Malaysia, New Zealand and Portugal police officers as very useful for PNTL development, he added that some other nationalities UNPOL officers had the same quality as PNTL but not any better. While referring to the cases of Bangladesh and Pakistan UNPOL, Prof. Matias Boavida[13] linked PNTL training with the nationalities of the trainers in a different perspective by saying that if the trainer is violent then the trained police would learn violent techniques. Undoubtedly, the training component severely compromises the professional quality of any police force no matter where in the world.

Secondly, the training course for the new cadets was not satisfactory. A three month course in the Police Academy of Dili plus six months of field training proved to be too short to fully instruct police officers. The strategy and the training were reliant on the motivation of the CIVPOL trainer in charge and not on a well-planned institutional developmental approach. By the time of the independence, more than 1,700 PNTL officers had been

11 That meant only within a period of two years and a half.

12 Interviewed in his office in Dili in March 2011.

13 He is a Political Science Professor at the National University of Timor Lorosae – Department of Public Policies and he was interviewed in his office in March 2011.

through the Police Academy. That number only reached 3,000[14] by May 2004 when it was already UNMISET stage. The PNTL Commander in charge of the Police Training Centre, Carlos Geronimo,[15] explained that in the 2000-2002 period the training was completely undertaken by UNPOL. During 2003-2004 it was done jointly by UNPOL and PNTL trainers and by 2005 the UNPOL officers were just observers. The goal of the training had always been focused on creating a police whose "character is military, but our policing is community police,"[16] he added.

Another relevant factor that undermined success and showed deficient planning was the use of 'western' procedures for selecting candidates. In Timor-Leste people, speak Tetum[17] plus a variety of different local languages[18]. Although, being in a country where only a small percentage of the population had any knowledge of the English language,[19] the CIVPOL was constrained by western interviewing techniques using the English language. In practice during the selection process, there appeared to be biased towards those interviewees who spoke some English (Hood 2006: 64; IGG 2008: 8).

As it was previously analysed, even though dealing with the creation of defence forces was not new for the UN, the development of the FDTL fully proved to be affected by the lack of planning (including priorities and partnerships), strategy and belated implementation. Due to those aspects, SSR in the army was translated into improvisation in the field what can be originally attributed to the fact that UNTAET "did not provide clear guidance and officials were unsure whether they were even allowed to assist the 'armed group'" (ICG 2008:4).In the case of Timor-Leste, the absence of initial planning was only solved nine months after the mission was launched.

Actually, planning and implementation matters challenged the expertise and capacity of UNTAET officials. Hood (2006: 73) pointed out certain weaknesses in UNTAET's leadership in itself due to the politicized nature of senior positions. UNTAET, UNMISET and the CIVPOL senior officials "were largely contingent upon the appointees' nationalities, rather than expertise and experience" and because of that "poor performance was rarely censured." The Security Advisor for the Secretary of Internal Security, Flavito Maria Simoes[20] understood that because there was no single model for SSR at that time, within the UN mission there was a struggle from different advisers to "impose" their country model. As a result, UNTAET ended up providing different inputs depending on the

14 The original plan was to train 2,800 officers by the end of the UNTAET mission as already explained in this section.

15 Interviewed in March 2011 in his office in Dili.

16 Trying to understand what the practical meaning of that training spirit is might be a good topic for further research.

17 Dili dialect and now a national language.

18 As Timorese people remember, by the time UNTAET was deployed the number of interpreters was limited.

19 This is easily verifiable by interacting with people in Dili for a few days.

20 He was interviewed in March 2011 in his office in Dili.

nationality of the person in charge of the implementation of the policy. The Legal Adviser to the Secretary of Security and member of the PNTL Commission Dr Isabel Ferreira[21] confirmed Mr Simoes' opinion by saying that because UNTAET personnel did not have much experience and was composed by a variety of nationalities there were many models of state-building in the mission depending on the nationality of the adviser.

6.3 Local Ownership

The UN highlights that: "In order to be successful and sustainable, support in the area of security sector reform must be anchored on national ownership" (UNSG 2008: para 45 c). However, inadequate consultation and the lack of Timorese participation in the decision making process pre-conditioned the absence of local committed ownership regarding the security sector formation. The limited interaction between Timorese leaders and UNTAET concerning the police force composition is a converging point to understand how local ownership was non-existent during the whole process. Only a selected group of National Council of Timorese Resistance (CNRT) leaders including Xanana Gusmão were consulted about the formation of the PNTL (Hood 2006: 64).

The recruitment process and the training program were articulated with no substantial collaboration of the Timorese officials. This trend of executing policies without close Timorese participation was also noted from the very beginning by Chopra (2002: 990) who asserted that: "when the new Transitional Administrator reached Dili, he immediately began a direct dialogue with Gusmão, but then relied on this relationship almost exclusively instead of leading effectively himself. It did not work." In fact, this situation appeared to be favourable to UNTAET leadership who were able to continue with the mission with "little local politics to worry about" (King's College 2003: para 26).

In order to understand to what extent the requirement of local ownership was fulfilled, it is necessary to analyse the incorporation of ex-POLRI in the PNTL. According to Dr Ferreira, UNTAET's criterion for police formation was simple: being able to communicate in English and to have policing experience. This logic leads us to analyse UN's decision regarding the incorporation *ab initio* of 350 former POLRI in the ranks of the new East Timorese Police Service (ETPS) as a crucial point. Even though the re-incorporated POLRI officers were Timorese born, they had been part of a repressive institution which executed violence as a strategy to stabilize a foreign occupation.

Moreover, UNTAET failed to include Timorese political leaders and civil society in the police development. During the first two years, power over the police service was not shared with the Timorese leadership while PNTL was a part of the UN CIVPOL. It was not until independence that Timorese officials had some involvement regarding the PNTL. At least, the incorporation of a large number of them cannot be analysed as a minor

21 She was interviewed in March 2011 in her office in Dili.

mistake or a failed example of SSR. As The former (and first after UNTAET period) Prime Minister of Timor-Leste Dr Mari Alkatiri[22]also believed that the Timorese had voted to become independent of that regime and therefore they had the right to be freed from the institutional part of it. The Indonesian Police were also part of the defeated power.

In order to judge whether or not Internal Security was going to be provided by a stable and accountable democratic institution it might be also interesting to evaluate whether the situation of the Timorese born and former POLRI was an aspect that should have been included in the DDR process. In the end, they were also affected by the conflict. As part of the outcome, the inclusion of former members of the Indonesian occupation police questioned the legitimacy of the force and was a main source of criticism (King's College 2003: para 77). It was a clear example of the lack of inclusion of the Timorese in the decision-making process and it would become not only the initial element of failure of the police in the days to come.

This situation raises the question about in which ways the UN was expecting to secure development by relying on former members of an occupying and repressive force.[23]To what extent SSR was supposed to be effective in recycling security personnel that belonged to an institution that had spread terror by practicing torture and arbitrary detention over the civilian population for decades, is another aspect to seriously think about. "The UN should have thought twice about recruiting former members of the previous repressive regime's security apparatus" (Hood 2006: 64). Dr Alkatiri confirmed that argument by expressing that the inclusion of the POLRI officers was a wrong option because those policemen were members of the Indonesian occupying force. Because of the fact that by the time he took office the police force had already been staffed by UNTAET, the POLRI issue conditioned the control of the police during his Government, he concluded. The fact that the Timorese were seeing the new police as a threat severely compromised any attempt of local ownership of the force. In this sense Rees shared an anecdote:

When asked what posed the greatest threat to Timor Lestes' security in 2004, a senior officer in the High Command of the country's defence force, the FALINTIL-FDTL, and a 24 year veteran of the guerrilla resistance to Indonesian occupation, stated simply, 'The police' (Rees 2006: 6).

This reliance on former Indonesian POLRI might have been decided in order to gain time and to profit from their previous expertise[24]but it would prove to be a major mistake for the outcome of SSR. The POLRI officials were given a four weeks 'transitional training'

22 He was interviewed in March 2011 at Fretilin Headquarters in Dili.

23 It might be naïve to think that it can be attributed to the lack of expertise of CIVPOL and UN executive staff not only concerning the local language and the political situation but also the recent historical background.

24 Despite the fact that their policing experience was repressive and not human rights respectful.

course and not the three months one that the new cadets had to take.[25] These 350 POLRI were low ranked in Indonesian times but the UNTAET SSR decision allowed them to be reconverted into the future officers in charge of the incipient PNTL. In practical terms, former members of a repressive force were granted a much better role in the new PNTL. This matter certainly reflected an improvised move by the UN in trying to take a shortcut in their police building challenge. However they were planting another seed of instability by establishing an illegitimate police force that would become a competing power of the FDTL.

UNTAET decision to rely on a foreign study (King's College) before dealing with the future of Falintil contributed to the lack of local ownership.[26] The fact that the King's College was selected was not casual either. As Bellamy (2003:116) asserted the "basic points of the study were unmistakably drawn from the SSR agenda (…) This is unsurprising given that King's College London, and its Centre for Defence Studies in particular, has pioneered the SSR agenda." Moreover in both planning (King's College) and implementation (ODFD) there were foreigners, not the Timorese nor the UN staff who made essential decisions about the defence force. The DDR process through the FRAP was also a matter decided by foreigners. The aspects evaluated in this section serve to understand how and why the UNSG requirement of local ownership was absent of the Timorese SSR experiment.

6.4 Tailored to the Needs of the Country

The UNSG SSR Guideline affirms that: "A United Nations approach to security sector reform must be flexible and tailored to the country, region and/or specific environment in which reform is taking place, as well as to the different needs of all stakeholders" (UNSG 2008: para 45 d). In order to satisfy this principle the SSR institutional development must be implemented according to the needs of the country. At this stage of the analysis, it can be assessed that the above observed failures in SSR, although analysed separately, are intertwined and influencing each other.

Practical institutional capacity building did not reflect the security needs of the country. The police became a divided force into a variety of specific divisions. The creation of different divisions and special units inside the PNTL[27] was the result of multilateral and bilateral advising during UNTAET period. In this respect, in June 2006, Ramos Horta observed that "the police are very factionalized with too many weapons, and more than 3,000 police with so many areas of expertise, like the border police, the rapid response unit, the special force. I don't know how we managed to have all these different units for such a small nation" (cited by Goldsmith and Dinner 2007: 1098).Once the UN handed

25 It is difficult to imagine how the POLRI members were expected to be recycled into a democratic, human rights respectful and accountable police institution within a month.

26 It is relevant to note that a foreign institution which was not a part of the UN or of any of the donors (nor composed by Timorese) was asked to conduct the proposal.

27 Rapid response, border patrol, special force, etc.

over policing in 2004 these special units became highly armed. In other words, the fact that some police units were better armed than the military, contributed to the inter- and intra-force rivalries. In this regard, the question that derives from this matter is whether the division of the police force into a variety of sections necessarily tailored to Timor-Leste internal security requirements or to external actor's needs.

As already explained the initial defence plan did not come from a Timorese proposal but from a UK based institution.[28] It is interesting to point out that before the study introduces a threat assessment in order to validate what Timor was in need in security terms, it was assuming that the FDTL *parse* would be professional, accountable, transparent, and democratically controlled. Nevertheless, lacking consideration of the particular situation of Timor-Leste,[29] the King's College plan was insufficient to show how the FDTL would become a professional, accountable, and democratically managed army. In fact, those initial assumptions proved to be just hypothetical not tailored to the country's situation when looking at the course of events that were about to take place in the mid-term.

Another outstanding aspect of the lack of flexibility of the untailored defence plan was its budget. In practice, The King's College SSR experiment was expensive for an impoverish nation. While initial costs were around U$S 3, 3 million,[30] the defence budget for the fiscal year 2001-2002 was only U$S 2, 85 million. The "planned force is probably unsustainable form East Timor's slender fiscal base in the light of other urgent demands" (ASPI 2002: 24). On this topic, Bellamy (2003: 117) asserted that the expenses needed to satisfy the plan amounted 12% of government budget in those early days. Furthermore, the ASPI (2002: 25) concluded that this uncertainty of leaving the "under-funded police force too overstretched to perform its vital tasks, and an expensive ETDF with little to do" would constitute a "potential legal and political minefield concerning proper responsibility for responding to problems."

Consequently, this level of expenses introduced financial and political constraints on the post-independence Timorese Government. If the option of cutting military expenditure and salaries to adjust the budget was to be implemented, then the risk of potential instability would also have increased. On the contrary, keeping a high level of expenditure on defence diverts funds from other essential development areas. If this occurred, SSR policies would create a negative effect on economic development (Bellamy 2003: 117).

28 As mentioned previously, Bellamy (2003:116) explained that the Centre for Defense Studies of the King's College of London was selected because in reality it was one of the promoters of SSR and not because they were specialists in Timor-Leste.

29 A small and impoverished nation composed by a diverse ethnicity, at the beginning of its independence of centuries of foreign domination and with basically no domestic source of income.

30 Excluding equipment and facilities.

From the Timorese perspective, Simoes' clarified during his interview that SSR during the UNTAET period was an ineffective effort to create and army and a police force that did not match what Timor required at that time. UN focused on 'institution building' rather than 'state/nation building.' In his opinion and because Timor-Leste was a post-conflict society there was a huge need to recover before reconstructing. Psychological rehabilitation, for example, would have been very important for the people in order to be able to achieve that recovery.

In the search for the UN requirement "tailored to the needs of the country" is again relevant to re-assert that the practical development of the army was not conducted by UNTAET but executed by a multinational group of officials operating outside the UN mission. The UN allowed bilateral donors to create the FDTL by delegating the decision making to military officers from donor countries. The Timorese leadership might have known better than anyone what their country needed. Instead, the Office for Defence Force Development (ODFD) that operated as an external agent of SSR out of the orbit of the UNTAET mission provides another element to prove how by allowing bilateral donors to handle SSR, the mission may have contributed to satisfy external security requirements to the detriment of Timorese needs.

6.5 Rule of Law and the Democratic Oversight

The UNSG 2008 Report emphasizes that "governance and civilian oversight of the security sector are essential." It continues explaining that "issues as normative and consultative frameworks, institutional management and oversight mechanisms are often neglected in a security sector reform process." If such neglect occurred, the objectives intended to be achieved by such reform might be undermined causing a decrease in the security outcome as the UN warns: "lack of attention to the rule of law, governance and oversight can also limit the practical effectiveness and durability of external support for security sector reform" (UNSG2008: para 41).

In terms of democratic control and civilian oversight even in 2005 civilian oversight continued to be "all but non-existent" (Hood 2006).Rees (2003; 2006) was already blaming UNTAET for failing to adequate support for civilian oversight both concerning FDTL and PNTL affirming that the decision to establish civilian management and oversight over the police and the military was delayed until the end of the mission in order to have a more "effective" control over its development. The reason provided by the former UNTAET adviser is that the SSR process was always limited by "short timelines." Furthermore, an early report (King's College 2003: vii) condemned that the institutions that were supposed to be in charge of the oversight[31] of the security actors to be left "underdeveloped and incomplete" by UNTAET. Partially, this underdevelopment can be explained by what Matsuno (2009: 49) characterizes as the failure of parliamentary democracy.

31 Such as the Parliament and the Ministries of Defense and Interior.

Here again, the lack of civilian oversight in the army creation was also due to the fact that the development of the FDTL was delegated to the Office for Defence Force Development (ODFD). As Hood (2006: 71) concluded during UNTAET and UNMISET periods the ODFD was able to deliver technical advices but failed in areas of civilian oversight and in the development of policies of strategic and management. Its poorly defined authority clouded relations with the Timorese Government and the UN missions and without integrating the ODFD to the Transitional Administration, accountability and transparency were seriously affected. Explaining the absence of civilian oversight, Rees's answer during his interview was clear by stating that because of the lack of expertise available during UNTAET, the mission was only capable of "delivering a shell," with cero civilian oversight.

At the time UNTAET left Timor-Leste there was no specific legislation framework limiting the roles of the security forces. The situation was going to affect the professional performance of both institutions. In fact, the only legal boundary is stated in the section 146.2 of the Constitution of Timor-Leste where it is decided that the FDTL is responsible for the external defence and that police function is to "guarantee the internal security" (section 147). However, that broad constitutional mandate with no legal framework left issues like border patrol and maritime or naval enforcement unresolved. "The police do not and cannot operate in a vacuum. Without a legal framework and without a functioning judicial system the best police service is paralyzed. UNTAET is a case point" (King's College 2003: para 84).

In this regard, The Joint Assessment Mission (JAM 2003: 8) understood that the gap between the "constitutional mandate" and policing "creates the potential for conditions vulnerable to human rights violations, crime, and public insecurity, and also can undermine public trust in police." They affirmed that "this gap may be filled by undesirable forms of vigilantism and private security groups that are neither accountable nor transparent." Hood (2006: 74) supports the idea that "despite an opportunity to craft and mould all the democratic governance institutions in East Timor in 1999-2002, the UN failed to establish any effective mechanisms for democratic control of the security sector."

The lack of a precise legal framework specifying roles and functions to each security force allowed the promotion of competing (instead of complementing) security actors. This competition opened the way to political manipulation. In this sense, Simoes expressed that UNTAET lack of expertise was the main factor responsible for creating an unprofessional security sector that operated without defined roles making them easy to be manipulated for political interests. In a way, the enmity between the police and the army was fuelled by the 'politization' of them. Timorese political elites also pursue to secure their objectives through the security forces. Instead of keeping stability, they became "actors of violence and insecurity," he affirmed.

Rivalries between the PNTL Rapid Intervention Unit and the military began also taking place in the streets of Dili. Because the FDTL were seen as loyal to President Gusmão "there have been attempts to promote the police as an alternative force, reflecting a struggle between factions of the ruling Fretilin party" (Cotton 2005: 188). On the other side, political dissidents who did not sympathize with Gusmão could find in the Minister of Interior Mr Lobato (in charge of the PNTL) certain tutelage. Already in the year 2002 the ASPI was concerned about this issue expressing that the FDTL had an "evident allegiance to the President" which creates a "risk that if the police form an alignment with the Prime Minister the two forces could find themselves in partisan opposition to one another" (ASPI 2002: 25).

7. Conclusion: SSR and Instability

Although UNSC Resolution 1272 empowered UNTAET as an extensive peace-keeping operation, it operated as transitional government capable of, among other things, exercising executive, legislative, and judiciary authority in order to establish an effective administration. However, the mandate did not specify the development of the security forces or how to implement a democratic oversight over them. In fact, SSR was a part of the way out of Timor-Leste for the peace-keeping operation rather than an entrance strategy. Once in the field, other actors were required to assume the challenge according to their own understandings.[32] Even though it distanced itself from the army issue, it cannot be understood that the UN did not intervene in that part of the process. In the end, UNTAET was the one and only political actor responsible[33] for all SSR implemented policies.

Timor-Leste proved to be a political experiment where early decisions concerning the demobilization of the combatants and the creation of the security forces were made lacking planning, strategy and a long-term view. Problems concerning the insufficient amount of trainers, lack of expertise and competing models according to the adviser plus the nationality and language issue are all prove of the improvisation may have prevailed. The police was a creation based on a remnant of an Indonesian force which was part of the defeated enemy. However, it was receiving most of the attention while the future army was mostly ignored. Even worse was that the PNTL was given more funds, weapons and training without paying attention to the human rights records of its senior members. A controversial demobilization of the Timorese guerrilla fighters (Falintil) was to link SSR not with stability for development but with violence and further instability. In fact, Falintil as the victorious force was the one that should have received substantial respect and attention from the UN and international donors. To the eyes of the Timorese the UN had created an illegitimate police force. As a result of the process and without aligning policies with the needs of the country the ineffective impulse regarding the police development and the neglectful distance towards the defence force created an initial sensitive scenario.

32 Maybe also according to their own interests?
33 In this case by omission.

In a post-conflict society without any previous indigenous institutional history, personal and political alliances were likely to be prioritized over the expectations for the implementation of western rule of law. Or what is worse, when there were not Timorese but foreigners the ones who were in charge of that implementation as well as conducting every aspect from DDR to SSR the result was a plan that lacked local ownership and proved not to be tailored to neither the institutional capacity nor the needs of the country. The deficient legal security framework and non-existent democratic oversight of the police and army added other significant factors to the tensions within the regime. The fact that the security forces were divided and confronting each other made them easy to be politicized by local and external actors. Personal liaisons among individuals had kept the Timorese united while struggling against foreign regimes. Reasons to follow individuals rather than institutions, can be found in the importance of the roles, guerrilla member/clandestine (whether as a combatant or as a supporter) by which Timorese society had learnt to be cohesive and united to resist successive occupations. Those roles and personal links were naturally expected to persist (and not to vanish) even after the independence. It is difficult to imagine why the Timorese would erode their trust in their leaders of the resistance and simply start respecting institutions promoted by external actors or how it would be possible to create a non-partisan security sector without, at least, a proper legal framework. The institutionalization through the police and the army of old internal divisions without much of a rule of law and cero functioning democratic oversight made this goals impossible to achieve.

By the time the UNTAET handed over full responsibility for internal security to PNTL (May 2004) internal discontent was in rise. Unemployed youths and the lack of work opportunities plus riots involving martial arts gangs and former Falintil members were reflecting how SSR within an impoverished socio-economic situation contributed as a catalyst for instability and violence. Opposite of what SSR is intended to perform, that sort of environment certainly had a negative influence in the stability efforts and consequently it slowed the pace of development. In the light of the previously analysed political and technical matters, the episodes of violence between members of the police and the army that were mounting after independence in 2002 and culminating in 2006 raise the question of whether the UN SSR policies in Timor-Leste, instead of creating a sustainable and solid decrease in the risk of conflict, in fact helped to cement the road for a rivalry between the two forces and confrontations within each. The answer is that though intending to enforce peace and security in Timor-Leste the UN endeavour contributed to a new chapter of instability and violence. Furthermore, it opened the door for external re-intervention which also provided to international donor and the UN the unique opportunity to reengage in SSR. In simple terms, in the case of Timor-Leste experiment external actors not only built the security sector but after the 2006 crisis they were entitled to reform it.

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HINTS AND HUES OF TRANSITIONAL JUSTICE IN THE PHILIPPINES OVER THE LAST TWENTY-FIVE YEARS

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This paper focuses on the Philippines' transition continuum and its experience with the use of transitional justice mechanisms viewed from the lens of two Presidents surnamed Aquino, Corazon (who was President from 1986-1992) and Benigno III (who is the incumbent President), and who are mother and son. The peg is significant because it is the first time that the country has been ruled by a mother and son who both had a similar mandate: to preside over periods of transition, albeit twenty-five years apart. The essay is in three parts. The first part of the essay defines and contextualizes the notion of justice in transition. The second part examines the circumstances that thrust Mrs. Corazon C. Aquino and Mr. Benigno S. Aquino III into office and the context that each found themselves in with a focus on the measures taken by the two Presidents within their first year in office to manage the transition from authoritarian rule to constitutional governance. The third part looks into the effectiveness and responsiveness of these measures. The essay concludes with an assessment of the success, or lack of it, that both Presidents had with these measures and how these have addressed the transition continuum in the country.

* The topic came about during a seminar on Transitional Justice given at the Columbia Law School during the Fall of 2011 by Professor Graeme Simpson. He also suggested the peg and characterized the image of a mother and son having ascended to the presidency 25 years apart as "oedipal." The previous incarnation of this paper passed through his experienced eyes and critical pen. For all these, the author is grateful.

"*History, despite its wrenching pain,*
Cannot be unlived, and if faced with courage,
Need not be lived again."
- Maya Angelou, 1993,
"On The Pulse of Morning"

1. "What's past is prologue"

This essay focuses on the Philippines' experience with transition from authoritarian rule to constitutional governance and looks into its transition continuum, which spans twenty five years, involves five presidents, two declarations of martial law, two Constitutions, and a mother and son who both became Presidents, albeit reluctantly but with the similar mandate to exact accountability from their respective authoritarian predecessors. It is the almost "oedipal" image of mother and son--Corazon Aquino and Benigno Aquino III--occupying the same office twenty-five years apart and facing almost the same expectations but under different circumstances and the effects on the country's transition from authoritarianism that is the peg of this essay.

Both presidents took office twenty-five years apart as essentially inspirational leaders with great personal integrity and moral character but with unexceptional governance skills and experience--Corazon Aquino had no experience with governance until she took office in February 1986; Benigno III, the current President, though a three-term Congressman and a first-term Senator when he was elected President in 2010 had a quiet and relatively unexceptional stint as a legislator. Such as they were, both took office laden with extremely high expectations and a mandate to hold their extremely unpopular and reviled predecessors accountable for their excesses and crimes. For Corazon C. Aquino, it was the late Ferdinand E. Marcos, who had declared martial law in the Philippines on September 21, 1972, imposed a practically handwritten Constitution, looted the country's coffers and ruled by decree until his ouster on February 25, 1986 by the now-famous "People Power Revolution." For Benigno C. Aquino III, it was now Congresswoman Gloria M. Macapagal-Arroyo, who, as Vice President in 2001, assumed office under the constitutional line of succession when former President Joseph Estrada was ousted by a second "People Power Revolution" and later was proclaimed President in a controversial presidential election in 2004; Macapagal-Arroyo, like Marcos, declared martial law albeit only for a certain territory, was charged with plundering government funds, and was much reviled. Mother and son, upon assumption to office, were expected to address the plunder of the national treasury as well as gross violations of human rights; both were expected to restore the confidence of the people in democratic institutions that their respective predecessors had undermined and fundamentally destroyed.

This paper also tackles the Philippines' experience with transitional justice mechanisms viewed from the lens of the two Presidents, both surnamed Aquino and who are mother and son. Both had the similar mandate to preside over separate periods of transition twenty five years apart. In the first part of the essay, the notion of justice in transition is defined and contextualized. In the second part, the circumstances that thrust Mrs. Aquino and Mr. Aquino III into office and the context each found themselves in is examined, with a focus on the measures taken by the two Presidents within their first year in office to manage the transition from authoritarian rule to constitutional governance. The focus on the first year is deliberate because Mrs. Aquino's first year in office was as head of a revolutionary government where she ruled by decree under a provisional constitution, without a legislature and under a reorganized Supreme Court and a bureaucracy reorganized at all levels. Mr. Aquino's first year in office clearly reveals some parallels in terms of perspective, focus and tools used; however, there are also some significant and notable differences that will be discussed in detail *infra*. In the third part, the effectiveness and responsiveness of these measures are inquired into. The essay concludes with some insights into how much or little the measures have helped in shaping the country's future by acknowledging its past and managing the present.

2. The Notion of Justice in Transitions

Whenever transition occurs, a divide is created between the old and the new, the former and the current, the past and the present. This divide poses a challenge and, perhaps, even a danger to meaningful societal transformation arising from how the present deals with the past.

Transitional justice looks at how the past affects the present to determine the future. At its core, it is the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes. (Teitel; 69) Teitel further describes transitional justice as becoming both extraordinary and international in the post-war period after 1945 and characterizes it in three phases: Phase I, associated with war crimes, trials and sanctions, ended with the Cold War; Phase II, associated with accelerated democratization and political fragmentation and the supposed "third wave of transition," is best exemplified by the fall of the former Soviet Union and the resulting transitions throughout much of the world; and Phase III, associated with globalization and exemplified by conditions of heightened political violence and instability and involving the normalization of a body of law associated with pervasive conflict as the rule rather than the exception (*Id*; 70-72).

The challenge arises when a successor regime is either too immersed in the past that the present is forgotten or is too indifferent to the past that the present is besieged with unlearned lessons from past mistakes. In both instances, the effects on a country's future are significant. Living in the past while operating in the present prevents a country from looking forward while forgetting the past and focusing only on the present ensures that

the mistakes of the past may just become the starting point of what the present has to offer. (Posner and Vermuele; 761) Posner and Vermuele submit, correctly, that "(t)he urge to wipe the slate clean and start at Year Zero is deep and understandable, but it has been resisted by most transitional states. Wiping the slate clean does not erase the memories of the victims or the continuing influence of the old regime's perpetrators and supporters" (*Id.;* 825).

The notion of achieving justice in transition is a process of bridging that divide created by a transition. Teitel, in a genealogical look at the literature, characterizes the process into three phases: Phase I, associated with war crimes, trials and sanctions, ended with the Cold War; Phase II, associated with accelerated democratization and political fragmentation and the supposed "third wave of transition," is best exemplified by the fall of the former Soviet Union and the resulting transitions throughout much of the world; and Phase III, associated with globalization and exemplified by conditions of heightened political violence and instability and involving the normalization of a body of law associated with pervasive conflict as the rule rather than the exception. (Teitel; 70-72) She describes the relationship between transitional justice and history as a complicated one because while "revisiting the past is understood as the way to move forward…the paradoxical goal in transition is to undo history, …to reconceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects." (*Id.*; 86-87) The balancing approach is also advocated by Jose Zalaquett, considered one of the pioneers of the field, who submits that there are "two considerations that must be balanced -- the ethical principles that ought to be pursued, and actual political opportunities and constraints that ought to be taken into account. By balancing these factors, ethical principles can be realized to the fullest possible extent. No single international convention or set of norms exists where such principles can be found. These principles must be fashioned from existing international norms, from ethical postulates, and from judgment, taking into account all relevant experiences" (Zalaquett; 1430).

The idea that transitional justice need not be completely tied down to looking at past mistakes but may be what Teitel calls a "progressive history" (86) is supported by the view that it need not always and only focus on a "backward look," i.e., punishment of wrongdoers, compensation of victims for losses, forcing individuals to return property wrongfully taken and revealing or documenting the truth about past events, but that it can also be understood in forward-looking terms, i.e., by providing a method for the public to recapture lost traditions and institutions, depriving former officials of a political and economic influence that could be used to thwart reform, signalling a commitment to property rights, the market and democratic institutions and establishing constitutional precedents and rules that may deter future leaders from repeating the abuses of the predecessor regime (Posner and Vermeule; 766).

The balance that is sought must also be placed, always, in context. The context would determine the means or tools to be used but also the sequence as well as the focus. Every transition is unique and the requirements of transitional justice of one regime would differ from those of another (Posner and Vermeule; 766). When a predecessor regime has been extremely brutal or repressive, the demands for justice, post transition, are generally more stringent and more urgent; on many occasions, this would lead to the use of conventional criminal law tools that may be available within a particular system, such as criminal prosecution and the creation of special tribunals, or the resort to reparations. When a former regime has been highly secretive and the truth has been scarce, the formation of truth commissions would possibly be more important and more urgent than criminal prosecutions; Zalaquett notes that "(b)ringing the facts to light is also, to some extent, a form of punishment, albeit mild, in that it provokes social censure against the perpetrators or the institutions or groups to which they belonged…(and) although the truth cannot in itself dispense justice, it does put an end to many a continued injustice. It does not bring the dead back to life, but it brings them out from silence" (Zalaquett; 1433). When the old regime has undermined the credibility of societal institutions by means of cronyism or nepotism, the use of lustration might be considered higher in priority than criminal prosecutions or even administrative sanctions.

The urgency that defines the means or tools to be used would also need to be reconciled, however, with the availability of resources and other practical considerations, such as the stability of the successor regime or the implications of implementing any of the tools on its ability to govern and carry out needed changes. As Zalaquett points out, "(i)n ambiguous transitional situations, dealing with past human rights violations is …a wrenching ethical and political problem. But there are no hard and fast rules on how to proceed. Ethical principles provide guidance but no definite answer…" (Zalaquett; 1429) and suggests that the approach should be to balance the ethical principles with the political opportunities and constraints because, only in doing so, will ethical principles be realized to the fullest possible extent (*Id.*; 1430).

In this regard, sequencing is as important as the choice of the transitional justice mechanism itself, i.e., the right mechanism or principle must be used at the right time. It becomes imperative then that the context—political, social, economic, cultural, personal---be fully clear or understood to a new government or a set of leaders before choosing which transitional justice tool to employ. A difficulty in this regard would arise for many leaders who take over in post-conflict or post-authoritarian regimes because many set out not looking to govern but simply to win, oust, depose or take over; for many, the singular goal was victory, in whatever form that it would take. Where victory is seen as the end not the means and governing becomes an alien and entirely foreign concept, the sequencing and choice of transitional justice mechanism would be a difficult notion to comprehend.

3. The Philippine Transition Continuum

The Philippines has had two contemporary experiences with transition—the first, when Ferdinand Marcos's 14-year hold on power ended in February 25, 1986 with the "People Power" revolt sweeping Corazon Aquino into power as President; and the second, when Gloria Macapagal-Arroyo's nine-year regime ended with the election of Mrs.. Aquino's son, the current President Benigno S. Aquino III. These two transition points took place within a span of twenty-five years and involved two presidents insistent on holding on to power and two presidents reluctant to take power.

The parallelisms are quite striking. Both Mr.. Marcos and Mrs.. Macapagal-Arroyo had not only actively sought the presidency but also tried any means to stay in office beyond constitutional limits. Mr. Marcos declared martial law, ruled by decree and changed the Constitution while Mrs. Macapagal-Arroyo, having assumed office under a parallel, albeit smaller-scale, "People Power" revolt in 2001, tried unsuccessfully to change the Constitution, manipulated the elections and eventually stayed in power by running for and winning a congressional seat during her incumbency as president. Both left a trail of questionable transactions that reeked of corruption and plunder and a record of human rights violations including unsolved extrajudicial killings, and enforced disappearances and restrictions on fundamental freedoms such as those pertaining to expression, organization and assembly and those pertaining to the press. Both left a legacy of tarnished societal institutions—having interfered with the legislature, the judiciary and the military as well as having undermined the institutions mandated with ensuring transparency and accountability.

Both Mrs. Aquino and Mr. Aquino III, on the other hand, were reluctant presidents--each responding only to a popular draft premised on an overwhelming popular sentiment against their respective predecessor regimes. Mrs. Aquino became the candidate that unified the political opposition against Mr. Marcos during the 1986 presidential "snap election," agreeing to do so only when it became clear that she was who the people wanted—having been presented with more than one million signatures asking her to accept the draft to run. Mr. Aquino III, the current president, on the other hand, became the "sentimental" choice after Mrs. Aquino passed away in August 2009, and accepted the draft belatedly and reluctantly. Both Aquinos enjoyed tremendous goodwill and were, thus, laden with similarly heavy and high expectations: to restore integrity and credibility to public institutions, to demand and ensure accountability and to translate the goodwill that both of them enjoyed personally into meaningful reforms. That they were mother and son should have been incidental, except that the son's governance style, demeanour, personality and even personal predilections clearly mirrored that of the mother and reflected in his choice of policies, priorities and programs thus making the relationship both relevant and pivotal.

Despite the similarities between mother and son, one crucial difference exists. Mrs. Aquino took office as head of a revolutionary government under Proclamation No. 1 which expressly declared that she and her Vice President Salvador H. Laurel were taking power "in the name and by the will of the Filipino people" and where she, among others, directed

the submission of courtesy resignations from all appointive public officials including all the members of the Supreme Court. (Proclamation No. 1, February 25, 1986). She presided over this government for one year, choosing to transition into constitutional governance by putting in place a new Constitution, drafted by 50 appointed Commissioners, which was submitted to the people at a plebiscite and ratified in February 1987. Mr. Aquino III and all other presidents who succeeded Mr.s. Aquino took office under the very same Constitution that Mr.s. Aquino had ordered written. In comparing their respective first years in office, this distinction becomes relevant and significant and will be discussed in greater detail *infra*.

Conscious of their respective mandate to preside over a transition from an authoritarian and unpopular predecessor regime, both Mrs. Aquino and Mr. Aquino III, in their respective first year as President, employed a variety of transitional justice tools in various forms, shades or hues—with varying degrees of success and effectiveness. Some of the tools that both used in common include vetting, the formation of truth-seeking entities, formation of peace negotiation panels and institutional reform; they differed significantly in terms of the use of criminal prosecution against their respective predecessors as well as the manner by which each would approach collective or institutional memory.

3.1. The Transition Tools: Corazon Aquino

3.1.1. Vetting

Mrs. Aquino put vetting high on the list of her priorities when she assumed office. Understandably anxious about any attempts at change being thwarted by entrenched bureaucrats appointed by and loyal to Mr. Marcos, Mrs. Aquino's first act was to remove any such obstacles.

Vetting is a transitional justice tool geared towards institutional reform; it is an important aspect of personnel reform and may be defined as assessing integrity to determine suitability for public employment where the measure of integrity is a person's conduct and where that conduct should, therefore, be the basis for any legitimate vetting processes. (United Nations, High Commissioner for Human Rights; 4) Within a post-conflict or post-authoritarian context, it becomes inherently a preventive measure but also a *post hoc* assessment, designed to safeguard any needed reforms from undue interference that may be posed by those entrenched in power and self-interested in remaining in power but also intended as an accountability measure for those who, at the time of transition, may be considered responsible for violations of human rights or any other conduct that might have contributed to the authoritarian rule or conflict situation. Vetting measures would inherently be urgent, drastic and summary; however, it must, of necessity, also be fair and reasonable. On the other side of the spectrum, would be purges and other large-scale removals on the sole basis of group or party affiliations that might be construed as being too broad and expansive and may invite due process concerns.

De Greiff argues that massive summary dismissals or purges should be distinguished from legitimate vetting because the criteria for the former are not sufficiently specific as to distinguish individual conduct from a perceived collective stigma while the latter would refer to "processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment" (De Greiff; 522-544). Viewed in this light, legitimate preventing vetting may cross the line to punitive vetting, which is the levying of punishment by removal from office without reasonable compliance with due process requirements.

After expressly acknowledging the revolutionary and extra-constitutional nature of her government through Proclamation No. 1, Mrs. Aquino's first official act was to order a reorganization of the entire government; she demanded the resignations of all Supreme Court Justices and all appointive government officials; through Proclamation No. 3, which provided for an *interim* "Freedom Constitution," she dissolved the legislature and exercised legislative powers.

A subsequent instruction caused the removal from office of elected local government officials and their replacements by Officers-in-Charge, until an election for these posts could be held under the new Constitution. The officers-in-charge were essentially *interim* local executives who were to serve in this capacity until the first elections under a new Constitution could be called. This was even more problematic and controversial from the "rule of law" standpoint as the governors and mayors had a mandate that was given to them through an outwardly and formalistically democratic process and such a mandate could not simply be disregarded without a judgment holding that the processes were fraudulent.

The possible resistance coming from the military and the police was also addressed by the early and essentially "forced" retirement of twenty-two "Marcos Generals," i.e., those who were perceived or actually loyal to Marcos. As Commander-in-Chief, Mrs. Aquino did not need anything else other than the authority of that office to carry this out. While these measures were drastic, they fell within the parameters of the revolutionary powers she exercised as President under Proclamation No. 1 and the *interim* Freedom Constitution.

3.1.2. Truth-seeking

Mrs. Aquino created two entities which, though not formally known or named as such, were actually *de facto* truth-seeking commissions or had the best potential to be such. The first was the Presidential Commission on Good Government (PCGG) created under Executive Order No. 1 while the other was the Presidential Committee on Human Rights (PCHR) created under Executive Order No. 8. Both were given wide-ranging powers to complement their respective primary mandates. For the PCGG, it was to recover ill-gotten wealth of the Marcos family and its cronies (E.O. No. 1, First Whereas Clause); for the PCHR, it was to investigate gross violations of human rights during the Marcos regime, such as disappearances, extrajudicial killings and involuntary internal displacement (E.O.

No. 8, secs. 4(a) and 5(c), (d)). Under these two Executive Orders, powers traditionally reserved only to the courts and congress, such as the power to subpoena (E.O. No. 1, sec. 3(e); E.O. No. 8, sec. 5(c)) and to hold in contempt (E.O. No. 1, sec. 3(f); E.O. No. 8, sec. 5(f)), were conferred on both the PCGG and the PCHR.

From the transitional justice perspective, the use of Truth-seeking bodies may have any or all of the following basic aims: (a) to discover, clarify, and formally acknowledge past abuses, (b) to respond to specific needs of victims; (c) to contribute to justice and accountability, (d) to outline institutional responsibility and recommend reforms and (e) to promote reconciliation and reduce conflict over the past. (Hayner; 24) Clearly, the two entities—the PCGG and the PCHR—fall within these basic aims of truth commissions and, though not so named, could be considered as truth commissions for all intents and purposes.

3.1.3. Peace building and reconciliation

Mrs. Aquino inherited a deeply divided country with at least two major insurgencies. Even during Mr. Marcos's regime, the country was already beset with insurgency from the Communist Party of the Philippines (CPP) and its military arm The New People's Army (NPA) as well as secessionists under the then-active Moro National Liberation Front (MNLF). Keeping a campaign promise, Mrs. Aquino ordered the release of all political prisoners, including the then-detained Jose Maria Sison, the acknowledged founder of the CPP and Bernabe Buscayno, the acknowledged founder of the NPA. (Fineman, Mark and Rone Tempest, Los Angeles Times, 28 February 1986: online; last Accessed on August 8, 2012) During this period of revolutionary transition, Aquino offered peace talks with both the CPP-NPA and the Moro National Liberation Front (MNLF), which offer was accepted by both the CPP-NPA and the MNLF.

The release of political prisoners was significant not only because it reflected Aquino's personal experience as the wife of a political prisoner but also because it effectively conveyed her administration's desire to have a fresh and peaceful start. The release of the political prisoners was effectively an amnesty granted at the start of her term by a president with full revolutionary powers and it was a gesture that was accepted by the political prisoners, thus indicating a clear acknowledgment of her government and her authority. The peace negotiations with the CPP-NPA did not, however, end with a peace accord. It ended abruptly as the negotiators for the CPP-NPA withdrew after the so-called "Mendiola Massacre," during which a group of peasants and farmers demanding genuine agrarian reform marched to the President's palace but were violently dispersed; 13 were killed and at least 40 others injured when they were fired upon by presidential guards. This led to the breakdown of the talks as the government panel chair himself resigned in protest and the members of the CPP-NPA panel to the negotiations withdrew. Thus, no significant headway was made in peace building with the CPP-NPA during that period and for the rest of Aquino's term.

The peace negotiations with the MNLF would be relatively more fruitful, though not as permanent. In 1987, Aquino herself personally visited Nur Misuari, the Chair of the MNLF in his home base in Jolo, Sulu in Mindanao—an unprecedented act that generated goodwill on the part of Misuari. This goodwill certainly helped in creating the Autonomous Region in Muslim Mindanao, which the 1987 Constitution ordains. Mr. Misuari would have his share of legal problems though and his group, the MNLF, would eventually lose credibility and be replaced by yet another group, the Moro Islamic Liberation Front (MILF), with whom succeeding presidents (Estrada, Macapagal-Arroyo and Benigno Aquino III) would negotiate.

As a final note on this point, it must be emphasized that, unlike conventional notions of peacekeeping and reconciliation efforts under transitional justice, Mrs. Aquino never initiated talks with the Marcoses. Her firm insistence was that Mr. Marcos should be accountable for his misdeeds and, short of a public admission, she was unwilling to consider the possibility of any rapprochement with the Marcos family. The firmness of her position on this matter was underscored by her refusal to allow Mr. Marcos and his family back into the Philippines when he was alive as well as after he had died.

3.1.4. Documentation and Preservation of Records; Institutional Memory

In Proclamation No. 1, Mrs. Aquino specifically left the civil service untouched, ordering a *status quo* and giving an exhortation to "preserve all records with scrupulous care." (Proclamation No. 1, secs. 3 and 4 (1986)) Unlike Ackerman, who advocated burning all records for fear that none could be trusted and that the new leaders would use them to blackmail the previous leaders, Mr.s. Aquino's revolutionary government clearly placed a premium on finding out what was what first. (Ackerman; 81) This was, again, understandable simply because Mr. Marcos had been in power for so long and information had been so repressed that Mr.s. Aquino and her government, literally, did not know what was fact and what was fiction.

3.1.5. Prosecution, Reparations and Addressing Impunity

If there was one thing that the people expected of Mrs. Aquino, which she failed or refused to do, it was to prosecute Mr. Marcos and hold him accountable for the many violations of human rights during his regime and for the systematic plunder of the country's treasury. To the day that Mr. Marcos died, not a single case was filed against him in the Philippines for the simple reason that Mrs. Aquino refused to allow him back and, therefore, the courts could not acquire jurisdiction over him and his family. Citing national security, Mrs. Aquino barred the Marcos family and specific cronies from returning to the Philippines. It was the fear that Marcos still retained a loyal following, which he did in his hometown in the North of Luzon, and could destabilize a still fragile government, that government invoked to justify the ban. It is a matter of historical record that Mr.s. Aquino survived the most number of attempts to oust her by members of the military loyal to then-Defence

Minister Juan Ponce Enrile, one of those who helped put her in power. The Supreme Court ruled in *Marcos v. Manglapus*, G.R. No. 8821 (1989) to favour the government ban on Marcos's return from exile while he was alive, which it reiterated after he died. Marcos's remains were allowed back into the country only after Aquino's term when President Fidel Ramos, Cory's successor and a second cousin of Marcos, acceded to the return of Marcos's remains upon compliance with specific conditions. One of those conditions was that the remains would be brought to his hometown in Ilocos Norte. The family complied but has not buried the remains, choosing to keep the mummified remains in an underground refrigerated crypt, with a Philippine flag draped over it and the President's seal behind it and which is made open to public viewing. To this date, the remains of Marcos are still not buried and the issue of burying him is still open—with the sticking point being that the family insists—and has insisted ever since--on a burial with full honours at the *Libingan ng mga Bayani* (literally, "Burial Ground of Heroes") and to which every president after Ramos have refused.

Mrs. Aquino's refusal to allow Marcos back when he was alive directly resulted in a failure to cause prosecutions to be brought against him, his family members and his cronies. The civil suits that were filed after his death are all for recovery of damages against his estate but there is not one single case against Marcos for looting the treasury, for his policies that led to torture, to extrajudicial killings, to enforced disappearances and other violations of human rights. And since there has yet to be a clear accounting of his estate, i.e., which assets properly pertain to him and which assets pertain to the country, it is doubtful that any litigation, even if successful, would result in a judgment being enforced.

Even as she effectively foreclosed the option of criminal prosecution by refusing to allow Marcos back, her government actively supported the class action suit filed in Hawaii against Marcos by several human rights victims during martial law. This class action suit filed under 28 USC §1350 or the Alien Tort Claim Act and the Torture Victim Protection Act was initially dismissed on jurisdictional grounds but after a successful appeal to the U.S. Court of Appeals for the Ninth Circuit, the case went to trial. Underscoring her commitment to this cause, Mrs. Aquino's first Justice Minister even submitted an opinion that Marcos was not entitled to immunity and filed an amicus curiae Brief before the U.S. Court of Appeals for the Ninth Circuit in 1987. (Van Dyke 188-189) From the beginning, Mr. Marcos's lawyers vigorously opposed this and it took some time for the case to be heard. However, after about ten years, a final judgment was reached after trial with a jury awarding the class consisting of 9,531 plaintiffs $1.2 Billion in exemplary damages and $766 Million in compensatory damages in the *Trajano* litigation before the Federal Courts of the United States.

While Marcos was in exile and after his death, it was the consensus that history would judge him harshly. The irony is that there does not even appear to be any basis for a judgment as there is no clear acknowledgement in recorded history as to what has been done. There is not a single declaratory judgment that would document that Marcos was ever charged

with, let alone found guilty of, any crime. Even as a footnote, the truth as to the level and extent of corruption as well as the level and extent of human rights violations during his regime has not been told. To this day, at his ancestral home in Batac, Ilocos Norte, he is referred to as "*Pangulo*" ("President") and is lovingly remembered as a hero.

3.1.6. Institutional reform

Determined to reverse what Marcos had destroyed in terms of civil and political rights and freedoms, Mrs. Aquino issued Proclamation No. 2, lifting the suspension of the writ of *habeas corpus* which Marcos had used to keep people detained indefinitely and which the Supreme Court had sustained during martial law. This was an important measure that not only emphasized the primacy of freedoms even in her revolutionary government but also drove home the point that she was not going to be like Marcos in this respect. But, by far, her most significant proclamation as president of a transitional revolutionary government would be Proclamation No. 3 that established a provisional constitution or a "Freedom Constitution." Rejecting the 1973 Constitution, which represented the most grievous excesses of the Marcos regime, the revolutionary government was determined to create a new constitutional order starting with an entirely new Constitution. But until that constitution was written, the new government refused to operate under the 1973 Constitution.

The provisional or "Freedom" constitution abolished the national assembly by simply superseding the provisions in the 1973 Constitution defining the legislature and allocating power to it. (Freedom Constitution, Art. I, sec. 3) Instead, the President was vested with legislative powers until a new legislature shall have been elected under a new constitution. (Freedom Constitution, Art. II, sec. 1) Under Article V of Proclamation No. 3, Mrs. Aquino ordered the creation of a Constitutional Commission to draft a new constitution to replace the Freedom Constitution. To implement this provision, she issued Proclamation No. 9, convening the Constitutional Commission, and appointed fifty commissioners to draft the new charter. The Commission formally presented to Aquino the draft charter on October 15, 1986. After a nationwide information campaign to inform the people about the new draft charter, it was submitted for ratification on February 2, 1987. The draft charter was overwhelmingly ratified with 76.37%, or 17,059,495 voters, favouring ratification as against 22.65%, representing 5,058,714 voters, opposing ratification.

On February 11, 1987, President Corazon "Cory" Aquino voluntarily ended her revolutionary government, gave up her vast powers under the Freedom Constitution and, together with all government officers and employees including the Armed Forces of the Philippines, took an oath to protect, preserve and defend the 1987 Constitution as President of the Philippines. This signalled not only the return to the old ways of doing things—bicameral congress, separation of powers, a written constitution with a Bill of Rights, among others—but also effectively the end of the "transition period" as far as Mrs. Aquino was concerned. Yet, there were still so many things left to do, and so many things started that had to be completed.

3.2. The Transition Tools: Benigno Aquino III

Mr. Aquino III is, in many ways, his mother's son. Like his mother, he is not the flashy type; he often keeps his own counsel and is often also stubborn and intractable, especially when a decision has already been made. Like his mother, he detests unsolicited advice and keeps a close, small group of advisers. This similarity in perception, attitude and even governance style shows in some of the policies that Aquino III has implemented; more relevantly, the choice of transition tools that Mr. Aquino III has employed track the choices that his mother employed, albeit with different results. Perhaps very much aware that his mandate is to ensure that the impunity gap that existed during Mrs. Macapagal-Arroyo's time is addressed, Mr. Aquino III's policies evince a transitional justice paradigm much more clearly than Mrs. Aquino's.

3.2.1. The long shadows of the Past

Similar to his mother's situation, it did not take long for Marcos's shadow to hover around Mr. Aquino. Because every post-Marcos president, with the exception of Fidel V. Ramos (who allowed the return of Marcos's remains but refused the hero's burial, conceding only to a burial in Marcos's hometown) had refused to deal decisively and categorically with the issue of Marcos's burial as a hero, this question came up again early in Mr. Aquino's term. When first presented with the request of the Marcos family for a hero's burial, Mr. Aquino III initially did not act on the request but tossed the political "hot potato" to his politically-savvy vice president who, exhibiting a seasoned politician's deft manoeuvring skills, then took the issue to the nation by asking people in a survey how they felt and what they wanted. The survey results showed an almost statistical dead heat at 51-49 against the hero's burial. Despite the results, it took some time before Mr. Aquino III finally announced that he would not allow Marcos to be buried at the heroes' cemetery and finally stating publicly his position that Marcos was no hero but was instead a dictator who ravaged a people and plundered a country (Joel Guinto, Philippines' Aquino Says No Hero Burial for Marcos in His Term; online; last Accessed August 10, 2013). This position is significant because it would be the first time Mr. Aquino III would publicly declare his position on the fitness of Mr. Marcos to be considered a hero. Finally, the long shadow of Marcos had been put away, at least temporarily.

After Marcos, however, another shadow loomed large over Mr. Aquino III and it was Mrs. Macapagal-Arroyo's. Conscious that his mandate was primarily to hold her accountable, Mr. Aquino III sought to reduce the impunity gap arising from the previous failures to hold Macapagal-Arroyo accountable for the corruption-related charges levelled against her from 2001-2010. While in office, Mrs. Macapagal-Arroyo was immune from suit while in office; several attempts to impeach her failed to garner sufficient votes in the House of Representatives, which she controlled during the nine years of her administration. To do this, Aquino III chose to use a two-part approach: first, restore trust in public institutions mandated to ensure accountability, which were rendered ineffective during

Macapagal-Arroyo's administration, and second, prosecute Mr.s. Macapagal-Arroyo and hold her accountable for graft as well as for violations of human rights. The first part he could only do by removing the people currently leading these institutions before any meaningful reforms could be implemented; the second part he could only do if he had enough evidence to sustain the charges to be filed against his predecessor.

3.2.2. Addressing the impunity gap and Institutional Reform

Two of the most important institutions that were rendered ineffective during Macapagal-Arroyo's term were the Office of the Ombudsman and the Supreme Court, both of which had appointees who were loyal to Macapagal-Arroyo. At the same time, he was bent on prosecuting Gloria Macapagal-Arroyo, who continued to hold office as an elected Congresswoman.

Using the process of impeachment, a constitutional mechanism to implement accountability for selected public officers, Mr. Aquino III set out to remove first the Ombudsman and later the Chief Justice of the Supreme Court. He succeeded in both. The Ombudsman chose to resign instead of facing trial before the Senate. On the other hand, the Chief Justice, who was appointed by Mrs. Macapagal-Arroyo, despite a constitutional ban on appointments (which the Supreme Court itself validated in *De Castro v. JBC*, G.R. No. 191002 on March 17, 2010, but which the President refused to acknowledge as binding), was removed from office after conviction in the Senate during an impeachment trial.

3.2.3. The Philippine Truth Commission of 2010

Mr. Aquino III's first executive order created a truth-seeking body that, unlike those of his mother's, is expressly named as such. (Executive Order No. 1 (2010)) The Philippine Truth Commission of 2010 was described as "having all the powers of an investigative body" and was given the primary task of conducting "thorough fact-finding investigation(s) of reported cases of graft and corruption … involving third level public officers and higher, their co-principals, accomplices and accessories from the private sector, if any, during the previous administration and thereafter submit its finding and recommendations to the President, Congress and the Ombudsman." (Executive Order No. 1, sec. 1 (2010))

Barely a month from its issuance, however, the constitutionality of Executive Order No. 1 was challenged before the Supreme Court which eventually ruled in *Biraogo, et al. v. Truth Commission* that Executive Order No. 1 was unconstitutional for violating the equal protection clause of the Constitution because it singles out only the "previous administration" in the scope of its inquiry. The Court specifically ruled that "(t)he clear mandate of the envisioned truth commission is to investigate and find out the truth "concerning the reported cases of graft and corruption during the previous administration" only. The intent to single out the previous administration is plain, patent and manifest. Mention of it has been made in at least three portions of the questioned executive order…

That the previous administration was picked out was deliberate and intentional as can be gleaned from the fact that it was underscored at least three times in the assailed executive order. It must be noted that Executive Order No. 1 does not even mention any particular act, event or report to be focused on unlike the investigative commissions created in the past…The equal protection clause is violated by purposeful and intentional discrimination." (G.R. No. 192935, December 7, 2010)

Significantly, however, the Court differentiated the Philippine Truth Commission of 2010 created under Executive Order No. 1 from other truth commissions, specifically referring to the South African model but dismissing the PTC as "a far cry from South Africa's model …(because) (t)he latter placed more emphasis on reconciliation than on judicial retribution, while the marching order of the PTC is the identification and punishment of perpetrators" (*Id.*).

Mr. Aquino III's defeat on Executive Order No. 1 at the Supreme Court was significant because, similar to Mrs. Aquino's Executive Order Nos. 1 and 8 creating the PCGG and PCHR, respectively, the intended Truth Commission of 2010 was designed to be an extraordinary remedy to carry out the much-needed transition. Unlike Mrs. Aquino's PCGG and PCHR, both of which were never successfully questioned, Mr. Aquino's first major initiative, and the clearest indication of his government's use of a transitional justice paradigm, was stopped dead in its tracks by the Supreme Court.

It must be noted that, despite the Court's suggestion that the Truth Commission be created by an act of Congress and not simply by executive order, Mr. Aquino III has not taken steps towards reviving the intended Philippine Truth Commission. One reason that can be offered for this is that the Truth Commission was intended as a stopgap measure to ensure accountability and file cases against the former President and was necessary only because the former Ombudsman was considered to be loyal to Mrs. Macapagal-Arroyo. With the resignation of the former Ombudsman and the appointment of a new Ombudsman, the stopgap measure was most likely deemed unnecessary.

3.2.4. Vetting

Like his mother did, twenty five years before him, Mr. Aquino III also ordered a reorganization of the government, particularly the entire executive department through Executive Order No. 2 which directed that all "(m)idnight appointments, as defined…are hereby recalled, withdrawn, and revoked (and) (t)he positions covered or otherwise affected are hereby declared vacant"= and pursuant to section 3, directed that officers-in-charge take over. (Executive Order No. 2, secs. 1, 2, 3 (2010)). "Midnight appointments" are defined under this Order as those made by the "former president and other appointing authorities in departments, agencies, offices and instrumentalities" (Executive Order No, 2, sec. 1 (2010)) within the election ban on appointments under the Constitution which, in 2010, started on March 11. Thus, the definition included "(t)hose made on or after March 11, 2010, including all appointments bearing dates prior to March 11, 2010 where the appointee

has accepted, or taken his oath, or assumed public office on or after March 11, 2010, except temporary appointments in the executive positions when continued vacancies will prejudice public service or endanger public safety as may be determined by the appointing authority" and "(t)hose made prior to March 11, 2010, but to take effect after said date or appointments to office that would be vacant only after March 11, 2010." (*Id.*) Unlike Mrs. Aquino's vetting, which was met with protests but not much else, Mr. Aquino's vetting was met with both opposition and legal challenge before the Supreme Court.

While the need for the reorganization could not be seriously disputed, the same question of particularization again emerged. Similar to Mrs. Aquino's Proclamation No. 1, Mr. Aquino III's vetting process was not conduct-based. In removing the so-called "midnight appointments" and vacating those positions, Mr. Aquino III simply declared that appointments that were "valid until annulled" were, in fact, in violation of the Constitution--without a finding of such violation by a competent court. Additionally, Mr. Aquino's Executive Order No. 2 premised the reorganization on a Supreme Court administrative ruling, *In Re: Valenzuela* (AM No. 98-5-01-SC (Nov. 9, 1998)), which the Court itself had declared abandoned in *De Castro v. JBC* (G.R. No. 191002, March 17, 2010). Unlike Mrs. Aquino who enjoyed extraordinary powers which vested her actions with normative validity, Mr. Aquino III's use of vetting was questionable from the normative standpoint because he did not have the luxury of issuing this order under a revolutionary situation where he could disregard a Court ruling that he personally disfavoured.

4. From Aquino to Aquino: The Transition Continuum in Context

The similarity in both Presidents Aquinos' choice of tools and even sequencing is significant. From the point of view of transitional justice, the use of vetting as the first in a sequence of tools to carry out the transition is significant. It reflects the need to remove any obstacles to genuine reform that may arise out of possible obstructionist efforts by those loyal to the former regimes. It must be noted that both Mrs. Aquino and Mr. Aquino III found themselves in a situation where the restoration of trust in institutions, which had been undermined by their respective predecessor regimes, was paramount.

Whether or not the vetting was legitimate, however, was a question that needed to be determined and decided because it would determine the legitimacy of any further actions as well as the pace of the transition. Mrs. Aquino's orders for elected and appointed officials to submit courtesy resignations to allow her to reorganize the government did not specify any particular conduct, basis or standard from which cause for the removal from office could be inferred. The language of Proclamation No. 1 clearly shows that, rather than single out specific individuals based on previous conduct, Mrs. Aquino directed an undefined and unspecified group of persons to remove themselves with the threat of being removed otherwise; implicit in the language of the instruction was the premise that those expected to resign were those who had served to perpetuate or tolerate Mr. Marcos's continued rule. From an administrative due process perspective, this process would have

been highly problematic-- because it was a blanket generalization and a wholesale judgment of fitness to remain in office *sans* notice or right to be heard—had it not been ordered by the President of a revolutionary government. Viewed in this light, while Mr.s. Aquino's Proclamation No. 1 may partake more of punitive, rather than preventive, vetting, it was never questioned in court and was, in fact, accepted and complied with.

Mr. Aquino III has been criticized for many things, rightly or wrongly, but his focus on prosecuting Macapagal-Arroyo and "dismantling" the structures she set up during her 9-year reign should not be one of them. Though not as successful and as strategic as many would have wanted, it is significant that Mr. Aquino III has managed to do more than what his mother did, and without revolutionary powers at that.

While his attempt at a truth commission was struck down by the Supreme Court, he has managed to do institutional house cleaning at the highest levels without having to vet or lustrate; using constitutionally-granted powers, his administration has been able impeach two high public officers, causing one to resign and removing the other after a judgment of conviction rendered by the Senate acting as an impeachment court. These developments augur well for chances of prosecuting not only Gloria Macapagal-Arroyo herself but all others who profited or connived with her. He has publicly put on record his opposition to Marcos being considered a hero and has stopped dead in its tracks what appeared to be an orchestrated campaign to recast Marcos in a more positive light—possibly to pave the way for Marcos's son and namesake to run for president after his own term ends. He has also publicly put his support behind the pending bill on compensation for the victims of martial law. In his second State of the Nation Address, the reparations for the Marcos human rights victims merited one sentence—"(w)e aim to give due compensation to the victims of Martial Law" (President Benigno S. Aquino III, Second State of the Nation Address, 25 July 2011).

More importantly, he has reduced the impunity gap by ensuring that his predecessor Mrs. Macapagal-Arroyo stands charged in court and will face trial and be held accountable for her many offenses; at the moment, she faces a charge of electoral sabotage and another for plunder, both very serious offenses. Whether she will be held accountable for the other instances of graft and corruption as well as the many extrajudicial killings and enforced disappearances, which appeared to be state policy during her administration, remains to be seen.

What we are seeing though are clear signs of a transitional justice paradigm in Mr. Aquino III's actions. In the relatively short amount of time that he has held office, he has done more in shortening the transition continuum than his mother and all other presidents combined. Very recently, the Commission on Human Rights (CHR) was able to win a significant victory when it was able to secure the declassification and release of previously classified documents during martial law—from 1972 to 1981. (Philippine Daily Inquirer, "Philippines Releases Secret Martial Law Records, September 11, 2011; Accessed online,

last Accessed August 9, 2012) In a joint statement, the Secretary of Defence and the CHR Chairperson stated that "the… (military is) to make them available for historical and other public purposes and thereby start a process of healing based on truth, transparency, fairness and justice" (*Id.).*

5. History teaches us…nothing.

Reckoning with the past is always a tricky proposition. The Philippines is a prime example of just how doomed a people are to repeat history if its lessons are not learned and understood and acted on. Our experience with Mr. Marcos should have been one too many yet, it was repeated because it was never decisively dealt with by Mr.. Aquino during her administration. It is phenomenal how both Mr. Marcos and Mrs. Macapagal-Arroyo could have ruled the country in a similar way—where targeted killings and disappearances became policy, where crooked deals were negotiated as part of "business as usual," where family members and cronies benefitted from government contracts, where the military and police were used to terrorize the people and not protect them, where law was enforced with an iron fist and where impunity reigned. It is an abject lesson in what an important role memory plays in transition.

Corazon Aquino happily stepped down from office on June 30, 1992—the only President who could have run for re-election under the Constitution she had put in place, but refused to. She ended her Fifth and last State of the Nation Address almost a year before with these words, "This is the glory of democracy, that its most solemn moment should be the peaceful transfer of power" (President Corazon C. Aquino, Fifth State of the Nation Address, 22 July 1991). Her successor—the one she endorsed and who won the election--was someone she trusted and knew: Fidel Ramos. The transfer of power was constitutional, unlike her own experience; and perhaps for Mr.s. Aquino, that was what was most important. But as she transitioned out of power, much of the transition from the authoritarian rule of Marcos had not been completed; for some, it had not yet begun.

While many of Marcos's men were out of government, many of his presidential decrees remained effective and unrepelled. Many of the extrajudicial killings and disappearances that marked Mr. Marcos's regime remained unsolved, with no significant strides taken towards identifying perpetrators and uncovering orders that allowed these killings and disappearances to thrive; the relatives of those who were summarily executed never saw cases filed against those responsible; in many instances, those responsible were never identified. Those who were tortured never saw their torturers held accountable as, in fact, many of them continued to hold power; the assets of the Marcos family and their cronies remained unreachable; and the military had once again flexed its muscle as if to remind its outgoing Commander-in-Chief of what it had done in the past and what it could do again. Mr. Marcos and the dictatorship remained a fresh memory. Those who lived through martial law saw Mrs. Aquino's term as an opportunity to make things right—to put the past behind and move forward; perhaps to howl but then also to heal. But Aquino's term did not completely put the past behind because the truth remained elusive, as did justice; for

those who suffered tremendously during martial law, the wounds inflicted by Mr. Marcos and martial law remained, unscabbed and unhealed.

Much of the disappointment arises from how Mrs. Aquino chose to use—or not use—the powers of a revolutionary president that she was vested with. Despite tremendous goodwill and a popular mandate, Mrs. Aquino chose to exercise her powers as President of a revolutionary government sparingly and, as a result, was unable to carry out the sweeping reforms and changes that a genuine transition demanded. On the other hand, Mr. Aquino III has shown a firmer resolve to use his constitutionally-limited powers on a more sweeping and drastic scale than his mother.

The significant factor perhaps lies in the perspective that each brought to the transition process. Mrs. Aquino was clearly aware that she was a transition president and felt that all she needed to do was bring about democracy and constitutional governance and make both of them work; the realization that a true transition president needed to act both urgently and strategically did not fully sink in. Mrs. Aquino had, during her first year in office, the greatest opportunity to carry out a genuine transition—to put in place structures that would not allow an authoritarian rule to flourish again, to allow for collective memorialization of the horrors of 14 years of martial law, to address impunity by enforcing accountability for past actions by officials of the previous regime, starting with Mr. Marcos. However, for many reasons, including the need to first allow her government to survive politically, full advantage of these opportunities were missed. Mrs. Aquino survived the most number of *coup d'état* attempts as any post-Marcos President ever had and this certainly added to the things that her administration needed to deal with. The inability to fully cleanse the military of those loyal to Mr. Marcos stems from the reality that she was the Commander-in-Chief of the very military that she expected to protect the people but from where the most imminent threat to her government's existence would come. The precarious balancing act precluded any comprehensive strategy at ensuring that the organization could be fully professionalized. Compromises such as these, arising from the circumstances that faced the government at the moment, may be necessary but they are costly in that they detract from the necessary steps that a full and complete transition needed.

Mr. Aquino III, on the other hand, was fortunate enough to have taken office constitutionally with an overwhelming and indisputable mandate. Unlike his mother, he did not have to deal with issues of legitimacy and questions about his mandate and could thus address the more immediate concerns, chief of which was addressing impunity. This may explain, in part, why he was able to do more within a shorter period of time with lesser powers than his mother had. Like his mother, however, he also views his presidency as a transition from nine years of an administration that was unpopular, authoritarian, secretive and corrupt to six years of what he calls "the straight and narrow path," which is a direct translation of his campaign slogan and now governance mantra "*tuwid na daan*." This common perspective also explains why Mr. Aquino III's strategies show hints and hues of a transitional justice paradigm.

These hints and hues in the administrations of the two Presidents Aquino reflect the relationship of the circumstances and context prevailing at the time and the notion of justice involved (Teitel; 69). What is striking is the continuum that has been created over a span of twenty five years—what the mother has actually commenced, the son is now taking on and hopefully will finish. For a country with a notoriously short memory, it is hoped that the son will be able to bring the much needed closure that the past demands without forgetting the lessons for the present that it imparts and the vision for the future that it brings. Otherwise, we would have correct again the saying that, indeed, history will teach us that history teaches us nothing.

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CREATING PEACE THROUGH PEACE JOURNALISM AS AN ALTERNATIVE NEWS FRAMING

Inge Christanti & Yanuar Sumarlan*

People most likely read about news on war or conflict from newspapers. Reading the articles on conflicts often provokes hatred or anger rather than empathy or sympathy. This may lead to revenge or other reactive action that harms other people. Actually, this negative effect can be mitigated if the news is framed with other way of framing.

This paper offers alternative news framing for journalists in news on war or conflict to prevent and reduce negative effects on their readers. This paper starts with the way media influences and moulds readers' opinion on many things that happen around them. Opinions that are shaped by printed media are based on how journalists frame the news. One event can be framed differently depended on how journalists emphasize the event chronologically and pick the angle of reporting the news. As alternative news framing, the peace journalism can be used by journalists to contribute to create peace in readers' communities.

Some news regarding certain religious conflict in Indonesia will be analysed in this paper. News framing analysis will be revealed to show how framing news is important to reduce negative effects. In addition, this paper will discuss about the important role of journalists as peacemakers. Thus, peace journalism is the alternative news framing for journalists to take part in creating peace for communities undergoing conflict.

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1 Introduction

1.1 People and Mass Media

Printed or broadcast media reports a lot of new or updated information that is needed by the public on daily basis. To fulfil the public's need for news or updated information, media always try to report news that "sells." Thus journalists are competing among themselves every day to produce interesting, valuable, and catchy news. McQuail (2000) and Wolfsfed (2004) showed several points to ponder for journalists to write these kinds of news. These points are the news' magnitude, timing, proximity, and straightforwardness. Magnitude means the importance of the incident or events reported. For example, the news about Rohingya community has become one of the top issues in almost all media. Timing means journalists should always cover fresh news; the public want new information every day. Readers hope to read fresh incident or event that just happens. Proximity means how well the public know about the place or people in the news. The news about celebrities, for example, is always interesting for many readers because they know who the celebrities are. Straightforwardness refers to the simplification of complicated or ambiguous events by the media that will generally work to single out the ambiguous attributes within a complex story. For example, the media singles out only actions, which are more direct and clear-cut, rather than explaining the more complicated causes and contexts of those actions (Watson 2003). Besides, journalists have limited time and space to report an event or incident in its intricacies. For example, the news about labour demonstration usually covers the demonstration itself and the labourers' demand without supplying further background information of the event. It means that readers will only get a part of the whole picture.

The previous explanation shows that media and readers have relation as news providers and users. Media plays an important role as a source of information for people (Olii and Erlita 2011). As providers and users, media and the public interact daily as a part of communication process that produces public opinion.

1.2 Public Opinion

For Panuju (2002), public opinion is compilation of images which is created by the communication process. Constructive processes of public opinion start from a factual reality or an event that is turned into discourses in the process of communication (Panuju 2002). The purpose of public opinion creation is to influence people or some groups among the public. Newspapers as one form of printed media moulds the public opinion through its articles. These articles contain facts which are used to create public opinion. In reality, facts described in the articles can reinforce, change, or influence the public opinion. The news from printed media like newspapers can thus modify people's behaviour. It can also bend pattern of behaviour or attitude of communities on certain issues (Rivers, et al. 2003).

River's (2003) opinion that news could modify people's behaviour is also supported by Perse (2001). Perse claimed that several studies on media effects onto reader population suggest that "media and their contents have significant and substantial effects" (2001). The result of this study points to three general effects from the media's reports: cognitive, affective, and behavioural effects. It means that media does more than just influence readers' behaviour. Cognitive effect, for example, is concerned with how people process the information to learn something from it; how people's belief are formed or reformed by the information and how the information could satisfy people's curiosity.

Affective effect is about the way readers react emotionally to the printed information from the media. Emotive reaction impacts significantly on readers' understanding of reported events and reinforces or changes their position towards more positive or negative ways about certain issues. Lastly, behavioural effect is about the way the reported information may provoke actions taken by readers after they process the information (Perse 2001). Thus, the media influences people's mind on certain issues by creating a public opinion. Although the media sometimes gives a very little information about the issue, many readers may receive it as the whole fact or truth. Based on this little knowledge, people react and take a position on certain issues.

2 Mass Media in Indonesia

In the New Order Era (pre-1998), the government tightly controlled the press with heavy censorship and difficult process in giving publication license. At this era, the government could arbitrarily with impunity close down or ban certain publications which were considered as disobedience to the regulation. Sensitive issues on ethnic, racial, and religion, for example, were strictly forbidden to report. The government argued that these sensitive issues could jeopardise the security and political stability of the whole nation. Fortunately, this condition changed during the Reformation Era (post-1998).

Reformation era was welcomed by the communities as the era of freedom especially for journalists. If in the earlier era journalists could only cover difficult issues with fear of getting dire warning from the government. Finally, they can cover almost any news which is interesting and "sell" for the Indonesian public. The media in Indonesia had waited for such freedom of press for more than three decades. As a result, many newspapers, tabloids, magazine, radio, and television stations emerged in the beginning of 1999. Increase in number of media's company was recorded by Newspapers Worker Union of East Java as quoted by Panuju (2002).

Type of Media	Year 1997	Year 1999
Newspaper	79 companies	299 companies
Tabloid	88 companies	866 companies
Magazine	141 companies	491 companies
Bulletin	8 companies	11 companies

Table 1: Growth of Mass Media Company (1997-1999)

Sense of freedom was enjoyed by the Indonesian public and publication companies that were drunk in a euphoria. Freedom 'euphoria"' encouraged many people (including the media) to set themselves free to cover all of the previously "forbidden or taboo" issues. Journalists used this changing situation to report the news around the issues which were considered forbidden or taboo earlier. Yet, the Indonesian journalists were not apparently fully prepared for this kind of freedom. The unpreparedness of Indonesian journalists with the freedom was also reported by Panuju (2002) who claimed that the journalists faced a culture shock. They did not change their 'old way' of covering news through what was termed as "opinion news" or "talking news." Panuju (2002) also claimed that the media started to focus on gaping differences among groups or among individuals. The journalists only covered "differences" and "conflicts" in many aspects, and they thus merely worsened the conflict itself (Panuju 2002).

In addition, the journalists had shown little capability or strategic skills in covering the conflicts associated with ethnic, religious, racial and inter-groups relations. The Indonesian journalists thus entered a new condition which is described by McGoldrick and Lynch as a "period of soul-searching about how to combine their new freedom with a sense of responsibility" (2000).

3 Conflict in Indonesia

Indonesia is an archipelago that consists 17,500 islands and a home for more than 200 million people. From Sabang to Merauke, Indonesia has various races, ethnic groups, and religions (Portal Nasional RI, 2010). Based on Presidential Decree Number 1 / PNPS/ 1965, the government acknowledged six religions in Indonesia: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. The data from population survey in 2010 by Bureau Statistic of Indonesia shows that Indonesians profess Islam (87.18 percent), Christian (6.96 percent), Catholicism (2.91 percent), Hinduism (1.69 percent), Buddhism (0.72 percent), and Confucianism (0.05 percent). Besides, Indonesia also has various traditions or cultures. Various religious beliefs, ethnic groups, races, traditions, and cultures have become interesting factors for tourism promotion. Yet, they also have become sensitive issues that may cause conflicts for the communities with such a different set of nuances.

Since the Reformation Era, Indonesia has undergone many conflicts related to these sensitive issues along with the events around May 1998. Within the month, chaos happened in Jakarta and spread to several other big cities in Indonesia. This chaos was related to differences in racial and religious background of the Indonesians. Later, in March 1999 conflict spread quickly to Ambon between Muslims and Christians. Then, several conflicts followed through in Poso, South Maluku (Mollucas), Sampit (South Kalimantan), and Pontianak (West Kalimantan). Several incidents related to issues on religious beliefs still happen until this day. It proves that this issue remains explosive enough as a sensitive issue by the communities. Wahid Institute reported around 64 cases related to violations against of freedom of religion in 2010 alone. The cases are varied from constraining believers to practice their religions, intimidating or threatening believers with violence, launching violent campaigns against the believers, banning certain religions or faiths, to sealing a place to stop religious practices (Wahid Institute 2010). An increasing number of case of violation against freedom of religion was also reported by Wahid Institute in 2011. There were 93 cases took place throughout this year (Wahid Institute 2011). Even in the beginning of 2012, Wahid Institute received a report of a violent incident related with religious issues. This incident broke in Madura Island (East Java) against the local Madurese Shi'ite[1] community (Hafiz 2012).

4 Peace Journalism

Indonesian communities have experienced many violent incidents and open conflicts from time to time. Unfortunately, the Indonesia media have failed to make any remedial action regarding this conflict-laden country. Instead, the media choose the most expedient way in dealing with conflicts. On the one hand, some of the journalists cover conflict by presenting bombastic, vulgar, and sometimes provocative news on conflicts. On the other hand, the other journalists act very carefully in covering the news related to conflicts then ending up with tight self-censorship or withdrawal from covering about the news at all (Sudibyo 2011). Howard (2003) pointed out that there has been an "inherent contradiction between the values of news and the importance of peace-building." The connection between the values of the news and high rating points, or mere circulation records, plays an important role in the process of printing the news. The notion of commercialism by the

1 The Arabic word shi'a means 'party'; Shi'at Ali or "Ali's party" was the name given to those who sided with the Prophet's cousin and son-in-law Ali ibn Abi Talib (the fourth Caliph) in the conflicts surrounding the succession of the murdered third Caliph Uthman in 656 AD (Halm, 1991). Having blocked Ali ibn Abi Thalib from the caliphate, the anti-Ali Muslim factions withheld their allegiance when Ali came to rule. These groups crushed a nascent movement led by Ali's son Husayn whom they massacred in an Iraqi town Karbala in 680 AD. The essence of Shi'ism is its adherents' claim that Ali the Prophet Muhammad's cousin and son-in-law and his male descendants have rights to lead the Muslim communities as "Imams" (Kramer 1987, p. 1). Today, Shi'ites are majority only in few countries and in others are just minorities. What began as a dissident position on the matter of succession in the seventh century grew into a religious tradition, distinguished from majority "Sunni Islam" by its own reading of theology and sacred history. In most times and most places Shi'ites constituted minorities, occasionally persecuted and at best tolerated by the Sunni Islam ruling establishment (Kramer 1987, p. 2).

media is one of some impacts of this style of news reporting. In this case, the journalists' method of news framing has a role in the style of news report chosen by the journalists. Using news framing, the journalists will decide how and through what perspective they construct the news. One event can be seen from a variety of angles and the likely effects of each angle may not be the same. In other words, news framing are the way journalists 'give some interpretation to isolated items of fact' (McQuail 2000). Different journalists will make different coverage of the similar news when they report the news in different ways. To create the values of news, journalists seek immediacy, drama, and simple images (Howard 2003).

There are three most commonly used news frames noted by mass communication researchers. These are the episodic, thematic, and protest paradigm framings (Perse 2001).

Episodic	**Thematic**	**Protest Paradigm**
Focusing on one individual to present the story for the readers or audiences	Focusing on only one individual to present the story but use the collective experiences and conclusions	Focusing more on how each individual is involved in a problem or protest

Table 2: News Frames Typology

The common news framing used by Indonesian journalists in reporting the conflict is protest paradigm framing. The journalists describe the event of conflict and report who wins and who loses (Sudibyo 2011). The effects of news framing provoke a cognitive effect. Readers build up interpretation of certain issues after they watch or read the news. According to Price and Tweskbury:

> ... news frames have effects because of two separate, psychological processes. First, during message reception, salient message elements activate certain thoughts and ideas. Then, because these thoughts and ideas have been recently brought to mind, they are more accessible when people have to make subsequent judgments (1997).

This opinion emphasises the effects of news framing to influence readers' opinion regarding certain issues. Especially for the news about conflict, the journalists need to create an article which could provide holistic information. Readers need to know who stands in the conflict and what causes of the conflict.

A proper choice for news framing news on conflict is the peace journalism that offers different way of framing the news on conflict. Peace Journalism is ideas developed by Galtung in the 1970s (McGoldrick and Lynch 2001). In covering conflict through the printed news, the journalists are often trapped into making the news as a story of violence. To stop repeating this same mistake, Galtung (2003) suggested two ways of looking at a conflict: 'the high road' and 'the low road'. It really depends on the journalists whether

they want to take the angle on the 'conflict and its peaceful transformation' or on 'the meta-conflict that comes after the root conflict which is created by violence and war and questioning of who wins' (Galtung 1998). In Galtung's opinion (1998) most journalists have used war journalism in covering conflicts since this kind journalism focuses more on two conflicting parties or who wins and who loses. The peace journalism uses conflict analyses and transformation to emphasise balance, fairness, and accuracy in news reporting. This journalism builds a connection among the journalists, their sources, the stories they cover, and the consequences of their reports (McGoldrick and Lynch 2000).

Galtung (2002) compared the news coverage through peace journalism to war journalism through a journalist's writing news about health. On the one hand, a reporter on health-related news with peace journalism makes a report about a cancer patient from many angles such as the causes, the available treatments, and the available prevention. On the other hand, a war journalist is closer to a sports journalist who 'focuses on winning in a zero-sum game' (Galtung 2002). The following table will help to clarify differences between the "war journalism" and "peace journalism" which were developed from Galtung's Table:

	War Journalism	Peace Journalism
News Angle	Covering conflicts between two parties in arena battle ground and who wins or who loses	Exploring conflicts as an issue to find win-win solution
Focus of the news	Immediate effect of violence (how many people killed or wounded and material damage)	Undetectable effect of violence (traumas and glory, destroyed structure/culture)
Sources of information	Elite group such as government or military officers, religious leaders, community leaders, one side of the party involved in the conflict	All parties involved in the conflict (including the two conflicting parties, victims, and communities)
News orientation	Victory: focus on ceasefire and treaty	Solution: focus on reconstruction of the community structure/culture, resolution and reconciliation

Table 3: Comparison between the War Journalism and Peace Journalism

The comparison shows that by using the war journalism, the journalists perceive conflict as the problem between only two parties. They hardly offer the readers or audience any information about the cause or the root of the problem. This news framing turns the conflict itself opaque (Galtung 1998).

Unlike in the war journalism, in the peace journalism it is important that the readers or audience understand conflict as the problem beyond what happens between just two parties. In this news framing, the peace journalists focus more on invisible effects of conflict for the community as a whole. This kind of news framing provides a new perspective about the conflict for the readers or audience. The journalists portray conflict as the problem involving many parties and issues. The idea of 'show different voices and articulate the range of interest in any given situation' (Galtung 1998) can help the journalists to present a broader understanding about the conflict itself.

5 Freedom of Expression and Freedom of the Press

The journalists are entitled to freedom of press and freedom of expression in reporting an incident or event. As part of the press, the journalists have freedom to report incident or event and this freedom is related to the freedom of expression. No one, not even government, could interfere with the process of reporting an incident or event. However, every freedom has limitation. In exercising every right, every rights-holder is limited by other people's rights. This condition is also applied to the journalists in their profession.

Limitations for the journalists are written in the Ethic Code for Journalist which has been published by the Indonesian Journalist Association. Article 2 of the Ethic Code states that journalists should not produce articles that offend certain belief system or religion (Kode Etik Jurnalistik 2008). Furthermore, this Code explains that Indonesian journalists should avoid producing news that could provoke conflict. Since most Indonesian journalists have chosen the protest paradigm framing to report a conflict, they tend to only portray two conflicting parties and who wins or who loses.

The protest paradigm frame tends to cover the news through merely one side of the battling parties and to leave out detailed information regarding the conflict itself. This protest paradigm framing does not help those communities involved in recurrent conflicts in Indonesia. Indonesian journalists have had enough experiences and lessons in reporting conflicts; therefore they should be able to learn from their habitual mistakes of heating up the tense situation. As stated by Hanitzsch, 'journalists became combatants; their media became inflammatory pamphlets' (2004). There is an urgent need in Indonesia that the journalists start to take part in building peace. This idea has been thrown by several researchers and observers whose have been analysing the ways the Indonesian journalists cover conflict as reported news.

It is the right of the people to obtain information. The information provided by the journalists should be accurate and comforting. This way, the journalists will not contribute to stir up the problems in the troubled communities but to help the communities to solve their problems. The urge for the journalists to take part in the process of peace building or to start using peace journalism is especially crucial for Indonesia. This opinion was offered by Governor of Aceh. In his speech before the Indonesian Journalists Association Conference (2011):

> Journalists have a big role in creating peace ... journalists should report news with fairness and should not take side. Being journalists they're should be doing not only their job but also thinking about their moral obligation. Journalism is a profession that supports development and democracy.

In relation with the media's function, Manoff (1998) explores media's roles in conflict prevention and management. According to Manoff (1998), there are several potential roles that media could take part in: (1) channelling communication between parties, (2) educating the public, (3) building confidence, (4) counteracting misperceptions, (5) analysing the conflict; (6) De-objectifying the protagonists before one another, (7) identifying the interests underlying the issues, (8) providing emotional outlets, (9) encouraging a balance of power, (10) framing and defining the conflict, (11) saving 'face' and building consensus, and (12) building solution. If the media has a potential role in conflict prevention and management, the journalists could naturally take part in it. Manoff's opinion (1998) is also shared by group of people at Common Ground (CG), the NGO that supports conflict transformation processes. CG itself has several projects in critical regions and areas with political tension. Its project is targeting the journalists and media contents. A CG's article by Melone, Terzis and Beleli (2000) explained that:

> Journalists should avoid presenting certain views or action of individuals as belonging to a whole ethnic group. Instead they should portray them as individuals inside the ethnic groups or as representatives of a specific interest group. At the same time they should offer various alternative concepts, frameworks, perspective, and interpretations (2002).

The journalists could contribute to peace building process with the right ways. Using the peace journalism is one choice of news framing which could contribute to peace. The journalists could also report news with complete data, accurate information, balanced sources, and independence in approach. By doing this, journalist could 'a play positive role in conflict' (University of Peace 2005).

6 Indonesian Media Covering Conflict

For the purpose of this paper, a case study was analysed through several printed articles related to the latest religious-related conflict in Sampang, Madura Island. Description of the incident will be given here the readers. The incident itself began on 29 December 2011

when a mob set fire to a place of worship, a boarding school and some houses in Karang Gayam Village, Sampang, Madura Island. Numerous versions on the cause of this incident appeared. Some people said that it was triggered by a conflict between two brothers over a girl. Some other people claimed the conflict was caused by the fact that the community members in Karang Gayam village are Shi'ites. Eventually the issue of the victims' belief in Shi'ism as the main cause of this incident spread. Afterwards, many people considered this religious issue as the main cause of the incident.

The articles for analysis have been taken from Daily *Radar Madura* which is local printed newspaper. All the articles have been analysed through the style of news framing used by the journalists, i.e., whether it is the war journalism or peace journalism. Besides, a textual analysis has also been used to dissect the collected articles since it is important to identify which words (i.e. adjectives, nouns, or verbs) that have been used by the journalists to portray the conflicting parties, victims, and perpetrators. The reason for taking Daily *Radar Madura* is because this newspaper has reported the incident rather intensively compared to the other newspapers.

Before analysing each article with news framing, this paper looks into the frequency of the news. The frequency of news about incident in Karang Gayam village reveals the journalists' dominant angle in reporting this incident.

News	Frequency	Content
Internally Displaced Persons' (IDPs) condition at the shelter	6	- Condition of victims (IDPs) in the shelter. - Stadium was not designed for refugee shelter. - Many children in the shelter suffered upper respiratory infection and stopped going to school.
Case Development	4	- Determining the perpetrator. - Investigation on Shi'ite religious leader - Local Police transferred Shi'ite case to East Java Police Department
Dispute of Shi'ism as a heretics	7	- Banning of Shi'ism teaching in Sampang. - Prohibition of Shi'ite practices in Sampang. - Several Islamic organisations asked parliament to legislate control over Shi'ite. - One of government bodies declared Shi'ism as heretical.
Returning to the village	3	- Shi'ite community members were asked to return to their village by the authority. - Most of the IDPs refused to return without guarantee to safety. - In the end the IDPs was transported back forcibly to their village.

News	Frequency	Content
Village's condition after the IDPs returned	3	- Condition in the village was "heating up." - Police swept the village for any weapon. - Police were still patrolling around the village. - Police destroyed several weapon confiscated from the anti-Shi'ite villagers - Police kept a conducive situation at the village
Related parties opinion about the incident	6	- Brother of Tajul Muluk (leader of Shi'ite community) who provoked the incident said that he did not the incident to happen. - Several Muslim leaders expressed concerns and demanded an end to violence in Sampang. - NGOs expressed opinions about police's attitude toward the incident.

Table 4: Frequency of news

The news articles shown here have been chosen from Daily Radar Madura from 31 December 2011 to 25 February 2012. This period has been chosen for it is the time frame where the incident of burning the village was taking place. The total number of news chosen is 29 articles. As presented in Table 4, the news articles that discussed about Shi'ism as blasphemy dominate the contents of information with seven articles. Investigation on the case itself was only covered by four articles. The journalists tried to cover the condition of the victims at the shelter with six new articles. Then it was continued with three articles about victims' condition after they returned their village. The rest of the news was expressing the experts' opinion about the incident and the way the government managed it. Unfortunately, no article discusses and reveals the underlying causes of this incident.

6.1 News Framing Analysis

Analysis of all articles will be presented in the following table using the news framing theory. The table contains several articles that discuss the same or similar idea. The first analysis will be started from the news about the victims.

	Articles Description
News Angle	Several people burned the village where Shi'ite community live (Kampong Karang Gayam, Sampang, Madura Island).
	A group of people attacked Shi'ite community who live in Kampong Karang Gayam, Sampang, Madura Island.
	Children did not feel comfortable at the shelter.
	All children of Shi'ite community were forced to live in the shelter.
	Their houses burned, many children lost their uniform, stationery, books and other important things and the shelter is far from their school.
Focus of the News	Many houses burned down, Shi'ite community hid in the forest then was transported to the shelter.
	Shi'ite community were forced to move out from their village.
	Most of the children felt miserable at the shelter.
	Many toddlers have upper respiratory infection for living in the shelter.
	All children cannot go to school.
Sources of Information	One of the Shi'ite community members.
	One of the Shi'ite community members.
	One of the children of Shi'ite community.
	Medical personnel.
	One of the children of Shi'ite community and NGO staff.
News Orientation	All people in Kampong Karang Gayam left their houses and the village became a 'ghost village.'
	Shi'ite community felt uncomfortable to live in the shelter which is a stadium.
	All children suffered bad life condition at the shelter.
	Children, especially toddlers started to get sick.
	Children wanted to get back to school.

Table 5: News about the victims

Table 5 shows that the journalists have tried to show the plight of the victims of this incident. Unfortunately, the journalists are still using the war journalism framing in their reports. The article analysis shows that the journalists still describe about two conflicting parties in this incident. One party is the mob that ransacked and burned down the village and the other is the Shi'ite community living in that village. Nevertheless, in reporting about the difficult condition of the victims, the journalists have made effort on showing

the effects not only on the material damage (houses and schools) but also on the victims' psychological condition. The article showing children's miserable situation and their obstacles to go back to school reveals the journalists' attempt to use the peace journalism as their news framing.

The articles on development of the arson case investigation are fewer than those on other aspects of the incident. As shown in the Table on the frequency of the news, there are only four articles reporting on the arson case investigation. The news articles on the process of development of case investigation are shown in Table 6.

Articles Description	News Angle	Focus of news	Sources of Information	News Orientation
	Police found the perpetrators who burned down houses.	Police wanted to reveal a suspect.	Police's Public Relation	Police pointed a suspect for this incident
	Sampang's Attorney gets involved in investigation.	Sampang's Attorney focuses its investigation on the Shi'ite members.	Sampang's Attorney	Sampang's Attorney office need to establish case for this incident
	The case was transferred to Provincial Level Police Department (Sampang is just a district).	Provincial Level Police Department continued to investigate the incident.	Head of Sampang Police	Sampang Police transferred the case to the Provincial Level Police

Table 6: News about development of case investigation

The news articles on police investigation focus mainly on police's attempts to find the perpetrators. The war journalism framing is used in all of these articles because the journalists view the conflict merely as a battle between two parties; therefore, one of them should be punished for their fault. Moreover, the journalists rely on the 'elite' group as the sources of information, namely government and police officers as sources of information. As explained by Galtung (2003), the war journalism will focus on 'conflict arena, who threw the first stone and focus on elite peacemaker'. If the journalists use the peace journalism, they will try to uncover truth from all perspectives and explore the conflict deeper. They will try to investigate for more details of the causes and to explore deeply on the roots of the conflict.

Since the issue of religion is considered as the main cause of the problem, the journalists inquired and reported mostly information regarding this issue. The articles on whether Shi'ism or Tajul Muluk's personal teaching blasphemy or not dominate the discourse of this incident.

Articles Description	News Angle	Focus of News	Sources of Information	New Orientation
	Bangkalan Head of Regency, Bangkalan Head of Local Police Department, and Bangkalan Religious Leaders hold a meeting to discuss about Shi'ism	Decision of whether Shi'ism is considered a blasphemy or not	Bangkalan Head of Regency, Head of Local Police Department, and Religious Leaders	Result of this meeting is Shi'ah should not be spread in Bangkalan Madura Island.
	Indonesia Islamic Council met with parliament member and urged them to issue local legislation to forbid Shi'ism in Madura Island	Local legislation to forbid Shi'ism in Madura Island	Head of Indonesia Islamic Council in Madura	Local legislation is needed for contain the chaos.
	Board of Nahdatul Ulama Branch at Sampang, Madura Island release a *fatwa* (a ruling in religious matter) that Shi'ism is blasphemy	Shi'ism is blasphemy according to Board of Nahdatul Ulama Branch of Sampang, Madura Island	Board of Nahdatul Ulama Branch of Sampang, Madura Island	Board of Nahdatul Ulama Branch of Sampang, Madura Island asked for immediate issue of local legislation for forbid Shi'ism.
	Supervision Body of Community Faith Ideology released a decision that Tajul Muluk's teaching is a blasphemy	Supervision Body of Community Faith Ideology decided the teaching is a blasphemy	Supervision Body of Community Faith Ideology	Decision that Tajul Muluk's teaching is a blasphemy issued by government through Supervision Body of Community Faith Ideology.

Articles Description	News Angle	Focus of News	Sources of Information	New Orientation
	Board of Nahdatul Ulama Branch released another statement that Tajul Muluk's teaching is not Shi'ism	Tajul Muluk's teaching is a blasphemy and it is not Shi'ism	Board of Nahdatul Ulama Branch of Sampang, Madura Island	Board of Nahdatul Ulama Branch of Sampang stated that Tajul Muluk's teaching is not Shi'ism; therefore it is a blasphemy.
	Supervision Body of Community Faith Ideology thought that officials should make further action to control Tajul Muluk's teaching	Tajul Muluk's teaching had provoked unrest in the community	Supervision Body of Community Faith Ideology	Action should be taken to control Tajul Muluk's teaching as a follow up action from Supervision Body of Community Faith Ideology's decision

Table 7: News about Dispute of Shi'ism as a blasphemy

Similarly on the articles on the development of police investigation, on the articles discussing the status of the local Shi'ism as blasphemy the journalists mainly depend on the 'elite' group as sources of information for discussion. The journalists wait for statements from certain groups which are considered as having the authority to judge. This type of framing is also part of the war journalism since the articles focus on "us-against-them." "Us" here is the group of people as the source of information and "them" is the Shi'ite community. By using this journalism style, the journalists emphasise that in this incident "them" is the underlying problem. Failure to cover the incident from both sides produces the implication that the Shi'ite community as the guilty one. This implication definitely impacts the Shi'ite community. Tajul Muluk as the local Shi'ite leader has been criminalised for blasphemy against the Prophet/Islam. There is little effort from the journalists to find information from the Shi'ite community itself. The 'truth' that has been exposed here is 'truth' from the "us." Actually, there is no single accurate information related to whether Tajul Muluk's teaching is really the root of the problem or not.

Since the police have found the perpetrators and Tajul Muluk is the one who faces the accusation as blasphemous, the police conclude that there is no more problem in the village. As a result, Commander of Sampang Police Department asked the IDPs to return to their village.

Articles Description	News Angle	Focus of News	Sources of News	New Orientation
	Police had withdrawn from the village.	The IDPs should go back to their village	Head of Sampang Police	Police started to prepare for bringing the IDPs back to their village
	IDPs asked the police to guarantee their safety when they arrive to the village	The IDPs refused to go back to their village	One of the IDPs and Regency Chief of Staff	Police offered no guarantee for the IDPs' safety when went they back to their village
	Local Body of Disaster Control negotiated with the IDPs who agreed to go back the their village	The IDPs were transported back to their village	Head of Local Body of Disaster Control	Finally, the IDPs agreed to leave the shelter and went back to their village

Table 8: News about Return to the village

In reporting this issue, the journalists focus on 'ceasefire'. This term used by Galtung (2003) in describing that the journalists who use the war journalism often focus on victory in a way that peace is victory and ceasefire. These articles throw an impression that there is no more problem for the IDPs if they return to their village. The readers are driven to believe that the problem is over. Everything is fine and once again the police are able to control the order of the conflict area. Although some journalists wrote one article on the IDPs' reaction to this request by the police but this article is buried by other new articles whose sources is the police's own statement. Moreover, there are no information provide on the definite resolution between the conflicted parties and the action that should be taken to prevent similar incident in the future.

Shortly after the Shi'ite community returned back to their village, the journalists reported that the situation in Karang Gayam village was heating up again. The Shi'ite community thus prepared self-defence on their own by preparing weapons in their houses.

	Articles Description
News Angle	The situation heated up after several people visited Karang Gayam village by brandishing weapons.
	Several heads of small hamlets and their officers asked the community to lay down their weapon
	Police watch over the village including one of the school which only 100 meter from the burning houses
Focus of the news	Situation at the Karang Gayam Village heated up and intense
	Weapon surrender
	School was guarded by police
Sources of information	Villagers and Head of Local Police
	Several head of small village in Karang Gayam area
	Head of school in Karang Gayam village
News orientation	Five days after the IDPs went back to the village; the situation is heating up again because there is an issue that there will be new leader replacing Tajul Muluk
	Several weapons was given to the police
	Police is still maintain the situation in Karang Gayam village

Table 9: News about Situation after the returning

Actually, this incident has proven that the journalists used the war journalism as their news framing. Without any complete information on the real cause of the problem, the agreed resolution, and the prepared prevention, the incident was recurring only in the matter of days. Although no open conflict with victims took place this time, the incident proved that the problem was still far from resolved. The journalists were not able to support peace in this incident. They preferred to use the war journalism again in reporting this case. The journalists once again portrayed a two-party conflict and focused their sources of information on elite peacemaker, in this case the police officers. If the journalists wanted to use the peace journalism to frame this incident, they would focus not only to elite peace maker but also local peacemakers and introduced the peace initiative to prevent more outbreak of conflict.

7 Discussion and conclusion

This paper emphasises that media can influence readers' and people's opinion and behaviour on certain issues. Therefore, media has a role in shaping public opinion on issues in the communities. Most of the time, the media report incidents with limited information. From this limited information, people and readers build their reaction and take a position toward the burning issues.

Peace journalism is alternative news framing that leads journalists to use "another language, a language rooted in non-violence and creativity in thinking about conflicts" (McGoldrick and Lynch 2001). In peace journalism, there are some concepts which can change readers' perspectives on reading the news articles about conflict. These concepts are "voice to the voiceless," "non-violence," "transparency," and "exploration deeply on conflict to find causes and offer solutions." Using these concepts, the journalists present to the readers a different style of news reporting. Peace journalism offers more than just a simple story of two parties involved in a conflict. It gives the reader a 'bigger picture' of the incident. Journalists cannot just write a story of two parties fighting against each other. They need to give a comprehensive report on the incident and to cover the incident through the interests of many groups or parties.

As explored in this paper, journalists only have limited information about the real cause of incident in Sampang. They fail to dig deeper to find the root of the problem. The journalists only find information from an easy source like the police, the government officers, and other people/groups which represent the 'elite' group. Although in one of the articles cited the journalists try to give voice to the victims, it is insufficient just only through description of the impacts of the incident to the victims. The journalists should follow up the articles with explanation from the victims' perspective on what has happened in victims' own words. Lack of information on the underlying cause of the incident appears when people or readers outside the Shi'ite community get impression that this community takes the blame. Relying on information from only certain groups and reports that Tajul Muluk's teaching is blasphemous also encourages the readers and the public to think that Tajul Muluk's followers are equally misfits in a society where the Shi'ites are minority.

Besides, the journalists refuse to get information from the Shi'ite community, Tajul Muluk, or the leaders of the refugees. These sources should be able to create a balanced news coverage for this conflict. The unbalanced news produced by the journalists on this conflict indirectly supports the majority of people who quickly blame the Shi'ite community. The incomplete and imbalanced series of newspapers articles provoke another attack that takes place in August 2012 in Karang Gayam, Sampang, Madura Island against the Shi'ite community after they come back to their village. One member of Shi'ite community was killed. Another one was badly injured and still in the hospital. This untoward incident should motivate the local journalists to change their way of reporting the ongoing conflict. The Indonesian public has been dealing with a lot of ethnic and religious conflicts for such a

long time. As one of the stakeholders in the society, the media including the journalists should start to pay a role as an agent of change. The influence of the media over people and readers' points of view and attitudes toward certain issues can be seen as one advantage for the media. The media has the opportunity and capability to end conflicts and support the peace process through their printed news. The media can change the public's point of view and attitudes toward ethnic and religious conflicts.

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ABOUT SEAHRN

The Southeast Asian Human Rights Studies Network (SEAHRN) was born out of a common dream, among its 14 founding members, 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 and peace. 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 and peace in the Region.

Member institutions and individuals of SEAHRN are aiming to achieve the following core objectives:

- To strengthen higher education devoted to the study of human rights and peace in Southeast Asia through faculty and course development;
- To develop deeper understanding and enhancement of human rights and peace knowledge through collaborative research;
- To achieve excellent regional academic and civil society cooperation in realizing human rights and peace in Southeast Asia; and
- To conduct public advocacy through critical engagement with civil society actors, including inter-governmental bodies, in Southeast Asia

In pursuit of these objectives, SEAHRN has expanded its membership to 20 academic institutions/centres. Moreover, it has successfully organized two international conferences on Human Rights and Peace & Conflict in Southeast Asia (Bangkok, 2010 & Jakarta, 2012). It has also done training for both seasoned and emerging scholars in human rights- and peace-based research and instruction. In terms of resource material development, SEAHRN has already published *Human Rights in Southeast Asia Series I: Breaking the Silence* (October 2011) and *Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices* (September 2013). It is currently developing a human rights and peace textbook which features various themes written for and by Southeast Asian academics and scholars.

SEAHRN Members are committed to support, develop, enhance and strengthen the following areas in human rights and peace studies, research and advocacy:

- Faculty Development
- Pedagogical Training
- Curriculum and Course Development
- Research and Publication

- Human rights and Peace Conferences/Symposia
- Faculty and Student Exchange Programmes
- Outreach Programmes for ASEAN officials and Civil society groups
- Development of Human Rights and Peace Studies Database
- Development of Online-based Human Rights Resources

SEAHRN membership is open to academic institutions/centres focusing on human rights and peace studies and research in Southeast Asia. To know more about recent and upcoming activities of the Network, visit **www.seahrn.org**. Institutions/centres who wish to join SEAHRN are encouraged to send a letter of interest (signed by the Director/Chair/Dean) together with most recent profiles of faculty and academic study and research programmes relevant to human rights and peace to **seahrn@gmail.com.**

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- Human Rights Centre, Faculty of Law, Universiti Malaya
- Gender Studies Programme, Universiti Malaya
- Research and Education for Peace, Universiti Sains Malaysia
- Southeast Asian Conflict Studies Network (SEACSN), Universiti Sains Malaysia

Philippines

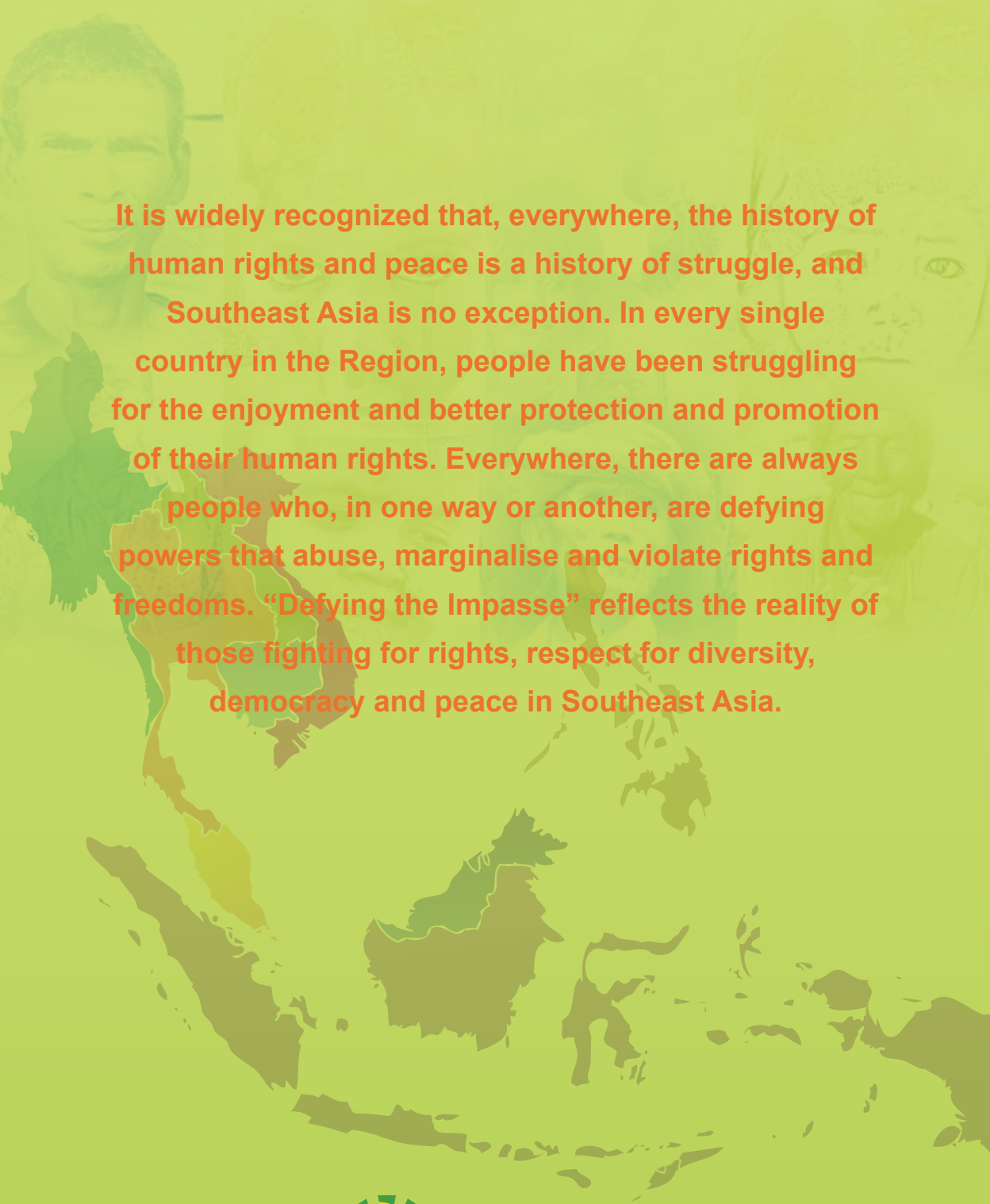
- Ateneo Human Rights Center, School of Law, Ateneo de Manila University
- Institute of Human Rights, University of the Philippines

Thailand

- Institute of Human Rights and Peace Studies (IHRP), Mahidol University
- Center for the Study of Human Rights and Non Violence, College of Politics and Governance, Mahasarakham University,
- Individuals for Chulalongkorn University (Faculty of Political Science)

Vietnam

- Center for Study of Human and Citizen Rights, Ho Chi Minh City University of Law
- Research Center for Human and Citizen's Rights (CRIGHTS) Law Department, Vietnam National University-Hanoi



It is widely recognized that, everywhere, the history of human rights and peace is a history of struggle, and Southeast Asia is no exception. In every single country in the Region, people have been struggling for the enjoyment and better protection and promotion of their human rights. Everywhere, there are always people who, in one way or another, are defying powers that abuse, marginalise and violate rights and freedoms. "Defying the Impasse" reflects the reality of those fighting for rights, respect for diversity, democracy and peace in Southeast Asia.

SEAHRN
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