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HUMAN RIGHTS AND REGIONALISM IN SOUTHEAST  
ASIA

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DISSERTATION SUBMITTED IN FULFILMENT OF  
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## Abstract

I have two aims in this dissertation. The first is to record an extraordinary period of human rights institution-building in Southeast Asia. This period began in 2007, with the signing of the Charter of the Association of Southeast Asian Nations (ASEAN). The Charter explicitly links the purpose of ASEAN with the strengthening of democracy and the protection of human rights and provides for the establishment of an ‘ASEAN Human Rights Body’. This body was established in 2009, as the ASEAN Intergovernmental Commission on Human Rights. The Commission’s first task was to draft the ASEAN Human Rights Declaration, which was completed and adopted by ASEAN Heads of State in November 2012. In the context of the political diversity of Southeast Asia, the region’s historical resistance to international human rights law, and the long shadow cast by the ‘Asian Values’ debate of the 1990s, I ask the following questions: What factors explain the establishment of these institutions? How deep is ASEAN’s new commitment to human rights and democracy? What do these institutions augur for the way rights are realised in Southeast Asia?

My second aim is to explore and test my theory that regional institutions possess a particular legitimacy in the promotion and protection of human rights. The theory is driven by a simple observation. Since the end of World War II, the discourse of human rights has become, to borrow a phrase used by Charles Beitz, ‘the common moral language of global society.’<sup>1</sup> Yet the original post-World War II vision of a legalised international human rights order (with judicial oversight, mechanisms for enforcement, and sanctions for non-compliance) has faded. The global human rights system works by setting standards, which are then invoked (by domestic and international non-governmental organisations, members of civil society, political oppositions, the international community) to persuade, shame or coerce

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<sup>1</sup> Charles Beitz, *The Idea of Human Rights* (2009) Oxford, Oxford University Press, 1.

states into compliance. The problems are: change is very slow, many states (both predatory and decent) are resistant to influence, and in circumstances of exception (civil conflict, war, political crisis) when human rights are most vulnerable to abuse, the system is least effective. The failures of the global system are many and patent.

On the other hand, states seem more willing to subscribe to binding norms promoted by regional organs of restricted membership. Regional systems now exist under the auspices of the Council of Europe, the Organisation of American States, the Organisation of African Unity, the League of Arab States and most recently, the Association of Southeast Asian Nations. Scholars have observed that there seems to be a ‘directness of association’ between members of regional organisations, which positively influences (or has the potential to influence) causal processes such as socialisation, binding, monitoring and enforcement. My theory is that regional factors such as smaller numbers, deeper levels of integration, greater consensus around the importance of certain societal values, similar geographic characteristics and shared economic and security interests, create the conditions for legitimate governance. I test my theory using a case study of Southeast Asia and its new institutions.

In the end, my conclusion is that in circumstances where regions possess low levels of democracy, then regional human rights systems do *not* possess a particular legitimacy. The nature of democracy, the relationship between democracy and human rights, and the deficit of democracy in Southeast Asia are at the heart of my explanation about why Southeast Asia’s nascent human rights system (currently) lacks legitimacy.

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## Preface

The period during which I worked on this dissertation, 2010–2013, was a tumultuous time in Southeast Asia. The 2010 general elections in Myanmar (Burma), in which Aung San Suu Kyi’s National League for Democracy refused to participate, returned to power the military-backed Union Solidarity and Development Party. It was unclear whether the election marked Myanmar’s first step towards genuine democracy, or merely a new consolidation of military power. Given that my hypothesis was about the legitimacy of regional human rights systems, it seemed important that I try to understand the relationship between the Association of Southeast Asian Nations (ASEAN) and the region’s ‘pariah state’. Myanmar was an obvious candidate for a case study in my dissertation. In 2010, I sought ethics clearance to interview key actors (government representatives, civil society activists, lawyers, members of the newly formed Myanmar National Human Rights Commission) in Yangon.

Because of the uncertain political circumstances within Myanmar, the University of Sydney Human Research Ethics Committee did not grant my ethics application lightly. The approval was eventually given (Ethic Approval ID 13246) in large part due to the efforts of one of my supervisors, Professor David Kinley, and two of Australia’s former ambassadors to Burma, Mr Christopher Lamb and Mr Trevor Wilson. I owe all three a great deal of thanks, not only for supporting my ethics application, but also for the time and trouble they took to provide me with contacts, introductions and advice on how to go about my work in Myanmar. My visits to Myanmar were extremely productive. Although not everyone I spoke to in Yangon in 2010 and 2013 was comfortable about being recorded or signing official ethics documents, everyone was willing—indeed, eager—to talk. I thank all those in Yangon

who gave me their time and assistance by agreeing to be formally interviewed, or by informally sharing their experiences with me.

My involvement in the Mekong Lawyers Network, and a particularly illuminating meeting of that network that I attended in Chiang Mai in April 2012, gave me access to civil society members from Laos, Vietnam, Myanmar and Cambodia. This opened up possibilities for researching attitudes in the ‘CLMV’ countries, which are too often ignored by scholars of Southeast Asia. I owe thanks to Daniel King and Earthrights International for inviting me to this meeting. In June 2012, I went to Kuala Lumpur to attend the civil society/ASEAN Human Rights Commission meeting about the ASEAN Human Rights Declaration. I am grateful to the Indonesian Human Rights Commissioner, Rafendi Djamin, and the Malaysian Human Rights Commissioner, Dato’ Sri Muhammad Shafee Abdullah, for their efforts to give me access to this meeting.

A particularly fruitful period was spent in 2012 as a visiting scholar at the Centre for International Governance and Justice, which is part of the Regulatory Institutions Network (RegNet) in the College of Asia and the Pacific, Australian National University. The visit took place under the auspices of Professor Hilary Charlesworth’s Australian Research Council Laureate Fellowship, ‘Strengthening the International Human Rights System: Rights, Regulation and Ritualism’. I am grateful to Hilary Charlesworth, Ben Authers, Emma Larking and all of the warm and generous scholars at RegNet for their interest and support.

It is impossible to imagine a better principal supervisor than Professor Ben Saul. Every sentence in this dissertation was written with the thought: What would Ben say about this? The result was a great deal of agonising but, I am certain, a far better result in the end.

A different kind of support was provided by my dear friend, Dr Emily Crawford. With enormous patience and care, Emily proofread my entire dissertation. She also gave advice,

guidance and encouragement at the times when these things were most needed. Mere thanks is not enough.

There are many others who provided me with support: at the beginning of this project, Professor Terry Carney; Dr Daniel Joyce; later, Dr Melissa Crouch and Professor Wojciech Sadurski. Kathleen Heath, research assistant *par excellence*, undertook the task of recovering my bibliography after a computer failure. Her friend Alice Gardoll finished this job. Sally Asnicar formatted my dissertation. I am grateful to all these people.

My parents, Michael and Christine Shanahan, and my brothers, Christopher and Matthew, were unstinting in their faith in me. My children, Jack, Maddy and Marcus, have my gratitude and love for their patience and good humour throughout this process. The final thanks, and the deepest, goes to John.

March 2014

Catherine Renshaw

## **Declaration of Originality**

I hereby certify that this dissertation is entirely my own work and that any material written by others has been acknowledged in the text. The dissertation has not been presented for a degree or for any other purposes at The University of Sydney or at any other university of institution. The empirical work undertaken for this dissertation (interviews, questionnaires and observations) was approved by the University of Sydney Human Ethics Committee.

# **Table of Treaties, Legislation and International Documents**

## **1. International Instruments**

Bangalore Principles of Judicial Conduct (2002), reported in UN Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, Annex E/CN.4/2003/65 (10 January 1993)

Constitution of the United Nations Educational, Scientific, and Cultural Organization (adopted 16 November 1945, 4 UNTS 275, entered into force 4 November 1946).

Convention against Transnational Organized Crime (adopted 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003).

Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') (adopted 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981)

First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 23 March 1976)

ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention) (adopted 17 June 1999, 2133 UNTS 161, entered into force 19 November 2000).

International Conference on Human Rights, Final Act of the International Conference on Human Rights: Proclamation of Teheran, A/CONF. 32/41 (22 April-13 May 1968).

International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 3 November 1976)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, 993 UNTS 3, entered into force 3 January 1976).

Montreal Statement of the Assembly for Human Rights (27 March 1968)

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (adopted on 25 May 2000, 2171 UNTS 227, entered into force on 18 January 2002).

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, 2131 UNTS 83 entered into force 22 December 2000).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, 2237 UNTS 319, entered into force 25 December 2003).

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (adopted 7 September 1957, 266 UNTS 3, entered into force 30 April 1957).

UNGA Res. 217 A (III), Universal Declaration of Human Rights, A/810 (10 December 1948).

UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) (24 October 1970).

UNGA Res. 2625(XXV), Friendly Relations Declaration, (24 Oct. 1970).

UNGA Res. 33/73, Declaration on the Preparation of Societies for Life in Peace, A/RES/33/73 (15 December 1978).

UNGA Res. 41/128, Declaration on the Right to Development, A/RES/41/128 (4 December 1986).

UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

UNGA Res. 61/295, Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (13 September 2007)

UNGA, World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (25 June 1993).

Charter of the United Nations (adopted 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945)

Convention on the Rights of the Child (adopted 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990)

Rome Statute of the International Criminal Court (adopted 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002).

## **2. Regional Instruments**

African Charter on Human and Peoples' Rights (Banjul Charter) (adopted 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986)

Agreement on Bilateral Cooperation For Eliminating Trafficking In Women And Children And Assisting Victims Of Trafficking (10 October 2005) (Cambodia and Vietnam)

Agreement on Cooperation to Eliminate Trafficking in Persons (24 March 2008) (Thailand and Vietnam)

American Convention on Human Rights (adopted 22 November 1969, 1144 UNTS 143, entered into force 18 July 1978).

Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008)

ASEAN Declaration (Bangkok Declaration), Bangkok, Thailand (8 August 1967).

ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children, Vientiane, Lao PDR (29 November 2004)

ASEAN Declaration of Principles to Combat the Abuses of Narcotics Drugs, Manila, Philippines (26 June 1976)

ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, Twentieth-Third ASEAN Summit (9 October 2013)

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Cebu, Philippines (13 January 2007)

ASEAN Declaration on Transnational Crime, Manila, Philippines (20 December 1997)

ASEAN Human Rights Declaration, Phnom Penh, Cambodia (18 November 2012)

ASEAN Inter-Parliamentary Organisation, Kuala Lumpur Declaration on Human Rights, Kuala Lumpur (September 1993)

Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, Cebu, Philippines (13 January 2007)

Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights 2009, Fifteenth ASEAN Summit, Cha-am Hua Hin, Thailand (23 October 2009).

Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008).

Constitutive Act of the Organization of African Unity (OAU), Lome, Togo (11 July 2000)

Declaration of ASEAN Concord II (Bali Concord II), Ninth ASEAN Summit, Bali, Indonesia (7 October 2003)

Declaration of ASEAN Concord, First ASEAN Summit, Bali, Indonesia (24 February 1976).

Declaration of the Advancement of Women in the ASEAN Region, Bangkok, Thailand (5 July 1988)

Declaration on the Elimination of Violence Against Women in the ASEAN Region, Jakarta, Indonesia (30 June 2004)

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, 213 UNTS 2, entered into force 3 September 1953), as amended by Protocol 11 (1998) and Protocol 14 (2010)

Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration) (29 March-2 April 1993)

Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, Ha Noi, Vietnam (28 October 2010)

Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children (13 July 2005) (Thailand and Lao PDR)

Memorandum of Understanding on Cooperation to combat trafficking in persons, especially Women and Children (24 April 2009) (Myanmar and Thailand)

Memorandum of Understanding on Strengthening the Cooperation on Combating Human Trafficking (11 November 2009) (Myanmar and China)

Memorandum on Bilateral Cooperation in Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (31 May 2003) (Cambodia and Thailand)

Memorandum on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (3 November 2010) (Lao PDR and Vietnam)

Ninth International Conference of American States, American Declaration on the Rights and Duties of Man, Bogota, Colombia (2 May 1948).

Organisation of American States, Protocol of Amendment to the Charter of the Organization of American States (Protocol of Washington) (14 December 1992).

Organisation of American States, The Inter-American Democratic Charter, Lima (11 September 2001)

Southeast Asia Nuclear-Weapon-Free Zone Treaty (Bangkok Treaty), Bangkok, Thailand (15 December 1995) reported in 1981 UNTS 129.

Terms of Reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (2010).

The International Congress on the Human Right to Peace, Santiago Declaration on the Human Right to Peace (December 2010).

Treaty on Extradition, Bangkok (6 May 1998) (Thailand and Cambodia)

UNGA Res. 2504 (XXIV), Agreement concerning West New Guinea (West Irian), A/RES/2504 (19 December 1969) (Indonesia and the Netherlands).

Vientiane Action Program, Tenth ASEAN Summit, Vientiane, Lao PDR (29 November 2004)

### 3. International Case Law

European Court of Human Rights	<i>Sahin v Turkey</i> , Application No. 44774/98 (10 November 2005)  <i>Handyside v United Kingdom</i> , Application No. 5493/72 (7 December 1976)
Inter-American Court of Human Rights	Government of Costa Rica ( <i>In the Matter of Vivian Gallardo, et al.</i> ), Decision of 13 November 1981, No. G101/81 (1981)
UN Human Rights Committee	<i>Toonen v Australia</i> , Communication No. 488/1992, CCPR/C/50/D/488/1992 (1994)

### 4. Domestic Case Law

Australia	<i>Minister for Immigration and Ethnic Affairs v Teoh</i> [1995] 128 ALR 353
India	<i>Vishaka v State of Rajasthan</i> AIR [1997] SC 3011  <i>Air India v Nergesh Meerza</i> [1981] 68 AIR 1829 (SC)
Malaysia	<i>Chayed bin Basirun &amp; Ors v Noorfadilla bt Ahmad Saikin</i> [2012] 1 MLJ 832  <i>Beatrice Fernandez v Sistem Penerbangan Malaysia &amp; Anor</i> Civil Appeal No: W-02-186-96 (5 October 2004)
Philippines	<i>Ladlad LGBT Party v Commission on Elections</i> (8 April 2010) (Republic of the Philippines Supreme Court)

*Marcos v Commission on Elections*, GR. No. 119976 (18 September 1995)

## 5. National Legislation

Brunei	Islamic Family Law Order 1999 (Brunei)  Married Women Act, Chapter 190 (Revised 30 December 2000) (Brunei)  Trafficking and Smuggling of Persons Order 2004 (No. S 82) Government Gazette, 2004-12-22, Part II, No. 43, pp. 2651-2662 (Brunei)
Cambodia	Law on the Prevention of Domestic Violence and Protection of Victims 2005 (Cambodia)  Law on the Suppression of Human Trafficking and Commercial Sexual Exploitation, 2008, NS/RKM/0208/005 (Cambodia)
Indonesia	Law of the Republic of Indonesia regarding Elimination of Violence in the Household 2004, No. 23/2004 (Indonesia)
Lao People's Democratic Republic	Lao People's Democratic Republic Penal Law 1990 available at: <a href="http://www.asianlii.org/la/legis/laws/pl199076.pdf">http://www.asianlii.org/la/legis/laws/pl199076.pdf</a> [accessed 21 December 2012] (Lao People's Democratic Republic)  Constitution of the Lao People's Democratic Republic 2003 No. 25/NA (6 May 2003) (Lao People's Democratic Republic)  Decree on the Promulgation of the Law on Development and Protection of Women 2004, No. 70/PO (Lao People's Democratic Republic)

	Prime Ministers Decree No 26/PM of 6 February 2006, on the Implementation of the Law and Development and Protection of Women (Lao People's Democratic Republic)
Malaysia	Domestic Violence Act 1994 (Malaysia) Constitution (Amendment) Act 2001, Act A1130 (Malaysia) Anti-Trafficking in Persons Act 2007, Act 670 (Malaysia)
Myanmar	The Anti-Trafficking in Persons Law 2005 (The State Peace and Development Council Law No. 5/ 2005) (Myanmar) Constitution of the Republic of the Union of Myanmar 2008 (Myanmar)
Philippines	Constitution of the Republic of the Philippines 1987 (Philippines) Anti-Violence Against Women and their Children Act 2004 (Philippines) Anti-Trafficking in Persons Act of 2003, Republic Act 9208 (Philippines) Expanded Anti-Trafficking in Persons Act of 2012, Republic Act 10364 (Philippines)
Singapore	Singapore's Women's Charter (Amendment) Bill 1996 (Singapore)
Thailand	Measures in Prevention and Suppression of Trafficking in Women and Children Act 1997, B.E. 2540 (Thailand) Protection of Domestic Violence Victims Act 2007, B.E. 2550 (Thailand) The Anti-Trafficking in Persons Act 2008, B.E. 2551 (Thailand)

- United States of  
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[United States of America], Public Law 106-386 [H.R. 3244],  
28 October 2000, available at:  
<http://www.refworld.org/docid/3ae6b6104.html> [accessed 8  
October 2013]
- Vietnam
- Constitution of the Socialist Republic of Vietnam 1992 (as  
amended 25 December 2001) (Vietnam)
- Law on Gender Equality 2006 (Vietnam)
- Law on Domestic Violence Prevention and Control 2007,  
02/2007/QH12 (Vietnam)
- Law on the Prevention of and Combat against Human  
Trafficking 2011, 66/2011/QH12 (Vietnam)

## **List of Abbreviations**

AAPP	Assistance Association for Political Prisoners – Burma
ABC	Australian Broadcasting Corporation
ACTIP	ASEAN Convention Against Trafficking in Persons
ACW	ASEAN Committee on Women
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AFPFL	Anti-Fascist People’s Freedom League
AFTA	ASEAN Free Trade Area
AHRD	ASEAN Human Rights Declaration
AIA	ASEAN Investment Area
AICHR	ASEAN Intergovernmental Commission on Human Rights
AICO	ASEAN Industrial Cooperation Schemes
AIPMC	ASEAN Inter-Parliamentary Caucus on Myanmar
AMAN	Indigenous Peoples Alliance of the Archipelago
AMM	ASEAN Ministerial Meeting
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
APF	Asia Pacific Forum of National Human Rights Institutions
APFWLD	Asia Pacific Forum on Women’s Law and Development
APSC	ASEAN Political-Security Council
ARF	ASEAN Regional Forum
ASC	ASEAN Security Community
ASCPA	ASEAN Security Community Plan of Action

ASEAN	Association of Southeast Asian Nations
ASEAN PMC	ASEAN Post-Ministerial Conference
ASW	ASEAN Sub-Committee on Women
AWP	ASEAN Women's Program
Bangkok Declaration	1999 Bangkok Declaration on Irregular Migration
Banjul Charter	African Charter on Human and Peoples' Rights
BCP	Burmese Communist Party
Bogota Declaration	1948 Pan-American Declaration of Human Rights and Duties
BSPP	Burma Socialist Program Party
CATW-Asia- Pacific	Coalition Against Trafficking in Women in Asia-Pacific
CEDAW	Committee on the Elimination of all forms of Discrimination Against Women
CHF	Chin National Front
CLMV	Cambodia, Laos PDR, Myanmar and Vietnam
COI	Commission of Inquiry
COP	Conference of Parties
CPB	Communist Party of Burma
CPP	Cambodian People's Party
CRC	Convention on the Rights of the Child
CRPP	Committee Representing the 'People's Parliament'
CSO	civil society organisation
DEVW	2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region
DEVWC	Declaration on Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN

DPR	<i>Derwan Parwakilan Rakyat</i>
DVB	Democratic Voice of Burma
EAS	East Asian Summit
ECHR	European Convention on Human Rights
EPG	Eminent Persons Group
EU	European Union
FIDH	International Federation for Human Rights
GAATW	Global Alliance against Trafficking in Women
HLTF	High Level Task Force
HRWG	Human Rights Working Group
HTI	Hizbut Thahir Indonesia
IAI	Initiative for ASEAN Integration
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGHLRC	International Gay Lesbian Human Rights Commission
ILGA	International Lesbian, Gay, Bisexual, Transgender and Intersex Association
ILO	International Labour Organisation
IMF	International Monetary Fund
INTERFET	The International Force for East Timor
IOM	International Office for Migration
JCC	Joint Cooperation Committee
KIO	Kachin Independence Organization
KNLA	Karen National Liberation Army
KNU	Karen National Union
LBH Jakarta	Jakarta Legal Aid
MNHRC	Myanmar National Human Rights Commission

MUI	Indonesian Ulema Council
Myanmar ISIS	Myanmar Institute of Strategic and International Studies
NDSC	National Defence and Security Council
NETS	natural economic territories
NGO	nongovernmental organization
NHRI	National Human Rights Institution
NLD	National League for Democracy
NMSP	New Mon State Party
NPA	National Plan of Action
NUP	National Unity Party
PAP	People's Action Party
Paris Principles	Paris Principles on the Status of National Institutions
PKS	Justice and Prosperity Party
RIA	Roadmap for the Integration of ASEAN
SAPA	Solidarity for Asian People's Advocacy
SEANF	Southeast Asian NHRI Forum
SLORC	State Law and Order Restoration Council
SOGI	sexual orientation and gender identity
SOM	Senior Officials Meeting
SOMTC	Senior Officials Meeting on Transnational Crime
SPDC	State Peace and Development Council
SSA-South	Shan State Army-South
SUARAM	Suara Rakyat Malaysia
SUHAKAM	Malaysian Human Rights Commission
The Convention	Convention on the Elimination of all Forms of Discrimination Against Women

TIP	Trafficking in Persons
TOR	Terms of Reference
Trafficking Protocol	2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
Transnational Crime Convention	United Nations Convention against Transnational Organized Crime
TVPA	United States Trafficking Victims Protection Act (2000)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNAMET	The United Nations Mission in East Timor
UNESCO	United Nations Educational, Social and Cultural Organization
UNGA	United Nations General Assembly
UNLD	United Nationalities League for Democracy
UNSC	UN Security Council
UNTAET	United Nations Transitional Administration in East Timor
UPR	United Nations' Universal Periodic Review
USDP	Union Solidarity and Development Party
Women's Caucus	Southeast Asia Women's Caucus on ASEAN
ZOPFAN	Zone of Peace, Freedom and Neutrality

# Chapter 1: Introduction

- 1.1 Why States Change
- 1.2 Legitimacy
- 1.3 What Conception of Human Rights?
- 1.4 Testing the Theory: Why Southeast Asia?
- 1.5 Structure of the Dissertation
- 1.6 Conclusion

I have two aims in this dissertation. The first is to record an extraordinary period of human rights institution-building in Southeast Asia. This period began in 2007, when the ten members of the Association of Southeast Asian Nations (ASEAN)<sup>1</sup> signed the ASEAN Charter.<sup>2</sup> The Charter confirms ASEAN's international legal personality,<sup>3</sup> deepens processes for cooperation between states,<sup>4</sup> provides new frameworks for decision-making,<sup>5</sup> and

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<sup>1</sup> ASEAN was formed in 1967. ASEAN's current members are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.

<sup>2</sup> Association of Southeast Asian Nations, Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) ('ASEAN Charter').

<sup>3</sup> Ibid, Chapter II, Article 3.

<sup>4</sup> Ibid, Articles 8–10.

<sup>5</sup> Ibid, Article 8.

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explicitly links the purpose of ASEAN with the strengthening of democracy and the protection of human rights within the region.<sup>6</sup>

The Charter was followed, on 23 October 2009, by the inauguration of the ASEAN Intergovernmental Commission on Human Rights (AICHR), established under Article 14 of the Charter, with a mandate to promote ‘the principles of democracy and constitutional government’ as well as human rights and fundamental freedoms.<sup>7</sup> The Commission was tasked with drafting an ‘ASEAN Human Rights Declaration’, which was eventually adopted on 18 November 2012.<sup>8</sup>

For a number of reasons, these events are remarkable. First, the states of Southeast Asia have diverse political systems and historically, their leaders have had varying ideas about the value and importance of human rights. Southeast Asia cannot describe itself in the same way Europe did in the Preamble to the 1950 European Convention on Human Rights, as a region comprised of ‘like-minded’ nations with ‘a common heritage of political traditions, ideals, freedom, and the rule of law.’<sup>9</sup>

Second, ASEAN states have traditionally been reluctant to engage with the international human rights treaty monitoring system. Of the seven major international human

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<sup>6</sup> Ibid, Preamble. The Preamble to the ASEAN Charter states that: ‘ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;’ ‘Purposes’ of the Charter, include Article 1(7): ‘To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;’ ‘Principles’ of ASEAN, Article 2(2)(h), oblige states to adhere to: ‘the rule of law, good governance, the principles of democracy and constitutional government’ and Article 2(2)(i) ‘respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice’.

<sup>7</sup> Terms of Reference (TOR) of the ASEAN Intergovernmental Commission on Human Rights (2009) (AICHR), Article 2.1(d) refers to: ‘adherence to the rule of law, good governance, the principles of democracy and constitutional government’ and 2.1(e) refers to “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”. TOR AICHR, Article 2.4, stipulate a constructive, non-confrontational and evolutionary approach to developing human rights norms and standards in ASEAN.

<sup>8</sup> The ASEAN Human Rights Declaration, 18 November 18, 2012.

<sup>9</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, 213 UNTS 2, entered into force 3 September 1953), as amended by Protocol 11 (1998) and Protocol 14 (2010), Preamble.

rights treaties, only the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have been ratified by all ASEAN member states. Even in relation to these treaties, several ASEAN states have entered substantial reservations.<sup>10</sup> Only the Philippines is a party to the First Optional Protocol (1966) to the International Covenant on Civil and Political Rights (ICCPR), allowing its citizens the right of individual petition to the Human Rights Committee.<sup>11</sup> The reluctance to engage in the international treaty system suggests, at the least, there has historically been ambivalence about subjecting government action to external scrutiny, and at the most, ongoing state-level resistance to the international human rights project altogether. Against this backdrop, what explains the turn to human rights and democracy, and what potential does it have to further the realisation of rights in Southeast Asia?

My second aim in this dissertation is to explore and test my argument that regional institutions possess a particular kind of legitimacy in the promotion and protection of human rights. The theory is driven by a simple observation. Since the end of World War II, the discourse of human rights has become, to borrow a phrase used by Charles Beitz, ‘the common moral language of global society.’<sup>12</sup> Yet a legalised international human rights order (with judicial oversight, mechanisms for enforcement and sanctions for non-compliance)

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<sup>10</sup> Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’) (adopted 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981); Convention on the Rights of the Child (adopted 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990). Brunei has entered a reservation in regard to provisions of the Convention that may be contrary to the Constitution and to the beliefs and principles of Islam. Malaysia has declared that accession is subject to the understanding that the provisions of the Convention are not contrary to and do not conflict with the Constitution and the beliefs and principles of Islamic law. Singapore has similarly entered a reservation that provides that all of its obligations are subject to Singaporean law. Generally, on reservations of ASEAN states see: Susanna Linton, ‘ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children’ (2008) 30 *Human Rights Quarterly* 436.

<sup>11</sup> The Philippines acceded on 22 August 1989. First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 23 March 1976).

<sup>12</sup> Charles Beitz, *The Idea of Human Rights* (2009) Oxford, Oxford University Press, 1.

remains a distant prospect.<sup>13</sup> The global human rights system works by setting standards, which are then invoked (by domestic and international non-governmental organisations, members of civil society, political oppositions, the international community) to persuade, shame or coerce states into compliance.<sup>14</sup> There is broad agreement among scholars that the system functions best in domestic circumstances where there is an active civil society, democratic conditions enabling freedom of expression, the rule of law, and a politically responsive government.<sup>15</sup> The problems are: change is very slow,<sup>16</sup> many states (both predatory and decent) are resistant to influence,<sup>17</sup> and in circumstances of exception (civil conflict, war, political crisis) when human rights are most vulnerable to abuse, the system is least effective.<sup>18</sup> The failures of the global system are many and patent.<sup>19</sup>

On the other hand, states seem more willing to subscribe to binding norms promoted by regional organs of restricted membership, 'of which the other members are its friends and neighbours, rather than to a world-wide organ in which it (and its allies) play a proportionally

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<sup>13</sup> Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7(1) *Human Rights Law Review* 251.

<sup>14</sup> Beth Simmons, *Mobilizing for Human Rights* (2009) Cambridge, Cambridge University Press; Jutta Brunee and Stephen J. Toope, *Legitimacy and Legality in International Law* (2010) Cambridge, Cambridge University Press; Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge, Cambridge University Press; Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (2013) Cambridge, Cambridge University Press; Harold Koh, 'How Is International Human Rights Law Enforced?' (1999) 74(4) *Indiana Law Journal* 1396, 1397–1398.

<sup>15</sup> Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1(2) *European Journal of International Relations* 157; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621; Risse, Ropp and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*, above n 14.

<sup>16</sup> Jose Alvarez, 'Do States Socialize?' (2005) 54(4) *Duke Law Journal* 961, 967-968.

<sup>17</sup> Alexander Wendt, 'Collective Identity Formation and the International State' (1994) *American Political Science Review* 384, 385.

<sup>18</sup> Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373.

<sup>19</sup> Mary Robinson, UN High Commissioner for Human Rights, 'Take Hold of it Boldly and Duly', Romanes Lecture, Oxford University (11 November 1997) available at: <<http://www.un.org/rights/50/dpi1938.htm>> [accessed 1 February 2013]; Emilie Hafner-Burton and K. Tsutsui, 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most' (2007) 44(4) *Journal of Peace Research* 407.

smaller part.<sup>20</sup> Regional systems now exist under the auspices of the Council of Europe, the Organisation of American States, the Organisation of African Unity, the League of Arab States and most recently, the Association of Southeast Asian Nations (ASEAN). Some scholars have observed that there seems to be a ‘directness of association’<sup>21</sup> between members of regional organisations, which positively influences (or has the potential to influence) causal processes such as socialisation, binding, monitoring, and enforcement.<sup>22</sup> Regional systems are, in general, characterised by smaller numbers of members, deeper levels of integration, greater consensus around the importance of certain societal values, similar geographic characteristics and shared economic and security interests.<sup>23</sup> These things, many argue, are pre-conditions for effective governance.<sup>24</sup>

What drives my argument about the legitimacy of regional human rights arrangements is this: Judgments about human rights involve navigating difficult questions about the relationship between culture and rights, and the appropriate balance between rights and freedoms. They must be made with a deep understanding of the specific circumstances in which human rights violations take place in different complex societies, and with knowledge of the nature and importance of local peculiarities (religion, history, custom). For this reason, power in relation to rights should be exercised close to the people. In the language of

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<sup>20</sup> A H Robertson, *Human Rights in the World* 2<sup>nd</sup> ed (1982), Manchester University Press, 164–165.

<sup>21</sup> Norman J. Padelford, ‘Recent Developments in Regional Organisations’ (1955) 49 *American Society of International Law Proceedings* 23, 204.

<sup>22</sup> Kong Qingjiang ‘Construction of the Discourse on Legitimacy of International Institutions’ in Rudiger Wolfrum and Volker Roeben (eds) *Legitimacy in International Law* (2008) Springer, Berlin, Heidelberg, New York 369-380, 378-379.

<sup>23</sup> Robertson, *Human Rights in the World*, above n 20, 164–165; Andrew Moravcsik, ‘Explaining International Human Rights Regimes: Liberal Theory and Western Europe’ (1995) 1(2) *European Journal of International Relations* 157, 157; Louise Fawcett ‘Exploring Regional Domains: A Comparative History of Regionalism’ (2004) 80(3) *International Affairs* 429, 429–431; Andrew Hurrell, ‘One World? Many worlds? The Place of Regions in the Study of International Society’ (2007) 83(1) *International Affairs* 127, 131; Jon C Pevehouse, *Democracy from Above: Regional Organisations and Democratisation* (2005) Cambridge, Cambridge University Press, 19–28; Harry Estill Moore ‘Regionalism and Permanent Peace’ (1944) 23(1) *Social Forces* 15–19, 19; Burns Weston, Robin Lukes and Kelly Hnatt, ‘Regional Human Rights Regimes: A Comparison and Appraisal’ (1987) 20 *Vanderbilt Journal of Transnational Law* 585, 590.

<sup>24</sup> Hurrell, above n 23, 131; Report of the Commission to Study the Organization of Peace, ‘Regional Promotion and Protection of Human Rights’, 28<sup>th</sup> Report (1980), 15.

subsidiarity, we would say that power should be devolved to the smallest, lowest, or least centralised competent unit.<sup>25</sup> The level of the *state*, it would seem, is best suited to promoting and protecting human rights.<sup>26</sup> Yet we know from history that the state is also often the primary violator of rights, and that within closed political communities such as states, judgments about the balance between individual freedom and public morality, or between liberty and security, are sometimes poorly struck.<sup>27</sup>

For these reasons, we need what Adam Smith described as a ‘certain distance’ in order to obtain objectivity about questions of justice: ‘We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us.’<sup>28</sup> My hypothesis is that regional organisations might provide the ‘certain distance’ that imparts objectivity (as well as understanding) in judgments about rights. H  l  ne Ruiz Fabri, writing in the first edition of the *Asian Journal of International Law*, put it very simply: ‘National is not enough any more for most countries. Global is too much. Regional is, let us say, practicable.’<sup>29</sup>

My working hypothesis is that the regional level of governance provides something unique and additional to the global level, a *via media* between the particularistic nature of rights violations in their local contexts, and the ideal of universalism; and that the mediating function of regional organisations lends them a particular kind of legitimacy, and hence

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<sup>25</sup> Paolo G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 38.

<sup>26</sup> Louise Arbour, UN High Commissioner for Human Rights, Statement on the Opening of the 61st Session of the Commission on Human Rights, Geneva (14 March 2005).

<sup>27</sup> Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *Journal of Political Philosophy* 191.

<sup>28</sup> Adam Smith, *The Theory of Moral Sentiment* (1759) (rev ed 1976) Oxford, Clarendon Press, 11. Smith’s perspective on moral reasoning is discussed in Amartya Sen, ‘Open and Closed Impartiality’ (2002) 99 *Journal of Philosophy* 445.

<sup>29</sup> H  l  ne Ruiz Fabri, ‘Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White’ (2011) 1 *Asian Journal of International Law* 83, 83.

influence, in the promotion and protection of human rights. But the sorts of arguments that could be marshalled against my theory spring readily to mind. One argument, for example, might be that much of the power of human rights lies in its claim to universality. Might not undue attention to the efficacy of regional systems dilute this? Another argument might be that not all regions behave like a ‘society of states’, linked by common interests and common values.<sup>30</sup> In these circumstances, might not regional politics stymie the efforts of neighbouring states to influence one another’s behaviour?

Yet another argument might be that the global and regional levels each have a distinct and complementary role to play in implementing rights, and that dichotomising the division between the universal and regional levels is unproductive. The most powerful argument, perhaps, is that empirically, the effectiveness of different regional systems is highly variable.<sup>31</sup> A common theme that emerges from the work done on individual regional systems is that effectiveness depends very much on the same kinds of domestic variables that influence the efficacy of global instruments and institutions (the presence of the rule of law, strong civil society, pre-existing civil liberties).<sup>32</sup> If this is the case, then the structural conditions within states, rather than external influences (regional *or* global) might better explain why states respond to pressure to change. Throughout the course of this dissertation, I am alert to these counter-arguments. Some of them, as I will show, substantially undercut my theory about regional human rights arrangements.

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<sup>30</sup> Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (2002) New York, Columbia University Press.

<sup>31</sup> Alexandra Huneus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’ (2011) 44 *Cornell International Law Journal* 493; Stephen Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) Cambridge, Cambridge University Press; Dinah Shelton, ‘The Boundaries of Human Rights Jurisdiction in Europe’ (2003) 13 *Duke Journal of Comparative and International Law* 95; Dinah Shelton, ‘The Jurisprudence of the Inter-American Court of Human Rights’ (1994) 10 *American University Journal of International Law and Policy* 333. Pbiora Okafor *The African Human Rights System: Activist Forces and International Institutions* (2007) Cambridge, Cambridge University Press; Mervat Rishmawi, ‘The Revised Arab Charter on Human Rights: a Step Forward?’ (2005) 5(2) *Human Rights Law Review* 361.

<sup>32</sup> *Ibid.*

## 1.1. Why States Change

At the heart of this research project is the question of why states commit to international human rights norms, and after they have committed, why they (sometimes) proceed to give human rights norms prescriptive status within their own domestic systems.

This question engages, but does not fit neatly within, established research traditions of law, international relations, political science and sociology. I do not adopt and apply a single theoretical approach in this dissertation. I prefer what Peter Katzenstein calls ‘analytic eclecticism’; a focus on concrete policy and practice, attention to the complexity of real-world situations, an emphasis on interactions among different types of causal mechanisms normally analysed in isolation from each other.<sup>33</sup>

Nonetheless, many of the insights I find most useful emanate from within the broad school of constructivism. Within that school, in relation to human rights, different theories exist about how and why states change their human rights practices. One idea is ‘the spiral theory of human rights’ put forward by Thomas Risse, Stephen Ropp, and Kathryn Sikkink.<sup>34</sup> The authors argue that states act instrumentally in committing to international human rights norms, rationally balancing the costs and benefits of material and/or social sanctions and rewards (a logic of consequences).<sup>35</sup> They argue that commitments to international human rights, which are often merely tactical concessions, provide domestic and international actors with the leverage to pressure states into (eventually) making substantive changes.<sup>36</sup> A second

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<sup>33</sup> Rudra Sil and Peter J Katzenstein, ‘Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms Across Research Traditions’ (2010) 8(2) *Perspectives on Politics* 411; Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: a Dual Agenda’ (1993) 87(2) *American Journal of International Law* 205.

<sup>34</sup> Risse, Ropp and Sikkink (1999), above n 14; Risse, Ropp and Sikkink (2013), above n 14.

<sup>35</sup> Risse, Ropp and Sikkink (2013), *Ibid*, 16.

<sup>36</sup> Risse, Ropp and Sikkink (1999), above n 14; Thomas Risse and Stephen C. Ropp ‘Introduction and Overview’ (2013) in Risse, Ropp and Sikkink (2013) *ibid*.

set of scholars argue that states are influenced to behave in ways that suggest appropriate patterns of behaviour within a community of states. Where the adoption of international human rights norms is part of this pattern then, like their peers, states will also adopt these norms (a logic of appropriateness).<sup>37</sup> A third group of scholars view change in domestic attitudes to human rights as the result of social learning and deliberation, where states have their interests redefined through processes of interaction and mutual learning that lead to lasting preference change: the choice mechanism is non-instrumental and non-calculative.<sup>38</sup>

Even from this brief sketch, we can see how regional and global influences might operate differently to effect change in the human rights practices of states. In relation to the spiral theory, civil society's efforts to persuade states to translate norms into domestic legislation might be enhanced if the norm is endorsed by other states within the region. On the other hand, the norm might be such that an appeal to its universal, global nature gives greater purchase. This is precisely what I conclude from my discussion in Chapters 6 and 7, after contrasting the different ways that ASEAN states respond to global and regional efforts regarding the promotion of the rights of women, and norms regarding ending trafficking in persons. The rights of women, it seems, at least in Southeast Asia, are more effectively promoted by global instruments. In contrast, efforts to end trafficking in persons seem to be more effectively organised at the regional level. In relation to the logic of appropriateness, it seems likely that a 'community of states' and a 'group of peers' situated at the regional level might have more influence than the amorphous 'global society' to which all states belong.

On the other hand, some regions are marked by intractable differences between states (South Asia, East Asia) and in others, the presence of a hegemonic power distorts the way

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<sup>37</sup> James G. March and Johan P. Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52(4) *International Organization* 943. Jeffrey Checkel, 'Why comply? Social Learning and European Identity Change' (2001) 55(3) *International Organization* 553.

<sup>38</sup> Bruneo and Toope, above n 14.

that a logic of appropriateness might function (the Americas).<sup>39</sup> In relation to the redefinition of interests through interaction and learning, again, it would seem that proximity within regions should enhance these processes. Yet what if states belong to a region where the predominant norms are not ‘good’, liberal, democratic, human rights orientated norms? Might states be socialised in other directions?<sup>40</sup> These are the kinds of arguments that scholars have made in relation to ASEAN’s effort (or lack of effort) in relation to effecting change in Myanmar (discussed in Chapter 4 of this dissertation).<sup>41</sup>

The theories I have outlined above each in different ways draw upon individual level psychology (shame, social status, material reward) to explain what motivates macro-level state practices.<sup>42</sup> The anthropomorphism of constructivist scholarship has several critics.<sup>43</sup> Sceptics wonder whether people are really an appropriate metaphor for states, and how we can tell whether or not states are internalising patterns of behaviour, or ideas about the appropriateness of norms.<sup>44</sup> Jose Alvarez calls theories about socialisation ‘pop psychology’.<sup>45</sup> He argues that ‘states (or “organizations” in the abstract) do not “socialize”; people do.’<sup>46</sup>

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<sup>39</sup> Joseph Nye, *Peace in Parts: Integration and Conflict in Regional Organization* (1971) Boston, Little, Brown. Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16(3) *European Journal of International Law* 369.

<sup>40</sup> Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’ (1998) 23(1) *International Security* 171, 180, ‘Constructivism is agnostic about change in world politics.’ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization*, 52:4 (1998), pp 887–917, 892.

<sup>41</sup> Mathew Davies, ‘The Perils of Incoherence: ASEAN, Myanmar and the Avoidable Failures of Human Rights Socialization?’ (2012) 34(1) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 1.

<sup>42</sup> Anne-Marie Slaughter, *A New World Order* (2004) Princeton, Princeton University Press, 206–207.

<sup>43</sup> Jose Alvarez, ‘Do States Socialize?’ above n 16, 969. For a response to some of the criticisms, see Ryan Goodman and Derek Jinks, ‘International Law and State Socialization: Conceptual, Empirical, and Normative Challenges’ (2004) 54 *Duke Law Journal* 983.

<sup>44</sup> Alvarez, above n 16, 969.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

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To clear the ground, then, let me set out what I mean by socialisation. I follow Alderson's definition of state socialisation as: 'the process by which states internalize norms originating elsewhere in the international system.'<sup>47</sup> This process is primarily the result of interaction (between states, between governments and transnational civil society members, through judicial processes), which leads to internalisation of norms, ideas and attitudes.<sup>48</sup> The result of internalisation is a change in how states define themselves, or in the identity of states.<sup>49</sup> The difficult question is, how can we tell that norm internalisation is occurring?<sup>50</sup> What we are looking for is evidence that a particular idea, which was previously peripheral or opposed, is now viewed as right and appropriate and requires no further justification in order to secure compliance. Another way of saying this is that the norm generates a sense of obligation. In terms of state internalisation of human rights norms, the sorts of indicators that might reveal internalisation are: the attitude change of individuals (of political leaders, key civil society actors, the broader public), political change (change in political leadership or change in policy), the establishment of institutions to preserve and further particular norms (measures to strengthen the independence of the judiciary, the adoption of a bill of rights, or the establishment of a National Human Rights Institution).

Given this, both my theory and the empirical bent of my investigation become clearer. The proposition I am testing is that interaction at the regional level is particularly likely to lead to the internalisation of human rights norms. I am looking, within the particular region of Southeast Asia, for indicators that regional-level interaction among states has led (or seems to be leading to) shifts in the attitudes and perceptions of key actors, political change, and the establishment of human rights institutions.

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<sup>47</sup> Kai Alderson, 'Making Sense of State Socialization' (2001) 27(03) *Review of International Studies* 415, 417.

<sup>48</sup> Bruneo and Toope, above n 14.

<sup>49</sup> Alexander Wendt, 'Anarchy is What States Make of it: the Social Construction of Power Politics' (1992) 46(2) *International organization* 391; Bruneo and Toope, above n 14, 14.

<sup>50</sup> Goodman and Jinks, above n 43, 993-994.

## 1.2. Legitimacy

Why is legitimacy the touchstone for my investigation?<sup>51</sup>

As I have explained, my central question is whether or not—and if so, the circumstances in which—interaction at the regional level is likely to lead states to change their human rights practices. Another way of putting this is, under what circumstances will regional-level interaction give a human rights norm or institution *authority*?<sup>52</sup> From Weber, we know that authority is exercised in one of three ways: *via* means of: (1) coercion (2) self-interest, or (3) legitimacy.<sup>53</sup> Coercion requires the exercise or threat of force, and so is costly and oppressive. Self-interest requires continual acts of persuasion in order to convince actors about the benefits of compliance. It is expensive and demanding as a system of governance. Legitimate rule engenders compliance because actors hold ‘a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’<sup>54</sup> It is the optimal basis for compliance.<sup>55</sup> Most social scientists argue in a circular fashion that legitimacy (as a subjective concept denoting perceptions of appropriateness) engenders voluntary compliance, and that compliance in the absence of coercion or self-interest is one of the indicators of a

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<sup>51</sup> See Thomas Franck, ‘Why a Quest for Legitimacy?’ (1987) 21 *University of California Davis Law Review* (1987) 535.

<sup>52</sup> Ian Hurd, ‘Legitimacy and Authority in International Politics’ (1999) 53(2) *International Organization* 379; Martha Finnemore and Stephen J. Toope, ‘Alternatives to “Legalization”’: Richer Views of Law and Politics’ (2001) 55(3) *International Organization* 743; Jean-Marc Coicaud and Veijo Heiskanen (eds) *The Legitimacy of International Organizations* (2001) Tokyo, United Nations University Press; Jens Steffek, ‘The Legitimation of International Governance: A Discourse Approach’ (2003) 9(2) *European Journal of International Relations* 249.

<sup>53</sup> Max Weber, *The Theory of Social and Economic Organization* (1947) A M Henderson and Talcott Parsons (trans) and Talcott Parsons (ed) New York, The Free Press.

<sup>54</sup> Marc Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 571, 574.

<sup>55</sup> Hurd, above n 52, 388-389.

law or institution's (normative) legitimacy.<sup>56</sup> The importance of legitimacy in the international human rights system, where there are few sanctions and little incentive for states to comply with norms out of self-interest, is immediately apparent.<sup>57</sup> Over the past decade, legitimacy has become a major focus for international law scholars.<sup>58</sup>

Although they are inter-related, different methods are used to assess legitimacy in its subjective and normative senses.<sup>59</sup> In relation to legitimacy as a subjective concern, what are relevant are the perceptions of particular actors or sets of actors about the appropriateness of certain rules or institutions in a given context.<sup>60</sup> Different audiences (civil society representatives, rights-holders, states, members of the international community) may have different understandings about the legitimacy of rules or institutions. For example, the Terms of Reference (TOR) of AICHR state that the institution is 'inter-governmental' and

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<sup>56</sup> Daniel Bodansky, 'Legitimacy in International Law and International Relations', Paper presented to the American Political Science Association 2011 Annual Meeting, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) available at: <[http://papers.ssrn.com/sol3/PIP\\_Journal.cfm?pip\\_jrnl=1896384](http://papers.ssrn.com/sol3/PIP_Journal.cfm?pip_jrnl=1896384)> [accessed 4 February 2012], 15.

<sup>57</sup> Harold Koh, 'Internalization through Socialization' (2005) 54(4) *Duke Law Journal* 975, 979.

<sup>58</sup> Wolfrum and Roben (eds) *Legitimacy in International Law*, above n 22; Harold Koh 'Review Essay: Why Do Nations Obey International Law?' (1997) 106(8) *Yale Law Journal* 2559–2659; Thomas Franck 'Legitimacy in the International legal System' (1988) 82 *American Journal of International Law* 705 at 712; Thomas Franck, *The Power of Legitimacy Among Nations* (1990) Oxford, Oxford University Press; Thomas Franck 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 92. Hurd, 'Legitimacy and Authority in International Politics', above n 52 379-408; Jens Steffek 'The Legitimation of International Governance: A Discourse Approach' (1998) 9 *European Journal of International Law* 249–275; Ian Clark 'Legitimacy in Global Order' (2003) *Review of International Studies* 75-95; Daniel Bodansky 'The Concept of Legitimacy in International Law' (2008) in Wolfrum and Roben (eds) *Legitimacy in International Law* above n 22, 313-315; Abram Chayes and Antonia Handler Chayes 'On Compliance' (1993) 47(2) *International Organisation* 175–205; Christian Reus Smit, 'The Security Council's Crisis of Legitimacy and the Use of Force' (2007) 23 *International Politics* 44, 214; Samantha Besson 'The Authority of International Law—Lifting the State Veil' (2009) 31 *Sydney Law Review* 343; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 4 *Ethics and International Affairs* 405-437. Questioning the recent focus on legitimacy in international law and international relations see Shane Mulligan, 'Questioning (the question of) Legitimacy in IR: A Reply to Jens Steffek' (2004) 10(3) *European Journal of International Relations* 475.

<sup>59</sup> Bodansky 'The Concept of Legitimacy in International Law', above n 58.

<sup>60</sup> Hurd, above n 52, 381; Mathias Koenig 'Institutional Change in the World Polity – International Human Rights and the Construction of Collective Identities' (2008) 23(1) *International Sociology* 95–114; Seymour M Lipset, 'Social Conflict, Legitimacy and Democracy' (1984) in W Connolly (ed) *Legitimacy and the State* (1984) New York, New York University Press, 88; Jean Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36(4) *Political Theory* 578, 591.

‘consultative,’ comprised of state representatives who are ‘accountable to the appointing government.’<sup>61</sup> One of the conclusions I reach in this dissertation is that the provisions undermine the legitimacy of AICHR in the eyes of the region’s civil society members, who value institutional independence and powers of enforcement. At the same time, I argue that these provisions *increase* the legitimacy of AICHR in the eyes of (some) representatives of ASEAN governments, who value the preservation of sovereignty and the principle of non-interference. Furthermore, different state actors within the regional grouping hold different perceptions of the institution’s legitimacy. The point is that no single assessment of legitimacy is likely to capture the various views of the different audiences. The utility of an inquiry into (subjective) legitimacy is that it helps to uncover the different perspectives of relevant actors.

In relation to the normative elements of legitimacy, the inquiry is quite different. The search is for objective determinants for the moral authority to exercise power.<sup>62</sup> For example, there is a strong argument that in international law, legitimate authority is based on the consent of states reflected in international treaties. State consent is itself legitimated by national mechanisms that ensure international obligations reflect the will of domestic constituents.<sup>63</sup> From this perspective, the inquiry into the legitimacy of norms and institutions is technical, concerned with the democratic processes in different countries (elections, parliamentary procedures for passing legislation that adopts or gives effect to international treaties). This idea of legitimacy is taken up in Chapter 3, where I discuss the internal democratic processes of ASEAN states in ratifying the Charter. Another aspect of normative legitimacy relates to the qualities of institutions and the way rules are implemented. If the

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<sup>61</sup> TOR AICHR, Article 3; TOR AICHR, Article 5.2.

<sup>62</sup> Rudiger Wolfrum, ‘Legitimacy in International Law from a Legal Perspective’ in Wolfrum and Roben (eds) *Legitimacy in International Law*, above n 22, 1–24.

<sup>63</sup> See Allen Buchanan and Robert O Keohane, ‘The Legitimacy of Global Governance Institutions’ in Wolfrum and Roben (eds) *Legitimacy in International Law* above n 22, 25-62.

composition of an institution and its rules are fair and transparent, and the law is applied consistently, then this has a legitimising effect in international law (as it does in domestic law).<sup>64</sup> From this perspective, the inquiry is into the decision-making processes of institutions, how widely known and understood rules are, and how rules are applied. Determinacy (the clarity of a norm's meaning) is yet another element of legitimacy. As I explain in Chapter 3, lack of determinacy has an effect on both actual and perceived legitimacy. Deficiencies in normative legitimacy usually effect subjective legitimacy.

### 1.3. What Conception of Human Rights?

My conception of human rights shapes my approach in this dissertation. Like many others, I eschew the traditional, natural law idea of human rights as universal moral rights that we hold simply because we are human. There is simply no philosophical basis to support this idea.<sup>65</sup> I adopt what has become known as 'a political conception of human rights.'<sup>66</sup> In contemporary moral philosophy, this idea takes various forms. But at its core are two central arguments.

The first is that 'human rights protect urgent individual interests against threats to which they are vulnerable under typical conditions of life in a modern world order comprised of states.'<sup>67</sup> Two points arise from this. One is that the list of what these urgent interests *are* is not definite or settled. It is subject to revision or extension. Charles Beitz, employing Rawls'

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<sup>64</sup> Wolfrum, 'Legitimacy in International Law from a Legal Perspective', above n 62; Thomas Franck, 'Legitimacy in the International System' (1988) 82(4) *American Journal of International Law* 705-59.

<sup>65</sup> Joseph Raz, 'Human Rights Without Foundations' in Besson and Tasioulas (eds) *The Philosophy of International Law* (2010) Oxford University Press, Oxford, 321-337, 329.

<sup>66</sup> John Rawls, 'The Law of Peoples' (1993) 20(1) *Critical Inquiry* 36; Michael Ignatieff, *Human Rights as Politics and as Idolatry* (2001) Princeton, Princeton University Press; Charles Beitz, 'Human Rights and the Law of Peoples', in D Chatterjee (ed) *The Ethics of Assistance* (2004) New York, Cambridge University Press; Joshua Cohen, 'Minimalism about Human Rights: the Most We Can Hope For?' (2004) 12(2) *Journal of Political Philosophy* 190, 203; Peter Jones, 'International Human Rights: Political or Metaphysical?', in S. Caney, D. George and P. Jones (eds) *National Rights, International Obligations* (1996) Boulder, CO, Westview, 183-204.

<sup>67</sup> Beitz, above n 12, 111.

ideas of ‘reasonable agreement’ and ‘overlapping consensus’, argues that urgent interests are ones that most of us would recognise as important in a wide range of lives in contemporary society.<sup>68</sup> The other point is that rights are held against the state and its institutions; they are not just innately ‘held.’ Rights are ‘political’ in the sense that they are constrained by what is achievable under different circumstances.<sup>69</sup>

Second, states are important structures for organising society, providing for the self-determination of people and protecting their interests. For these reasons, state sovereignty should be respected. For Rawls, Raz, and Beitz, one of the things that defines a human right is that its abuse justifies international action that would otherwise violate sovereignty.<sup>70</sup>

There are three ways in which this conception of human rights shapes my research. First, at the level of method, political conceptions direct attention away from theory and metaphysics, towards pragmatism and empirically based assessments of the actual practice of human rights in complex societies. For example, in my discussion about the practice of polygamy in Chapter 5, I consider the international and domestic law relating to the practice. But I also consider the way the practice is experienced by men, women and children in communities where it occurs, and the way that these experiences shape responses to the efforts of different actors to prevent the practice. Second, the fact that the list of human rights is not settled suggests the importance of discourse and debate and focuses our attention on ideas about deliberative democracy and the conditions under which people can participate in shaping the kind of society in which they live.

For example, in my discussion of the drafting of the ASEAN Human Rights Declaration (Chapter 5), I show how the absence of public participation in the drafting process undermines the legitimacy of the Declaration. Third, because I argue that human

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<sup>68</sup> Ibid.

<sup>69</sup> Joshua Cohen, ‘Is There a Human Right to Democracy?’ in Christine Syrowich (ed), *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (2006) Oxford, Oxford University Press, 226–248, 238.

<sup>70</sup> John Rawls, *The Law of Peoples*, above n 66; Beitz, above n 12; Raz, above n 65.

rights are not innate or ahistorical, but are instead political agreements about what interests should be protected, I do not at the outset assume that *liberal democracy* is a human right or that democracy is required for the realisation of human rights. What democracy is, and the relationship between democracy and human rights, is discussed in Chapters 2 and 3. At this point, it is enough to say that I do not at the outset presume that the political philosophies of ASEAN's communist states (Vietnam and Laos) or its absolute sultanate (Brunei) are incompatible with human rights. What matters is the actual way that rights of participation are accessed and guaranteed in different political communities.

#### **1.4. Testing the Theory: Why Southeast Asia?**

I test my hypothesis using a case study of Southeast Asia. I focus particularly on two of ASEAN's recently established human rights institutions: AICHR, and the ASEAN Human Rights Declaration (2013). AICHR was established in 2009, pursuant to Article 14 of the ASEAN Charter (2007). As I have said, the Commission is 'consultative' and its 10 commissioners are 'accountable to their appointing governments.' The ASEAN Human Rights Declaration was adopted in October 2013, as a 'framework for human rights cooperation in the region and contribute to the ASEAN community building process.'<sup>71</sup>

The reasons why I approach my research question through a study of these institutions, and why I chose Southeast Asia as the region for my case study, are as follows:

First, my premise is that legitimacy is what gives international norms and institutions authority. My theory is that regional institutions may have particular legitimacy for a range of reasons that might include, for example, the shared economic and security ties that link states and create co-dependencies, or the inter-subjective understandings that arise from shared

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<sup>71</sup> ASEAN Human Rights Declaration (2013), above n 8, Preamble.

## *Chapter 1: Introduction*

histories, cultures, borders or political beliefs and interests; or the fact that interaction about the meaning and value of rights occurs more effectively between small numbers of states that share common values. As I explained earlier, legitimacy has both normative and subjective elements. In relation to the subjective aspects of legitimacy, what are relevant are the *beliefs* of relevant actors. Do these actors believe that these particular regional human rights institutions are appropriate, given the circumstances and context of Southeast Asia? The answer can only be uncovered by asking questions of the actors involved, and by attending to the particularistic circumstances of the region. This implies qualitative research and a level of detail that suggests a case study method. Southeast Asia is accessible. In the course of my research I interviewed four of the ten Commissioners of AICHR (though none would formally be recorded), dozens of lawyers and civil society activists, and sat in on several of the regional civil society deliberations about the drafting of the ASEAN Human Rights Declaration. The views of governments I divined from media reports, statements in parliament and official documents. All of this informed my assessment about the (subjective) legitimacy of ASEAN's regional human rights institutions.

Second, Southeast Asia represents a 'most difficult case.' It is politically and culturally diverse, and it has a longstanding resistance to the Western liberal cast of the classical idea of human rights; ASEAN states have been traditionally reluctant to engage with the international human rights treaty monitoring system. To the extent that it might be possible to generalise from a single case study to regional institutions more generally, then selecting 'a most difficult case' strengthens the generalisability of the hypothesis. In other words, if I am able to conclude in this project that Southeast Asia's regional human rights institutions possess a particular kind of legitimacy, then this provides a clear path for future scholars who may wish to extend the hypothesis to the regional institutions of Europe, or the Americas, Africa or the Middle East.

Third, the novelty of Southeast Asia's institutions represents a challenge and an opportunity. The challenge is that charting the creation and early years of these institutions requires first-hand empirical research. Secondary material is scarce, with the exception of the interest shown by some international relations scholars in the question of why, given Southeast Asia's reticence about human rights, the governments of the region decided to create human rights institutions at all (a question taken up in Chapter 3). The opportunity lies in the fact that elements of legitimacy can be studied closely at the point of creation, providing a base line from which future developments can be measured. As I note in the final chapter, legitimacy is not static. Institutions and instruments have the potential to garner legitimacy, regardless of the circumstances of their creation.

### **1.5. Structure of the Dissertation**

Democracy, in the multiple ways that it can be understood, emerges as the recurring theme of this study.

I begin (in Chapters 2 and 3) by explicating the relationship between democracy and human rights and describing the state of democracy in Southeast Asia. I draw conclusions about the effect of the lack of democracy within some Southeast Asian states on the legitimacy of AICHR. My focus in these chapters is on democracy understood as a system of politics, and on the way in which democracy affects the normative elements of the legitimacy of AICHR.

In Chapter 4, in a case study of recent developments in Myanmar, I consider how low levels of democracy within a region affect the ability of regional institutions to influence 'pariah' states. I conclude that even in regions that possess low levels of democracy, the

regional effect on processes of liberalisation and democratic consolidation has some significance.

In Chapter 5, I turn away from democracy at the state-system level. In a study of the drafting of the ASEAN Human Rights Declaration, I consider the importance of processes of democratic discourse in the creation of international instruments and in particular, the role of civil society in contributing to the creation of instruments that possess the quality of legitimacy. I argue that the absence of deliberative democracy in the drafting process for the Declaration undermines the instrument's legitimacy and stymies the emergence of a regional conversation about the meaning and value of rights.

In Chapters 6 and 7, I undertake a comparison of legitimacy at the regional/global levels across two different rights: the rights of women, and trafficking in persons. In relation to trafficking in persons, I find some evidence of the sorts of regional-level processes that support my theory: moral consciousness-raising, argumentation and persuasion amongst regional peers by national and regional actors, both governmental and non-governmental, coupled with the alignment of interests among states that share instrumental reasons for advancing a particular joint project. In relation to the rights of women, however, I find that the global level provides a greater level of legitimacy.

## **1.6. Conclusion**

Based on what I have said so far, what would a regional human rights system, possessing the quality of legitimacy, look like?

First, adopting a political conception of what human rights are, we would see evidence of a shared understanding of what interests qualify as human rights. Second, we

would see a high degree of awareness about how rights violations manifest themselves in specific local circumstances. Third, we would see dense interaction between states within a particular constrained geographical area, in the form of joint instruments and shared institutions created to address the problem. Fourth, we would see all this occurring against a backdrop of shared economic, political or security interests.

This is not what we find in Southeast Asia. Instead, we find little consensus about what rights are, and the absence of conditions necessary for fostering effective debate, argument and discussion about rights. We find that restrictions on freedom of information in several ASEAN countries inhibit regional awareness about rights and their violation in different circumstances. We do find evidence of government-level interaction and civil society interaction in relation to some human rights issues (such as trafficking in persons) but in relation to many issues—particularly sensitive political issues to do with civil rights and freedoms—norms of non-interference prevail. In terms of shared economic and security interests, regional economic integration is at an embryonic stage. There is some evidence of shared security interests in the sense of a joint wish to bolster regional solidarity in relation to China, but this is complicated by opposing views within ASEAN about how best to manage China's ambitions.<sup>72</sup>

The end result is that I do not *prove* my hypothesis. My conclusion is that regional human rights institutions do *not* possess a particular kind of legitimacy *in circumstances where states belong to a region with low levels of democracy*. Saul's intuition is correct: 'legitimate regional institutions must be firmly grounded in popular consent, reached through

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<sup>72</sup> In 2012, under the chairmanship of Cambodia, leaders at the ASEAN Summit failed to agree on a joint communique about a Code of Conduct for the South China Sea. Patrick Barta, 'Sea Dispute Upends ASEAN Summit' (23 July 2012) *Wall Street Journal* available at: <http://online.wsj.com/news/articles/SB10001424052702303919504577524133983292716> [accessed 29 January 2014].

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agreement and negotiation with the local communities whose values they purport to represent and protect.<sup>73</sup> Democracy (and its deficit in Southeast Asia) is at the heart of my explanation about the lack of legitimacy attaching to the region's new human rights institutions.

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<sup>73</sup> Ben Saul, 'In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities' (2000) 32 *Columbia Human Rights Law Review* 565, 596.

## **Chapter 2: Democracy and Human Rights**

### **2.1 Introduction**

### **2.2 Defining Democracy**

### **2.3 The Relationship between Democracy and Human Rights**

#### *2.3.1 Democratic Peace?*

#### *2.3.2 Democracy and Economic and Social Rights*

##### *(a) Liberal Democracies and Economic Development*

##### *(b) The Liberal Economic Peace*

### **2.4 Democracy as a Human Right**

#### *2.4.1 Self-Determination and Democracy*

#### *2.4.2 Democracy as a Freestanding Human Right?*

### **2.5 Democracy in Southeast Asia**

### **2.6 Conclusion**

We must remember that each country is the product of different circumstances, opportunities and constraints. Thailand has been at that stage before, when political repression was the order of the day. The advances we made towards greater democracy and human rights were paid for in tears and blood, here at Thammasat University. It is a process that each country must work out for itself, in its own way, at its own pace, in its own time.<sup>1</sup>

Thai Foreign Minister Surin Pitsuwan, address at Thammasat University, Bangkok, on 12 June 1998.

## **2.1. Introduction**

In Chapter 1, I set out my hypothesis, which is that in the promotion and protection of human rights, regional human rights institutions possess a legitimacy that global organisations do not. I outlined some of the possible reasons for this: for example, that regional systems articulate norms that reflect the aspirations and ideals of a discrete group of states, which are refined and redefined through discourse, in a context of awareness of the specific historical and political circumstances of different states. I suggested that these things bred legitimacy and that for this reason regional organisations may have significant potential to shape the discourse about rights protection within states.

As I foreshadowed in my conclusion to Chapter 1, Southeast Asia presents something of a challenge to this hypothesis. The conclusion I reach, at the end of this dissertation, is that where the region to which a state belongs lacks a critical mass of democracies, then the particular advantages of regionalism in elaborating human rights ideals (because of shared history, and bonds of culture, trade and security) may be greatly diminished. In this chapter, I begin to set out the reasons why this is the case. At the heart of

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<sup>1</sup> H.E. Dr Surin Pitsuwan, 'Thailand's Foreign Policy During the Economic and Social Crisis', Seminar Paper presented at the commemoration of the 49<sup>th</sup> anniversary of the Faculty of Political Science, Thammasat University (12 June 1998) 6. Quoted in John Funston, 'ASEAN and the Principle of Non-intervention: Practice and Prospects' (2000) Singapore, Institute of Southeast Asian Studies, 1–18, 11. Available at: <http://www.iseas.edu.sg/trends520.pdf> [accessed 13 September 2011].

the explanation is the relationship that exists between democracy and human rights. In the course of this dissertation, I show how low levels of democracy undermine regional efforts to advance human rights in a number of distinct ways.

For example, in Chapter 3 I show how the consent of *democratic* states is viewed as a prerequisite for the legitimacy of international law and for the legitimacy of institutions such as AICHR. In Chapter 4, I show how the potential for regional-level efforts to influence human rights within ‘pariah’ states such as Myanmar is dependent on the democratic density of the region. In Chapter 5, I show how prospects for achieving regional-level discourse about the meaning, value and scope of rights in instruments such as the ASEAN Human Rights Declaration is seriously diminished when the conditions for deliberative democracy are absent. Chapter 6 demonstrates how the absence of democracy within particular states makes it difficult to negotiate and debate at the regional level sensitive issues such as the rights of women. Chapter 7, in contrast, shows how certain human rights issues (such as trafficking in persons), which are less intimately connected to democracy, have a greater likelihood of being successfully managed at the regional level, even in circumstances where the region is not strongly democratic.

Chapters 2 and 3 examine the relationship between democracy and human rights and make the argument for the centrality (and primacy) of democracy. These chapters lay the foundation for the arguments made in all later chapters. I begin Chapter 2 by describing the difficulty of defining ‘democracy’, and by outlining the inadequacy of definitions, which merely adumbrate the specific characteristics of ‘liberal’ democracy (2.2). In the end, I propose a definition that is fairly close to the idea of democracy captured in Article 25 of the 2003 Vienna Declaration, which provides that ‘democracy is based on the freely

expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.’<sup>2</sup>

I then explain the two primary ways in which a relationship between democracy and human rights is commonly justified. The first is the Kantian idea that both democracy and human rights are necessary for the preservation of peace (2.3.1), and the second is the link that is said to exist between democracy, and economic and social rights (2.3.2). This second idea has two parts: the first is the idea that development and the just distribution of goods depend on democracy; the second connects with Kant’s idea of a liberal economic peace. I consider these justifications in light of the particular history and economic order of Southeast Asia, and suggest that there are limits to the applicability of these ideas in the Southeast Asian regional context.

Having concluded that the consequentialist justifications for the democracy/human rights nexus are implausible in the case of Southeast Asia, I turn to normative justifications for linking democracy and human rights (2.4). I consider first the idea that self-determination, an entitlement recognised under international law, is the origin of an understanding that democracy is itself a human right. I point out the conceptual problems of equating self-determination with democracy (for example, does a people’s right to self-determination give them the right to choose a non-democratic form of governance, or to abrogate the rights of minorities within the democracy?)<sup>3</sup> In the end, I concur with the view of the Human Rights

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<sup>2</sup> UNGA, World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (25 June 1993).

<sup>3</sup> See Fernando Tesón, ‘International Human Rights and Cultural Relativism’ (1984) 25 *Va. J. Int’l L.* 869. Tesón argues that of the two conflicting interpretations of self-determination, one advancing the idea that the principle permits a people to adopt *any* form of government, the other arguing that it implies a democratic form of internal governance, the latter is more convincing. The former is ‘at best a misconception, at worst a rationalization for oppression’, 882.

Committee, which is that rights of political participation are ‘related to, but distinct from, the right of peoples to self-determination.’<sup>4</sup>

I then consider the way in which liberal political philosophers such as John Rawls and Joshua Cohen have sought to link democracy and ideas about the freedom and equality of the individual, and I trace the development of this type of thinking in the elaboration of a liberal idea of democracy by various institutions of the United Nations. Finally, I describe the disjuncture that exists between this ideal and the idea of governance that has historically predominated in different states in Southeast Asia. All of this points the way to my discussion in the first part of Chapter 3, where I explore the reasons why most states within Southeast Asia have historically resisted the western idea of liberal democracy. The final part of Chapter 3 examines the effect of the disparate and conflicting understandings of democracy on the form and legitimacy of the region’s new human rights institutions.

## 2.2. Defining Democracy

The threshold question is how to define ‘democracy’ for the purpose of this dissertation.<sup>5</sup> Southeast Asia is a region replete with ‘democracies with adjectives’ (‘discipline–flourishing democracies’, ‘people’s democracies’, ‘dominant-party democracies’ and ‘emerging democracies’).<sup>6</sup> A definition of democracy based on the subjective understandings of

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<sup>4</sup> UN Human Rights Committee, General Comment No. 25: Article 25 The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service), CCPR/C/21/Rev.1/Add.7 (12 July 1997) available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument).

<sup>5</sup> Ezetah writes: ‘[t]he meaning of ‘democracy’, especially as expounded in scholarly writing and state practice, remains a riddle of immense proportions.’ Reginald Ezetah, ‘The Right to Democracy: A Qualitative Inquiry’ (1996) *Brook. J. Int’l L.* 22: 495.

<sup>6</sup> See David Collier and Steven Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’ (1997) 49(3) *World Politics* 430-51. See also: P.C. Schmitter et al, ‘What Democracy Is... and Is Not’ (1996) 2(3) *Journal of Democracy* 75. It is not only in Southeast Asia that observers have noted the existence of

different ASEAN state governments is unhelpful. But how does one objectively define democracy? The word is used promiscuously, across many disciplines,<sup>7</sup> indeed, so much so that some scholars have abandoned attempts at definition. They point, instead, to the characteristics of systems of government (usually in ‘Western Europe, North America, India, the Antipodes and a few other places’)<sup>8</sup> that appear to demonstrate certain features; most importantly, the peaceful transfer of power, and governance under and according to law by those who are elected by the majority. Certain other guarantees are viewed as being necessary for the effective and fair operation of a democratic political system, such as free communication and free association.<sup>9</sup> Other guarantees, such as principles of tolerance of dissent, and constitutional safeguards to protect minorities, are viewed as necessary to prevent the abuses of majority rule.

Of paramount importance in all of these accounts is the idea of the periodic election.<sup>10</sup> Francis Fukuyama concludes that ‘[a] country is democratic if it grants its people the right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage.’<sup>11</sup> Multi-party elections have come to denote the core of liberal democracy.<sup>12</sup> Since the collapse of communism and single-party states in Eastern Europe in 1989, the claim has been made that the world is at a ‘grand historical

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‘democracy with adjectives’. See Peter Burnell, ‘Democracy Promotion: The Elusive Quest for Grand Strategies’ (2004) *Internationale Politik und Gesellschaft* 10.

<sup>7</sup> James Griffin, *On Human Rights* (2009) Oxford, Oxford University Press, 243.

<sup>8</sup> *Ibid.*

<sup>9</sup> Thomas Franck, *Fairness in International Law and Institutions* (1998) Oxford, Oxford University Press.

<sup>10</sup> The procedural idea of democracy as elections derives from Joseph Schumpeter, *Capitalism, Socialism and Democracy* 3<sup>rd</sup> ed. (1950) New York, Harper & Row. Samuel Huntington is one who follows Schumpeter’s tradition. Samuel Huntington, *The Third Wave: Democratization in the Late 20<sup>th</sup> Century* (1991) Norman, University of Oklahoma Press, 6.

<sup>11</sup> See Francis Fukuyama, *The End of History and the Last Man* (1992) London, Penguin Books Ltd, 43.

<sup>12</sup> Multi-party elections are the key features of liberal states according to principle proponents of liberalism such as Fernando Tesón, ‘The Kantian Theory of International Law’ (1992) 53 *Colorado Law Review* 92; and Anne-Marie Slaughter (Burley), ‘Revolution of the Spirit’ (1990) 3 *Harvard Human Rights Journal* 1; Anne-Marie Slaughter, ‘Towards an Age of Liberal Nations’ (1992) 33 *Harvard International Law Journal* 393; Anne-Marie Slaughter, ‘Law and the Liberal Paradigm in International Relations Theory’ (1993) *Proceedings of the International Society of International Law*; Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law* 503.

tipping point' into 'universal (liberal) democracy.'<sup>13</sup> Liberal democracy's vision is one of free and equal individuals who pursue self-chosen ends and personal interests with minimum political impediments.<sup>14</sup> In the ideal liberal democracy, those who govern act for the common good (generally held to be the prosperity of society, the security of citizens, order and justice).<sup>15</sup> Prosperity, security, order and justice are held to be desirable because they permit the greatest possible degree of individual autonomy and liberty.<sup>16</sup>

Within most states in Southeast Asia, many resist definitions that elide democracy with 'liberal' democracy.<sup>17</sup> There are several reasons for this. First, some Southeast Asian leaders question liberal democracy's emphasis on values of liberty and autonomy, arguing that these values displace equally important values of familial and communitarian obligation, social order and harmony.<sup>18</sup> Second, 'equality' as a principle of political order has been set against the Confucian idea of rule by wise, benevolent and virtuous guardians, often born into

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<sup>13</sup> Larry Diamond, 'Universal Democracy?' (2003) *Policy Review* 3–26. See also Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996) New York, Touchstone; Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) *The American Journal of International Law* 46, 49; Amartya Sen, 'Democracy as a Universal Value' (1999) 10(3) *Journal of Democracy* 3–17. See also John W. Danford, *Roots of Freedom: A Primer on Modern Liberty* (2000) Wilmington, Delaware, ISI Books.

<sup>14</sup> A. Callinicos, *The Revenge of History: Marxism and East European Revolutions* (1991) Cambridge, Polity Press. Callinicos states that liberal democracy promises: (1) participation in politics; (2) control from below; and, (3) freedom of dissent.

<sup>15</sup> John Rawls, *Political Liberalism* (1993) New York, Columbia University Press.

<sup>16</sup> Robert Dahl reminds us that democracy is not a dichotomous concept, either present or absent: Robert A. Dahl, *Democracy and its Critics* (1989) New Haven, CT, Yale University Press. Bollen concurs: Democracy is 'always incomplete,' operating along a continuum of *degrees* marked by different elements and levels of inclusiveness, participation and accountability: K.A Bollen, 'Political Democracy: Conceptual and Measurement Traps' (1990) 25(1) *Studies in Comparative International Development* 7, 13. See also Philippe C. Schmitter and Terry P. Carl, 'What Democracy Is... and Is Not', above n 6, 251; William Case, 'Low-Quality Democracy and Varied Authoritarianism: Elites and Regimes in Southeast Asia Today' (2009) 22(3) *Pacific Review* 255–269.

<sup>17</sup> See Neil Petersen, 'International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism' (2010) 1(1) *Asian Journal of International Law* 149–163, 151;

<sup>18</sup> Mohamad Mahathir, 'Let's Have Mutual Cultural Enrichment' (16 March 1995) *New Straits Times*, 10–11; Mohamad Mahathir, 'No Freedom Without Responsibility' (20 May 1995) *New Straits Times*, 14. For a response, see: Amartya Sen, 'Democracy as a Universal Value', above n 13. See also: Amartya Sen, 'Democracy and its Global Roots: Why Democratization is Not the Same as Westernization' (2006) 1 *Moral Issues in Global Perspective* 208.

a dynasty of leaders, who represent the interests of the nation for the good of all.<sup>19</sup> Third, there is ambivalence about the idea of liberal democracy because of its association with the region's colonial history.<sup>20</sup> Fourth, liberal democracy's idea of competitive multi-party elections sits uneasily with the political philosophies of ASEAN's communist members, Vietnam and Laos.<sup>21</sup> Finally, it is apparent to some in the region that 'democracy' as understood by the West is no panacea for inequality, that '[r]eal existing constitutional democracies privilege the wealthy. As they install, extend, and protect neoliberal capitalism, they exclude, exploit, and oppress the poor, all the while promising that everybody wins.'<sup>22</sup>

A return to democracy's etymological root is helpful in negotiating between the two poles of 'universal' liberal democracy, and complete relativism.<sup>23</sup> Democracy derives from the Greek *kratos* (rule or power) and *demos* (of the people), and references a primary normative principle; namely, that it is right that 'the people rule or have ultimate political

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<sup>19</sup> Clark D. Neher, 'Asian Style Democracy' (1994) 34(11) *Asian Survey* 949-961. In Southeast Asia, 'wise, benevolent, virtuous guardians' might include Ho Chi Minh in Vietnam, Lee Kuan Yew in Singapore, Norodom Sihanouk in Cambodia, Ferdinand Marcos in the Philippines, Ne Win in Burma, Sukarno and Suharto in Indonesia, Mahathir in Malaysia. The idea of rule by wise and virtuous guardians, Dahl suggests, links Plato, Confucius and Lenin as critics of democracy: Dahl above n 16, 52-3. See also Michael Freeman, 'Human Rights, Democracy and 'Asian Values' (1996) 9(3) *Pacific Review* 352-366.

<sup>20</sup> Rudolf Severino, *Southeast Asia in Search of an ASEAN Community* (2006) Singapore, Institute of Southeast Asian Studies, 93. Severino, former ASEAN Secretary-General, writes that 'All except Thailand fell under Western colonialism, that extreme form of interference in a society's internal affairs...[i]n the light of Southeast Asian countries' colonial and post-colonial experience, the immense diversity amongst them, the make-up of their populations, the still-delicate state of their relations, and their conceptions of their respective interests, it is difficult to see why ASEAN's policy and practice of non-interference in member's internal affairs should be the object of wonder or derision.'

<sup>21</sup> Article 4 of the 1992 Constitution of the Socialist Republic of Vietnam (as amended 25 December 2001), provides that 'The Communist Party of Vietnam, the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the working people and the whole nation, who adheres to Marxism-Leninism and Ho Chi Minh's thought, is the force assuming leadership of the State and society.' See: William Case, 'Low-quality Democracy and Varied Authoritarianism: Elites and Regimes in Southeast Asia Today', above n 16, 255. On the disjunction between liberalism and communism, see James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights' (2001) *The Presidential Address, Proceedings of the Aristotelian Society* 101, 1-28.

<sup>22</sup> Jodi Dean, *Democracy and other Neoliberal Fantasies* (2009) Durham, Duke University Press Durham, 76.

<sup>23</sup> Stephanie Lawson, 'Culture, Relativism and Democracy: Political Myths about 'Asia' and 'the West' (1995) Working Paper 1995/6.

authority.<sup>24</sup> In modern society, the means of achieving the authority of the people is through political representation, which functions with a maximum level of inclusiveness in the systems of power so that there is a level of surety that those who hold authority govern with the consent of the governed.<sup>25</sup> By this, all have the opportunity to ‘assume responsibility for shaping the kind of civil society in which they live and work.’<sup>26</sup> This understanding of democracy is not too far from the idea of democracy captured in Article 25 of the 2003 Vienna Declaration, to which all ASEAN states have agreed: ‘Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.’<sup>27</sup>

It is necessary to make two points about the broad definition adopted here. First, the understanding of democracy outlined above does not list ‘multi-party’ democracy as either a requirement for or an indicator of democracy. As Bollen maintains, ‘having a multi-party system does not guarantee political rights and liberties ... it is theoretically possible for a one-party system to respect political rights and political liberties.’<sup>28</sup> Thus the definition of democracy which I adopt does not at the outset make the assumption that those ASEAN states that possess single political parties (Vietnam, Laos), or that in practice have had only one political party hold power (Cambodia, Malaysia, Singapore), or that do not hold general elections (Brunei) are ‘undemocratic.’

Second, the definition of ‘democracy’ adopted includes the Vienna Declaration’s emphasis on ‘full participation’ as an aspect of democracy. This leads us to ask how such

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<sup>24</sup> Stephanie Lawson, ‘Democracy and the Problem of Cultural Relativism: Normative Issues for International Politics’ (1988) 12(2) *Global Society* 251.

<sup>25</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’ above n 13, 46. See also Charles Tilly, ‘Processes and Mechanisms of Democratization’ (2000) 18(1) *Sociological Theory* 1 at 1; Bruce Mesquita et al, ‘Thinking inside the Box: A Closer Look at Democracy and Human Rights’ (2005) 49(3) *International Studies Quarterly* 439.

<sup>26</sup> Franck, above n 13, 46.

<sup>27</sup> Vienna Declaration and Program of Action, above n 2.

<sup>28</sup> Kenneth A. Bollen, above n 16.

participation is possible, in societies divided by disparities in the wealth and status of citizens. In short, it leads us to the idea of equality. The idea of equality ‘plays a central role in any reasonable normative conception of democracy.’<sup>29</sup> Yet it is often obfuscated in renderings of ‘liberal’ democracy that emphasise formal equality, particularly in voting rights.<sup>30</sup> The two ideas which undergird equality are (1) that each member of society is entitled to be treated with equal respect and is entitled to the same basic rights, and that (2) the political system reflects this equality, in that (irrespective of class or wealth), individuals are entitled to bring their interests and their judgments of what is politically right to bear on political decision-making.<sup>31</sup> The aim is ‘a society of equals, with equal rights and equal status, whose members relate to one another as equals,’ and where citizens have the freedom and resources to participate in decision-making, and there is equal respect for all participants.<sup>32</sup>

On this view, the questions we would ask in order to determine democracy in any given state are not questions about voting rights and the presence of viable alternative opposition political parties, but about particular processes of governance, political culture, practices of law, formal and informal systems of power and the impediments to equality (such as wealth and social status), which inhibit full participation in political life.

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<sup>29</sup> Joshua Cohen 'Is There a Human Right to Democracy?' (2006) in Christine Syprowich (ed), *Essays in Honour of G.A. Cohen* (2006) Oxford, Oxford University Press, 228, 229. In Dahl's words, the idea of a society of equals extended to political arrangements is 'the logic of equality'. Robert A. Dahl, *On Democracy* (2000) New Haven, CT, Yale University Press, 10.

<sup>30</sup> Henry Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book* 77, 109–110. cf Susan Marks, 'International Law, Democracy and the End of History' (2000) in Gregory Fox and Brad R. Roth (eds), *Democratic Governance in International Law* (2000), Cambridge, U.K., Cambridge University Press 532-566, 533.

<sup>31</sup> According to Cohen, above n 29, the idea of equality embodied in democracy is a more 'demanding political ideal' than the idea of equality found in human rights. Human rights (non-discrimination, individual rights of participation, association and expression, minimal rights to education, healthcare and so on) are a 'subset' of the rights associated with democracy. It is precisely these rights that non-liberal democracies often deny.

<sup>32</sup> *Ibid*, 239.

### 2.3. The Relationship between Democracy and Human Rights

What is the relationship between democracy and human rights? The view is widespread that ‘internationally recognized human rights require a liberal regime,’<sup>33</sup> that liberal democracy and human rights are ‘two sides of the same coin,’<sup>34</sup> that ‘human rights, equal rights and government under law are important attributes of democracy,’<sup>35</sup> and that liberal democracy is a necessary precondition for realising human rights.<sup>36</sup> Much of the literature on both democracy and human rights—and many of the statements emanating from the institutions of the United Nations—make the assumption that liberal democracy and human rights are co-dependent.<sup>37</sup>

In 2002 and 2005, for example, the Commission on Human Rights requested that the High Commissioner for Human Rights convene an ‘expert seminar on democracy and the rule of law.’<sup>38</sup> The first seminar noted the inseparable and interdependent character of democracy and human rights as concepts that had spread around the globe, but emphasised that there was no single universal model of democracy. The second seminar stated that free, fair, and periodic multiparty elections were a key component of democracy, the rule of law

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<sup>33</sup> Rhoda Howard and Jack Donnelly, ‘Human Dignity, Human Rights, and Political Regimes’ (1986) 80(3) *American Political Science Review* 801, 802.

<sup>34</sup> Thomas Carothers, ‘Democracy and Human Rights: Policy Allies or Rivals?’ (1994) 17(3) *Washington Quarterly* 109, 109.

<sup>35</sup> Fox and Roth (eds), *Democratic Governance in International Law* (2000), above n 16, 5.

<sup>36</sup> Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21(3) *Human Rights Quarterly* 608.

<sup>37</sup> As does the European Court of Human Rights: *Sahin v Turkey*, Application No. 44774/98 (10 November 2005). Habermas writes that ‘Consequently, liberal and political rights are inseparable.’ Jurgen Habermas, *The Postnational Constellation* (2001) Cambridge, Mass., Massachusetts Institute of Technology Press, 118. But see Makau Mutua, ‘The Ideology of Human Rights’ (1996) 36 *Virginia Journal of International Law* 589, particularly section I: ‘Liberalism, Democracy and Human Rights: A Holy Trinity?’ 601-607.

<sup>38</sup> E/CN.4/2003/59, sect. VII; Geneva, 25 and 26 November 2002; Resolution 2003/36; E/CN.4/2005/58E/CN.4/2005/58E/CN.4/2005/58E/CN.4/2005/58 Geneva 28 February to 2 March 2005.

and the protection of human rights, and that 'elections also had an autonomous value as a means of self-realization and recognition of human dignity.'<sup>39</sup>

Under the definition of democracy adopted in this dissertation, democracy is political representation that functions with a maximum level of inclusiveness in the systems of power. Inclusiveness might be said to suggest equality in the sense that all are permitted to participate on an equal basis in the processes of political power and law-making. Participation is only possible in circumstances where basic civil rights (the rights of freedom of expression, peaceful assembly, freedom to form and join professional associations) are protected, enabling the exercise of political choice. Thus, one can fairly easily establish that human rights (at minimum, basic civil ones) are necessary preconditions for any type of genuine democracy.

But is *democracy* necessary for the realisation of human rights? Three lines of argument suggest that it is. First, a long line of liberal thinkers have argued that developed democratic states rarely if ever make war upon each other.<sup>40</sup> This is because democratic institutions reflect the preferences of the people who, having to bear the costs of war, will oppose it. If these preferences are reflected in foreign policies, states are unlikely to wage

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<sup>39</sup> Ibid. The Seminar also noted that Periodic elections are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. The seminar noted that freedom of expression, assembly and association were essential conditions for democracy and for a democratic election process.

<sup>40</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795) in Kant's *Principles of Politics, Including his Essay on Perpetual Peace: A Contribution to Political Science*, trans. W. Hastie (1891) The Online Library of Liberty, available at: [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php?title%3D358&chapter=56096&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php?title%3D358&chapter=56096&layout=html&Itemid=27) [accessed 24 March 2013]; Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' in Sean Lynn-Jones, Michael Brown, and Steven Miller (eds), *Debating the Democratic Peace*, (1996) Cambridge, Massachusetts Institute of Technology Press, 3-57; Bruce Russett, 'The Fact of Democratic Peace' in Sean Lynn-Jones Michael Brown, and Steven Mille (eds), *Debating the Democratic Peace* Cambridge, Massachusetts Institute of Technology Press, 58-81. R.J. Rummel also argues that democracies rarely commit genocide: 'Democracy, Power, Genocide, and Mass Murder' (1995) 39(1) *Journal of Conflict Resolution* 3.

wars.<sup>41</sup> As conditions of war inevitably lead to human rights violations, it follows that democracy is necessary to preserve peace and thus protect human rights.

A second line of argument, based on the work of Nobel laureate Amartya Sen, holds that famines do not occur in democracies and thus that the preservation of life and the fulfilment of vital social and economic rights requires democratic conditions.<sup>42</sup> Sen argues that democratically elected governments, which are susceptible to criticism from the media and the informed public, promote the political incentive for governments to be responsive, caring and prompt in addressing deprivation: ‘Democracy and an uncensored press can spread the penalty of famines from the destitute to those in authority. There is no surer way of making the government responsive to the suffering of famine victims.’<sup>43</sup>

Beyond these two consequentialist arguments for democracy as a condition for the fulfilment of human rights lies a third idea: that democracy *is* an autonomous human right itself, not just a means for securing the realisation of other rights.<sup>44</sup> In this vein, it is argued that democracy is one of those values that defines our intrinsic humanness and as such should be protected and promoted. In the following sections, I consider the degree to which these three arguments for linking democracy and human rights resonate in the context of Southeast Asia.

### ***2.3.1 Southeast Asia’s Autocratic Peace?***

Underpinning the ‘human rights and democracy’ nexus is the Kantian idea that both are necessary for the preservation of peace.<sup>45</sup> In his *Treatise on Perpetual Peace*, Kant argued

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<sup>41</sup> David Lake, ‘Powerful Pacifists: Democratic States and War’ (1992) 86(1) *American Political Science Review* 86, 24-37.

<sup>42</sup> Amartya Sen, ‘Public Action to Remedy Hunger’ (1991) 16(4) *Interdisciplinary Science Reviews* 324.

<sup>43</sup> Ibid. See also Sen’s *Poverty and Famines* (1981) Oxford, Clarendon Press.

<sup>44</sup> Franck, above n 13.

<sup>45</sup> John Dosch ‘ASEAN’s Reluctant Liberal Turn and the Thorny Road to Democracy Promotion’ (2008) 21(4) *Pacific Review* 527, 527.

that peace among nations would result from (1) the creation of democratic nations, whose republican constitutions eliminated autocratic caprice in waging war, and (2) an understanding of the legitimate rights of all citizens and of all republics, as the moral foundation for a liberal peace.<sup>46</sup>

This idea is captured in the Universal Declaration of Human Rights, which states that: ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’<sup>47</sup> and stated even more clearly in the Preamble to the 1945 Constitution of The United Nations Educational, Social and Cultural Organization (UNESCO): ‘The great and terrible war which has now ended was a war made possible by the denial of democratic principle.’<sup>48</sup> The Preamble to the European Convention on Human Rights (ECHR) affirms a ‘profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.’<sup>49</sup>

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<sup>46</sup> Kant, above n 40, 1795. See: John R. Oneal, Frances H. Oneal, Zeev Maoz, Bruce Russett, ‘The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-85’ 33(1) *Journal of Peace Research*, 11. Leading proponents of the democratic peace are Fernando Tesón ‘The Kantian Theory of International Law’ (1992) 53 *Colorado Law Review* 92; and Anne-Marie Slaughter (Burley), ‘Revolution of the Spirit’ (1990), above n 12; Anne-Marie Slaughter, ‘Towards an Age of Liberal Nations’ (1992), above n 12; Anne-Marie Slaughter, ‘Law and the Liberal Paradigm in International Relations Theory’ (1993), above n 12; Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995), above n 12.

<sup>47</sup> UNGA Res. 217 A (III), Universal Declaration of Human Rights, A/810 (10 December 1948), Preamble.

<sup>48</sup> Constitution of the United Nations Educational, Scientific, and Cultural Organization (adopted 16 November 1945, 4 UNTS 275, entered into force 4 November 1946) and amended by the General Conference at its second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, fifteenth, seventeenth, nineteenth, twentieth, twenty-first, twenty-fourth, and twenty-fifth sessions, available at:

<[http://www.icomos.org/unesco/unesco\\_constitution.html](http://www.icomos.org/unesco/unesco_constitution.html)> [accessed 17 September 2011].

<sup>49</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, 213 UNTS 2, entered into force 3 September 1953), as amended by Protocol 11 (1998) and Protocol 14 (2010).

## Chapter 2: Democracy and Human Rights

To what extent do these ideas resonate in Southeast Asia? All states in Southeast Asia played a role in the Second World War. Laos was more heavily bombed than either Japan or Germany.<sup>50</sup> Thailand was (for a while) an ally of the Japanese, and the Malay states were called upon to support the Allied Forces. But the end of the Second World War did not bring peace to the region; Southeast Asia's departing colonial powers left behind them several unresolved territorial disputes. Sarawak and Sabah, for example, on the Indonesian island of Borneo, were claimed by Indonesia. The British, however, decreed them part of the newly formed Malay federation. After Indonesia ended its four-year war to gain independence from the Dutch, it commenced its *Konfrontasi* campaign against Malaysia in an effort to reclaim Sarawak and Sabah. The Philippines also lays claim to Sabah. In other parts of the region, newly-drawn national borders did not match ethnic borders. As a result of this, there was conflict along the Thai-Malay border and the Thai-Burma border and conflict between predominantly ethnic Chinese Singapore, which was part of the Malay federation when it gained independence from Britain in 1963, and the rest of the Malay federation.

Singapore was eventually expelled from Malaysia in 1965 and became its own city-state. Adding to these tensions and to the pervasive sense of regional unrest were communist insurgencies in almost every state in Southeast Asia.<sup>51</sup> In this context, in 1967, the aim of the nascent Association of Southeast Asian Nations, comprised at the time of Thailand, Malaysia, the Philippines, Indonesia and Singapore, was to bring about and preserve peace between the fledgling states and to defend the region from the threat of communism. But the 1967 Bangkok Declaration, drafted and signed by ASEAN's five original members,<sup>52</sup> made no

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<sup>50</sup> William Case, 'Laos in 2010' (2011) 51(1) *Asian Survey* 202.

<sup>51</sup> Erik Kuhonta, 'Towards Responsible Sovereignty' (2008) in Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (2008) Baltimore, The Walter H. Shorenstein Asia-Pacific Research Center/Freeman Spogli Institute for International Studies, Stanford University, 292-314.

<sup>52</sup> Indonesia, Singapore, Malaysia, Thailand and the Philippines.

connection between peace, democracy and human rights.<sup>53</sup> One reason for this is that there existed amongst ASEAN's five founding members no established democracy. Democratisation in Southeast Asia did not begin until some twenty years later.<sup>54</sup>

At the time of ASEAN's birth, Indonesia was under the authoritarian rule of President Suharto.<sup>55</sup> President Marcos ruled the Philippines and placed the country under martial law from 1972 until 1981.<sup>56</sup> Between 1959 and 1990, Singapore had one Prime Minister and one ruling party: Lee Kuan Yew and the People's Action Party. Until 1973, Thailand's monarchs shared power with predominantly military, or military-backed, governments. Malaysia, facing first a challenge from communism and then persistent religious and ethnic tension, was dominated by one party that placed the country under successive states of emergency. Thus, there was no consolidated democracy able to take the lead in promoting a 'democratic peace' at the regional level. Other means for peaceful co-existence needed to be found. Non-interference and mutual respect for sovereignty emerged as Southeast Asia's pragmatic response to the problem of creating and maintaining regional peace.

It also became clear, particularly after 1967 when Britain announced its withdrawal from 'East of the Suez', that regional self-reliance was an imperative of the Cold War order.

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<sup>53</sup> Rizal Sukma writes that: 'ASEAN's members have avoided wars with each other for more than forty years without having first democratized themselves.' 'Political Development: A Democracy Agenda for ASEAN?' (2008) in Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* above n 51, 135-150, 146.

<sup>54</sup> Counting from the year of the first democratic elections after authoritarian rule, democracy began in the Philippines in 1986, in Thailand in 1992 (with a short interruption in 2006-07) and Indonesia in 1999. In his influential study of the origins of the human rights regime in post-war Europe, Andrew Moravcsik categorises post-war European political systems at the end of the Second World War as either 'established democracies', (systems that had been continuously under democratic rule since before 1920 and remained so thereafter), 'new democracies,' (systems established between 1920 and 1950) and 'semi-democracies and dictatorships,' governments that were not fully democratic by 1950, because of civil war or internal repression. Adopting Moravcsik's taxonomy, at the time of the inauguration of AICHR, only the Philippines and Indonesia were established democracies (not counting the 'soft authoritarian democracies') all others are 'semi-democracies'. Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217-252. See also Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1(2) *European Journal of International Relations* 1.

<sup>55</sup> From the time of the 1965 *coup d'état* until Suharto's resignation in 1988.

<sup>56</sup> President Marcos remained in power in the Philippines until 1986.

At a press conference in 1966, Thai Foreign Minister Tanat Khanan stated that ‘countries in the region had long relied on outside power to save us ... and we seem to have abdicated our responsibility for peace-keeping.’<sup>57</sup> Indeed, it became apparent to Southeast Asian leaders during the Cold War years that not only were ‘outside powers’ unreliable saviours; they were also potentially a greater threat to peace than inter-state conflict within the region. From China and Vietnam came the threat of interference in the name of Communism, exacerbated in 1964 when China undertook a successful nuclear test and in 1978 when Vietnam invaded Cambodia. From the West came the threat of interference from the world’s leading democracy, the United States, which used its military power to bring democracy to several South American nations and attempted to do the same in Vietnam.<sup>58</sup>

The leaders of Southeast Asia were aware that inter-regional conflict would provide an incentive and an excuse for great power intervention in the region. Thus the Philippine’s President Ferdinand Marcos exhorted Asians to ‘work together as brothers, not at cross-purposes but for each other’s prosperity and happiness.’<sup>59</sup> ‘Working together’ meant a decision to suspend suspicion and hostility, to respect the internal governance of other states, and to ‘subordinate dogmatic theories to practical issues.’<sup>60</sup> Respect, not political like-mindedness, became the key to peace. The ‘ASEAN Way’ evolved, of ‘consensualism, informality, confidentiality, gradualism, and the ‘front state principle’ (i.e. accepting the lead of the member most exposed to specific external developments).’<sup>61</sup> These principles became the *modus operandi* of international relations within the region. Following these principles, in the first two decades of its existence, the Association of Southeast Asian Nations successfully

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<sup>57</sup> Press Conference with Thai Foreign Minister Tanat Khanan (4 August 1966) *Bangkok Post*.

<sup>58</sup> In Iran in 1953, Guatemala in 1954 and Chile in 1973, the United States had supported the overthrow of democratically elected governments.

<sup>59</sup> Quoted in *Bangkok Post*, 31 July 1966.

<sup>60</sup> Harvey Stockwin, ‘Tricky Negotiations’ (1967) *Far Eastern Economic Review* 349.

<sup>61</sup> Kay Moller, ‘Cambodia and Burma: The ASEAN Way Ends Here’ (1988) 38(12) *Asian Survey* 1087–1104.

ended Indonesia's period of *konfrontasi*, brought to an end Vietnam's invasion of Cambodia, and defused other latent conflicts among member states.<sup>62</sup>

Thus, instead of references to 'democracy' as the essential ingredient of peace and prosperity, ASEAN's founding 1967 Bangkok Declaration refers to the importance of economic and social cooperation in 'an increasingly interdependent world'. 'Democracy' is not mentioned in the 1971 Zone of Peace, Freedom and Neutrality (ZOPFAN) Declaration, which notes the 'right of every country to lead its national existence free from outside interference in its internal affairs as this interference will adversely affect its freedom, independence and integrity' or in the 1976 Declaration of ASEAN Concord, which notes, 'The stability of each member state and that of the ASEAN region is an essential contribution to international peace and security' and that 'The elimination of poverty, hunger, disease and illiteracy is a primary concern of member states. They shall therefore intensify cooperation in economic and social development.'

The 1976 Treaty of Amity and Cooperation underscores commitment to sovereignty and non-interference as the hallmarks of peaceful relations. ASEAN's *modus operandi* for creating and maintaining peace was not encouraging (let alone forcing) members of the regional association to adopt democratic political systems; it was, above all else, a policy of non-interference between states, few of which could be called 'democratic.' The communist political systems of Vietnam and Laos were no barrier to the admission of these nations into ASEAN in 1995 and 1997. Burma was admitted into ASEAN in 1997, whilst under the rulership of a military junta, which had ignored the results of democratic elections in 1990. In an article in *The Nation* focused on relations with Myanmar, Thai Deputy Foreign Minister MR Sukhumbhand Paribatra described the non-intervention principle as 'the glue keeping

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<sup>62</sup> Ibid.

ASEAN together'. ASEAN, he argued, 'cannot be the proactive promoter of changes in the existing political arrangement of any member country.'<sup>63</sup>

The ASEAN theme of maintaining peace despite political disparity through a policy of non-interference prevailed in the drafting of the ASEAN Charter (2008). In the 'Principles' of the ASEAN Charter, the single reference to 'democracy' in Article 2(h) is overshadowed by the references to sovereignty, non-interference, territorial integrity and national identity, which are detailed in Article 2(a), the reference to non-interference in the internal affairs of ASEAN Member States outlined in Article 2(e), the principle of respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion described in Article 2(f), and the principle of abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States in Article 2(k).

We can conclude from ASEAN's history, and from the Charter, that ASEAN is persisting in following what Emmerson terms its 'autocratic peace theory,' in which authoritarian states 'jointly and wisely avoided war.'<sup>64</sup> Writing at the time of the drafting of the Charter, long-time ASEAN-watcher Rizal Sukma argued:

[I]mposing democracy on a member state and intrusively spreading it throughout the region would trigger interstate tensions harmful to security. Therefore, democracy as envisaged by the ASC and the Charter is not meant to be the only instrument for ensuring or strengthening regional security. Nor is ASEAN being mandated to inculcate democracy directly inside member states. Forcing democracy on to the

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<sup>63</sup> M.R. Sukhumbhand Paribatra, 'Burma, ASEAN, Democracy, Dreams and Realities' (16 July 1999) *The Nation* (Bangkok), in N.J. Funston, *ASEAN and the Principle of Non-intervention: Practice and Prospects* (2000) above n 1, 12. See also Termsak Chalermpananupap 'ASEAN-10: Meeting the Challenges' (1999) Paper was presented at the Asia-Pacific Roundtable held in Kuala Lumpur on 1 June 1999, available at: <http://www.asean.org/2833.htm> [accessed 15 June 2011].

<sup>64</sup> Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* above n 51, 56.

region is something the Association has not done, cannot do, and should not try to do.<sup>65</sup>

### 2.3.2 *Democracy and Economic and Social Rights*

The second argument for the link between democracy and human rights is that there is a connection between democracy and economic development, which leads to the greater enjoyment of human rights.<sup>66</sup> There are two strands to this argument. The first relates to the modes of internal governance that characterise democracies, which (it is argued) lead to political accountability regarding distribution of economic goods, and reduce the chance of certain groups being excluded from basic economic necessities. In 1998, Amartya Sen became a Nobel laureate for a contribution to the economic sciences, which drew attention to a connection between (liberal) democracy and the just distribution of essential goods.<sup>67</sup> The second strand develops Kant's theory of liberal economic interdependence. Proponents of this theory argue that fellow democracies trade more with one another and, depending on one another for trade, preserve peaceful relationships in order to mutually increase wealth. Increased wealth further consolidates democratic reform. In this section, I consider both of these arguments in relation to Southeast Asia.

#### (a) *Liberal democracies and economic development*

Amartya Sen argues that substantial famines do not occur in independent and democratic countries that possess a relatively free press, because democratic governments, which face elections and criticisms from opposition parties and independent newspapers, are forced to

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<sup>65</sup> Sukma, above n 53, 136.

<sup>66</sup> A. Przeworski, and F. Limongi, 'Political Regimes and Economic Growth' (1993) 7(3) *Journal of Economic Perspectives* 51.

<sup>67</sup> Amartya Sen, *Poverty and Famines*, above n 43.

undertake the efforts required to prevent famines.<sup>68</sup> So it is the case that ‘even the poorest democratic countries that have faced terrible droughts or floods or other natural disasters (such as India in 1973, or Zimbabwe and Botswana in the early 1980s) have been able to feed their people without experiencing a famine’<sup>69</sup> and that ‘while India continued to have famines under British rule right up to independence ... they disappeared suddenly with the establishment of a multiparty democracy and a free press.’<sup>70</sup>

Southeast Asia’s modern experience of famine occurred in Cambodia in 1979. The Cambodian famine, which resulted in between 1.5-2 million deaths, was the result of civil war that lasted from 1970–1975, followed by the rule of the Khmer Rouge from 1975 to late 1978, and then Vietnam’s invasion of Cambodia in 1979. From this, Southeast Asia drew stark lessons about the connection between civil conflict, state insecurity, and starvation. But Southeast Asian leaders did not necessarily draw from the Cambodian experience the lesson that democracy improved state security, or consequently, economic security. Chew observes that the Southeast Asian experience was that order and stability were preconditions for economic growth, and growth was the necessary foundation of any political order that claimed to advance human dignity.<sup>71</sup>

Southeast Asia experienced rapid economic development in the post-war period, but democratisation – where it occurred – played an insignificant role in generating development, or in distributing the benefits of development amongst the region’s peoples. The oldest democracy in the region, the Philippines, has been far less successful than the electorally authoritarian states of Malaysia and Singapore in providing access to adequate housing,

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<sup>68</sup> Ibid. See also Sen, ‘Democracy as a Universal Value’, above n 13.

<sup>69</sup> Sen, above n 43, 5.

<sup>70</sup> Ibid.

<sup>71</sup> Melanie Chew, ‘Human Rights in Singapore: Perceptions and problems’ (1994) 34(11) *Asian Survey* 933.

medical care, and economic security.<sup>72</sup> Indeed, post-Marcos Philippines stands for many within the region as an example of the pitfalls of Western-style democratisation. With arguably the most democratic constitution in Southeast Asia and one of the region's first independent National Human Rights Institution, the Philippines has one of the worst economic records in ASEAN, and is marked by the poverty, insecurity and human rights abuses that result from economic instability.<sup>73</sup> In 1996, Singapore's then Prime Minister, Lee Kuan Yew, asserted that 'the liberal democracy practiced in the Philippines was an obstacle to economic progress, which required collective discipline and firm central control.'<sup>74</sup> More recently, former ASEAN Secretary General Rodolfo Severino has written:

In ASEAN, for example, some members of the Filipino elite may denigrate the restrictions on the rights of assembly and free speech imposed on the people of Singapore. On the other hand, many Singaporeans are appalled by the inability of the Philippines political system to deliver a better standard of life and social justice for the Filipino people. Under the stringent rule of the Vietnamese Communist party, the average Vietnamese is increasingly regarded – whether accurately remains to be seen – as having better prospects of a higher standard of living than the average Filipino or the average Indonesian, who, unlike the Vietnamese, enjoys the right to demonstrate on the streets and write freely in the newspapers.<sup>75</sup>

Severino's comments connect with the 'Asian values' debate, discussed in the following chapter (3.2.2) and in Chapter 5.<sup>76</sup> In short, during the 1980s and 1990s, leaders such as Indonesia's President Suharto made the claim that, until prosperity was achieved, democracy remained an unaffordable luxury. He (and others)<sup>77</sup> argued that high national

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<sup>72</sup> Juliet Johnson, 'In Pursuit of a Prosperous International System', in Peter Schraeder (ed), *Exporting Democracy: Rhetoric vs. Reality* (2002) Boulder, CO, Lynne Rienner, 31–54.

<sup>73</sup> Kishore Mahbubani, 'Dangers of Decadence' (1993) 72(4) *Foreign Affairs* 9; Kishore Mahbubani, 'An Asian Perspective on Human Rights and Freedom of the Press' Paper delivered at the conference 'Asian and American Perspectives on Capitalism and Democracy' jointly organized by the Asia Society of New York and Singapore's Institute of Southeast Asian Studies, International Foundation, and Institute of Policy Studies, Singapore (January 1993).

<sup>74</sup> Michael Vatikiotis, *Political Change in Southeast Asia: Trimming the Banyan Tree* (1996) London, Routledge, 103.

<sup>75</sup> Severino, above n 20, 151. See also: Mark Thompson, 'Pacific Asia after "Asian values": Authoritarianism, Democracy, and "Good governance"' (2004) 25(6) *Third World Quarterly* 1079.

<sup>76</sup> See Section 2.5.2 *infra*.

<sup>77</sup> Such as Malaysia's former President Mahathir, and Singapore's former Prime Minister Lee Kuan Yew.

economic growth rates required hard work and frugality, which in rapidly developing nations, could only be provided by stable and disciplined regimes. Suharto's 'New Order' government emphasised deliberation (*musyawarah*) and consensus (*mufakat*) as forms of politics, instead of the oppositional politics of Western liberal democracies.

The 1997 Asian financial crisis, which devastated the 'tiger' economies of the East (and toppled the Suharto regime),<sup>78</sup> impressed upon the region that their economies were inter-related and that crises would need to be addressed in concerted fashion. But the financial crisis did little to unseat understandings that the strong state was a driver of economic progress. Within Southeast Asia, many did not blame 'Asian values' (of authoritarian-style government) for the Asian financial crisis.<sup>79</sup> Writing seven years after the crisis, Thomson notes that authoritarian states such as Singapore and Malaysia have emerged stronger after the crisis, while the region's new democracies, such as Indonesia, the Philippines and Thailand have been politically unstable and slower to recover economically.<sup>80</sup> Indeed, leaders in Malaysia and Singapore have attributed to democracy the failure of Thailand, Indonesia and the Philippines to take timely steps to address the financial crisis. In addition, the onerous loan conditions imposed by the International Monetary Fund (IMF) generated deep resentment amongst many Southeast Asians: many perceived it to be the IMF, rather than the crisis, that was the cause of the suffering of Southeast Asians.<sup>81</sup>

In Malaysia, elections following the financial crisis were held under the banner of *reformasi*. The opposition focused predominantly on issues of 'governance' in the sense of corruption, cronyism, and nepotism, rather than on human rights and social justice.<sup>82</sup> In Singapore, Prime Minister Lee Kuan Yew insisted that 'Asian values' did not necessarily

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<sup>78</sup> Emmerson, *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* above n 51, 18.

<sup>79</sup> Amitav Acharya, 'Southeast Asia's Democratic Moment' (1999) 39(3) *Asian Survey* 418.

<sup>80</sup> Thompson, above n 75.

<sup>81</sup> *Ibid.*

<sup>82</sup> Surain Subramaniam, 'The Dual Narrative of Good Governance: Lessons for Understanding Political and Cultural Change in Malaysia and Singapore' (2001) 23(1) *Contemporary Southeast Asia* 65.

translate into a general lack of transparency: ‘Singapore, despite having both Asian values and transparency, could not avoid being hurt by the crisis because of the regional contagion effect of the slump in the neighbouring countries.’<sup>83</sup> Acharya points out that in the wake of the 1997 financial crisis, demonstrators in Indonesia were not demanding ‘greater democracy’, but an end to the corruption they saw as intrinsic to Suharto’s rule. From this perspective, the solution to Asia’s economic problems did not lie in greater democracy, but in ‘sound banking laws, rigorous supervision in the financial sector, and proper corporate governance.’<sup>84</sup>

Even Amartya Sen admits that ‘If all the comparative studies are viewed together, the hypothesis that there is no clear relation between economic growth and democracy in either direction remains extremely plausible.’<sup>85</sup> The argument that democracy is necessary for economic development has not accorded with Southeast Asia’s historical experience.<sup>86</sup> Indeed, the contrary proposition is the one that seems to have empirical substance: that authoritarianism supports economic development, while democracy hinders it. Even after the Asian Financial Crisis, there was (on the part of most ASEAN states) a turn towards a limited doctrine of ‘good governance’, rather than a turn toward liberal democracy. Good governance, constituted by principles of accountability and transparency, long-term orientation by government in deciding policy options, and social justice (meaning equality of work opportunity irrespective of race or religion), does not depend on democratic principles of inclusiveness and participation in politics; indeed, aspects of good governance run counter to such principles. Many ASEAN states would concur with the view put forward by Randall Peerenboom. ‘What is clear,’ writes Randall Peerenboom, ‘is that democracy is no panacea.

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<sup>83</sup> Amitav Acharya, ‘Southeast Asia’s Democratic Moment’, above n 79, 422.

<sup>84</sup> ‘Riots Not a Call for Democracy’ interview with Lee Kuan Yew (16 June 1998) *The Straits Times*, 33, quoted in Acharya, above n 79.

<sup>85</sup> Amartya Sen, ‘Democracy as a Universal Value’, above n 13, 4.

<sup>86</sup> Mahbubani, ‘An Asian Perspective on Human Rights and Freedom of the Press’, above n 73.

It will not necessarily lead to economic growth or even to a significant improvement in the protection of human rights in many cases.<sup>87</sup>

**(b) *The Liberal Economic Peace***

The Kantian notion of a liberal peace includes the idea that economic interdependence between democratic nations leads to a preference (among citizens) against wars with fellow democracies, by creating transnational ties that encourage accommodation rather than conflict. This idea has become a central tenet of liberal thinking: ‘the security and economic growth of one nation is linked to the security and economic growth of others. When democratic ideas advance and free markets flourish, so do we. When democracy retreats and access to markets is closed, our nation suffers.’<sup>88</sup>

The first article of the 1967 Bangkok Declaration appears to reference this idea, when it proclaims the purpose of the Association to be: ‘To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations.’<sup>89</sup> The 1976 Declaration of ASEAN Concord also provides that: ‘The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience.’<sup>90</sup> The ASEAN Vision 2020, the Hanoi Plan of Action (1999–2004) and succeeding Plans of Action, the Initiative for ASEAN Integration (IAI), and the Roadmap for the Integration of ASEAN (RIA), as well as ASEAN’s many other statements and

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<sup>87</sup> Randall Peerenboom, ‘Beyond Universalism and Relativism: The Evolving Debates about ‘Values in Asia’ (2003) 14(1) *Ind. Int’l & Comp. L. Rev.* 1-85, 7.

<sup>88</sup> Charles R. Larson, ‘Implications of US Withdrawal from Clark and Subic Bases’, Statement to Congress, Committee on Foreign Affairs (5 March 1992).

<sup>89</sup> Above, n 2.

<sup>90</sup> Declaration of ASEAN Concord, First ASEAN Summit, Bali, Indonesia (24 February 1976).

declarations, all pronounce an imperative for ASEAN to deepen and broaden economic integration in order to promote regional peace and stability, security, development and prosperity.<sup>91</sup> For example, part of the ‘ASEAN Vision 2020’ is the creation of an ‘ASEAN Economic Community’ in which there is a ‘free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.’<sup>92</sup> The ASEAN Economic Community envisions a single market and production base, created through initiatives such as the ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (AIA). Central to the idea of an ‘ASEAN Economic Community’ is addressing the ‘development divide’ between ASEAN’s original members and Cambodia, Lao PDR, Myanmar and Viet Nam.

But respect for economic sovereignty and the lack of regional institutions to implement and enforce compliance with AFTA, AFAS and AIA have proven to be major impediments to achieving an integrated market in Southeast Asia. It remains the case that ASEAN states remain in competition with one another for access to outside markets and that Southeast Asia lacks a strong economy within the region to act as a foundation for regional trade (like the French–German axis in the European Union, and the United States in North America). Because of this, the region’s medium to small sized nations continue to value trade and investment links with the outside world (recently with China, Japan and South Korea), more than intra-regional economic integration.<sup>93</sup> Thus, ASEAN’s economic interdependence has not significantly grown, despite the Association’s many declarations of growing common

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<sup>91</sup> Declaration of ASEAN Concord II (Bali Concord II), Ninth ASEAN Summit, Bali, Indonesia (7 October 2003).

<sup>92</sup> ASEAN, ‘ASEAN Vision 2020’ (15 December 1997) available at: <<http://www.asean.org/news/item/asean-vision-2020>> [accessed 14 September 2011].

<sup>93</sup> Amitav Acharya, *Constructing a Security Community in Southeast Asia* (2009) New York, Routledge, 148–191.

interests.<sup>94</sup> In 1967, the year of ASEAN's birth, 23 per cent of ASEAN exports were directed to other ASEAN countries.<sup>95</sup> By 1974, this figure had dropped to 12 per cent. In 2010, ASEAN Chair Surin Pitsuwan noted that trading amongst ASEAN member states still accounted for only 25 per cent of their total trade.<sup>96</sup> The most significant of ASEAN's outside trading partners is China. The intra-regional cooperation that does exist is connected to Singapore, which is the richest non-oil producing country in the world that is not a democracy. But it has a 'small economy, limited market and weak democratic credentials.'<sup>97</sup>

Acharya also points to informal forms of regional economic cooperation that have arisen, the 'natural economic territories' (NETS) of growth, between geographically linked ASEAN members with economic complementarities: the Singapore-Johor-Riau triangle; the Indonesia, Malaysia, Thailand triangle; and the Brunei, Indonesia, Malaysia, Philippines East ASEAN Growth Area. Acharya notes the claims of advocates of regional economic interdependence; that NETS provide a natural incentive for states to avoid use of force to resolve border disputes because of the effect this would have on their economy. But he argues that the 1997 Asian Financial Crisis demonstrated the limits of such theories of Pacific interdependency in Southeast Asia, by showing how economic disparities among states reduce the potential political gains of interdependence, and how interdependence can even 'serve as a transmission belt for spreading security problems through the region.'<sup>98</sup>

Kant's idea of a liberal economic peace is contingent upon trading nations being 'republics', representative of the people whose interests and rights are protected. He believed that republican forms of government could guarantee that economic interactions proceeded based on voluntary exchange, and that the agents of commerce would be accorded physical

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<sup>94</sup> Tivo Kivimäki, 'The Long Peace of ASEAN' (2001) 38(1) *Journal of Peace Research* 5, 11.

<sup>95</sup> Ibid, 12.

<sup>96</sup> Surin Pitsuwan, 'ASEAN Should Step Up Intra-regional Trade' (30 November 2010) available at: <http://www.ttrweekly.com/site/2010/11/asean-should-stept-up-intra-regional-trade/> [accessed 20 July 2011].

<sup>97</sup> Mark Thompson, above n 75, 1080.

<sup>98</sup> Acharya, *Constructing a Security Community in Southeast Asia*, above n 93, 169.

and legal protection by their foreign host republican governments. On Kant's view, then, the liberal economic peace presupposes respect for human rights and democratic political systems within trading nations, which ultimately reinforces peace through friendly engagement. As we have seen, ASEAN has never made democracy a criterion for membership in the regional Association, and its inter-regional trading links are limited by the size of the region's economies. Therefore, the legitimacy of a human rights regime in Southeast Asia cannot plausibly be tied to the notion of regional economic integration and a liberal peace.

#### **2.4. Democracy as a Human Right?**

In the previous two sections, I pointed to the weakness of consequentialist arguments about the merits of democracy vis-à-vis human rights in Southeast Asia (that it preserves peace; that it leads to prosperity). There exists a third case for the maintaining a human rights/democracy nexus – that democracy is a good in and of itself, of intrinsic value, and thus a human right that should be protected and promoted. There are two senses in which democracy might be viewed as a human right. The first invokes the opening words of the United Nations Charter, 'We the Peoples,' to suggest an argument that democracy is a *grundnorm* of international law and an overarching normative human rights principle that guides the international community's expectations about the way states should work. The argument here is that democracy in its broadest sense is 'self-determination' and is a right of all peoples. The second sense in which democracy is said to be a human right is *via* an extension of the very premise of human rights—that individuals are free and equal agents in society—to the political form that reflects this freedom and equality: universal suffrage and elected government under conditions of fair political contestation. I consider these arguments in turn.

### 2.4.1 Self-Determination and Democracy

In 1992, Thomas Franck argued that ‘both textually and in practice, the international community is moving toward a clearly designated democratic entitlement.’<sup>99</sup> Franck locates the origins of the entitlement in the right of self-determination, which is ‘the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion.’<sup>100</sup> Self-determination is one of the principles of the 1945 Charter of the United Nations,<sup>101</sup> and was incorporated into the identical Articles 1 of the ICCPR<sup>102</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>103</sup>

Franck (and others)<sup>104</sup> argue that self-determination implies democracy, because it requires that the will of the people dictate the political form of the nation. The connection between self-determination and democracy is supported by the 1970 Friendly Relations Declaration of the United Nations (UN) General Assembly, which provides that the right to self-determination presupposes ‘a government representing the whole people belonging to the territory without distinction as to race, creed or colour.’<sup>105</sup> Further support for a nexus between self-determination and democracy can be found in the Human Rights Commission’s 1999 Resolution: ‘Promotion of the right to democracy,’<sup>106</sup> which links the right of self-

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<sup>99</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’ above n 13, 91.

<sup>100</sup> Ibid, 52.

<sup>101</sup> Chapter 1, Article 1(2).

<sup>102</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 3 November 1976).

<sup>103</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, 993 UNTS 3, entered into force 3 January 1976).

<sup>104</sup> Antonio Cassese, ‘The Self-Determination of Peoples’ (1981) in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) New York, Columbia University Press.

<sup>105</sup> UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) (24 October 1970).

<sup>106</sup> Commission on Human Rights Resolution 1999/57 available at:

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.res.1999.57.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.res.1999.57.en?opendocument)

[accessed 13 September 2011].

determination, ‘by virtue of which they [the people] freely determine their political status and freely pursue their economic, social and cultural development’ and democracy, which ‘is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.’<sup>107</sup> In circumstances where elections have been postponed, the Human Rights Committee has found that a people ‘have been unable to exercise their right to self-determination’ under Article 1 of the Covenants as well as breach of Article 25 rights of political participation.<sup>108</sup>

Some argue that self-determination is coming to denote, very broadly, a principle of respect for ‘the will of the people,’<sup>109</sup> a further understanding that it is the will of the people that creates sovereignty<sup>110</sup> and finally, recognition that leaders who do not respect their own people’s right to self-determination cannot necessarily rely on the international community to abide by a principle of non-intervention.<sup>111</sup> In the case of Sierra Leone, the Security Council’s central demand in Resolution 1132 (1997) was that ‘the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order.’<sup>112</sup> In the case of Haiti (1994), the Security Council expressly stated that ‘the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President.’<sup>113</sup> In Libya (2011), the international community’s military support for opponents

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<sup>107</sup> UN Commission on Human Rights, Res 1999/57: ‘Promotion of the Right to Democracy’, E/CN.4/RES/1999/57 (27 April 1997) available at:

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.res.1999.57.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.res.1999.57.en?opendocument) [accessed 10 September 2011], Preamble.

<sup>108</sup> UN Human Rights Committee 1813th and 1814th meetings (CCPR/C/SR.1813 and 1814), held on 13 and 14 March 2000. Concluding observations, 1823rd and 1824th meetings, held on 21 and 22 March 2000.

<sup>109</sup> Franck, above n 13.

<sup>110</sup> W. Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84(4) *American Journal of International Law* 866.

<sup>111</sup> *Ibid.*

<sup>112</sup> Security Council Resolution 1132 (1997) S/RES/1132, 8 October 1997 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/267/13/PDF/N9726713.pdf?OpenElement> [accessed 13 September 2011].

<sup>113</sup> Security Council Resolution 917 (1994) S/RES/917, 6 May 1994 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/207/93/PDF/N9420793.pdf?OpenElement> [accessed 13 September 2011].

of Muammar Gaddafi's regime was extended on the basis that Gaddafi's rule had 'lost legitimacy' and that 'aspirations of the Libyan people for freedom, democracy, and dignity must be met.'<sup>114</sup>

As I discuss in Chapter 5, ASEAN states have a complicated relationship with the principle of self-determination. I suggest in Chapter 5 that concerns about the secessionist ambitions of minorities might explain why ASEAN states did not include a right of self-determination in the ASEAN Human Rights Declaration. Yet as I also point out, the traditional understanding of self-determination supports the idea of the political self-determination of states, which is a principle strongly endorsed by ASEAN states. The case of East Timor illustrates some of the incongruities of ASEAN attitudes to self-determination. In 1975, Indonesia acquired East Timor by military conquest. At the time, the Security Council passed a resolution calling for Indonesia's immediate withdrawal from East Timor and 'for all states to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination.'<sup>115</sup> After twenty-five years of East Timorese agitation for independence, a United Nations-administered referendum was conducted, which resulted in an overwhelming vote in favour of East Timor's independence from Indonesia.<sup>116</sup> In response to the referendum, pro-Indonesian militias and parts of the Indonesian military conducted a campaign of violence within East Timor.<sup>117</sup> The Security Council passed Resolution 1264

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<sup>114</sup> 'Gadaffi Lost legitimacy: Must Leave' (3 March 2011) *Al Arabiya News* available at: <http://www.alarabiya.net/articles/2011/03/03/140082.html> [accessed 26 July 2011].

<sup>115</sup> Security Council Resolution 389 (1976) S/RES/389, 22 April 1976 available at: <http://www.etan.org/etan/Unres.htm> [accessed 13 September 2011].

<sup>116</sup> James Cotton estimates that Indonesia's invasion led to the deaths of between 100,000 and 200,000 of the inhabitants of East Timor. See: James Cotton, 'Against the Grain: the East Timor Intervention' (2001) 43(1) *Survival* 127,133; R.S. Clark, 'Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 *Yale Journal of World Public Order* 2; I. Martin, and A. Mayer-Rieckh, 'The United Nations and East Timor: from Self-determination to State-building' (2005) 12(1) *International Peacekeeping* 125,131.

<sup>117</sup> See: Security Council Resolution 1264 (1999) S/RES/1264, 15 September 1999 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/264/81/PDF/N9926481.pdf?OpenElement> [accessed 13 September 2011]. The Resolution expresses: 'its concern at reports indicating that systematic, widespread and flagrant

under Chapter VII, authorising an international intervention ‘to restore peace and security in East Timor, to protect and support The United Nations Mission in East Timor (UNAMET) in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations.’<sup>118</sup> The Resolution was supported by Indonesia, Thailand, Malaysia and the Philippines, which all provided military support for The International Force for East Timor (INTERFET) and the United Nations Transitional Administration in East Timor (UNTAET).<sup>119</sup> Roland Rich argues that the Security Council’s action was carried out ‘on human rights and democracy grounds ... The right to self-determination of the people of East Timor was being denied following their overwhelming vote for independence.’<sup>120</sup> Resolution 1272 (1999), which established the UN Transitional Administration in East Timor, mandated ‘the development of local democratic institutions.’

Self-determination embodies a notion that the people are politically sovereign. The region’s experience of colonialism—nine of the ten Southeast Asian nations were former colonies—has led to widespread support for the principle that within a territorially defined area, a people must be free from external interference and able to govern themselves.<sup>121</sup> The principle of self-determination does not, however, explicate the *content* of the form of political organisation that the people choose. For example, a people could ‘freely determine’ to place themselves under non-democratic rule. In the case of East Timor, United Nations staff expressed anxiety after the referendum about some of the authoritarian tendencies of the overwhelmingly popular Fretelin party that dominated East Timor’s first post-independence

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violations of international humanitarian and human rights law have been committed in East Timor, and stressing that persons committing such violations bear individual responsibility ...’

<sup>118</sup> Ibid, paragraph 3.

<sup>119</sup> The military component of the UN Transitional Authority for East Timor was at different times under the command of the Philippines and of Thailand; Singapore and Malaysia both contributed troops.

<sup>120</sup> Roland Rich, ‘Bringing Democracy into International Law’ (2001) 12(3) *Journal of Democracy* 20, 31.

<sup>121</sup> Anderson suggests that Thailand, the only state in Southeast Asia not to have been colonised, was in fact ‘informally colonised’ by the British: Benedict Anderson, ‘Studies of the Thai State: The State of Thai Studies’ (1978) in Eliezer B. Ayal (ed), *The Study of Thailand* (1978) Athens, OH: Ohio Centre for International Studies, Southeast Asia Program, 199.

elections. Simon Chesterman quotes one UNTAET staff member: ‘I have grave doubts that anything democratic will come out of this. Look at Cambodia: everyone regards it as a success but it was a disaster—look who we put in to power!’<sup>122</sup>

The conceptual problems of equating self-determination and democracy have led the Human Rights Committee to state that rights of political participation are ‘related to, but distinct from, the right of peoples to self-determination.’<sup>123</sup> The Committee’s view is that the right of self-determination is a right of peoples; the right of political participation is an individual right, which can give rise to claims under the first Optional Protocol to the ICCPR.

I turn now to the second of the two understandings of democracy: as an individual human right.

#### **2.4.2 Democracy as a Freestanding Human Right?**

That democracy is in itself a human right is an idea that has interested political philosophers as well as human rights lawyers (see the discussion in Chapter 5). It is premised on the principle described in the first Article of the Universal Declaration of Human Rights: human beings are born ‘free and equal.’ The argument is that once one accepts the idea of the freedom and equality of the individual, then it is, in the words of Joshua Cohen, ‘natural to conclude that there ought to be widespread suffrage and elected government under conditions of political contestation, with protections of the relevant liberties (of participation, expression and association).’<sup>124</sup> This is because the extension of individual equality and freedom to

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<sup>122</sup> Simon Chesterman, ‘East Timor in Transition: Self-determination, State-building and the United Nations’ (2002) 9(1) *International Peacekeeping* 69. In relation to Cambodia, see: Amitav Acharya, ‘Southeast Asia’s Democratic Moment’ above n 79, 424.

<sup>123</sup> Human Rights Committee, ‘General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25) (12 July 1996) CCPR/C/21/Rev.1/Add.7, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) [accessed 13 September 2011].

<sup>124</sup> Cohen, above n 29, 241.

political arrangements 'expresses the respect owed to persons as equals, with political capacity.'<sup>125</sup> A political democracy is a natural concomitant to the idea of equality and equal respect, because its design reflects the equality principle in its methods for collective decision making by endorsing (1) equal rights of participation, including rights of voting, association and office-holding, and rights of political expression; (2) equally weighted votes; (3) equal opportunities for effective political influence.<sup>126</sup>

Dahl calls the extension of the idea of equality to participatory political arrangements 'the logic of equality.'<sup>127</sup> It is a logic that has been followed in international human rights instruments that set out the basis for rights of political participation. Article 21 of the Universal Declaration of Human Rights (UDHR) provides that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
- (2) Everyone has the right of equal access to public service in his country;
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.<sup>128</sup>

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<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Robert Dahl, *On Democracy* above n 29, 10.

<sup>128</sup> Article 29 of the UDHR is also relevant, as it invokes 'the general welfare of a democratic society' as the basis on which individual rights can legitimately be limited (together with the morality and public order). Declarations to the effect that the Universal Declaration of Human Rights, as one of the principal documents of international human rights law, had become part of customary international law, were made by participants at two important international gatherings in 1968: the Assembly for Human Rights in Montreal and the Teheran International Conference on Human Rights. See: International Conference on Human Rights, Final Act of the International Conference on Human Rights: Proclamation of Teheran, A/CONF. 32/41 (22 April-13 May 1968); Montreal Statement of the [Non-governmental] Assembly for Human Rights (27 March 1968). On whether or not the UDHR has become part of international customary law, see Hannum Hurst, 'Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 *Georgia Journal of International and Comparative Law* 287.

Article 25 of the ICCPR, which has been ratified by six of the ten ASEAN states,<sup>129</sup> provides that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.<sup>130</sup>

In his discussion of Article 21 of the UDHR and Article 25 of the ICCPR, written in 1988, Henry Steiner argued that:

for a right regarded as foundational, political participation suffers from serious infirmities. The norms defining it are either vague or, where explicit, bear sharply disputed meanings. Within the framework of human rights law, the right expresses less a vital concept meant to universalize certain practices, than a bundle of concepts, sometimes complementary but sometimes antagonistic.<sup>131</sup>

Steiner points particularly to: discordant understandings about whether Article 25 requires political pluralism or can be satisfied in a one-party state; whether, if the absence of opposition political parties are inimical to ‘genuine periodic elections’, then what obligations rest on states to foster their development and freedom to operate; what ‘direct’ participation in the conduct of public affairs actually means, and what measures are required to overcome the social and economic barriers that discriminate against some groups of citizens from participating in public affairs.<sup>132</sup>

The collapse of the Soviet Union in 1989 sparked a new enthusiasm on the part of the General Assembly, the Human Rights Committee and the Human Rights Commission<sup>133</sup> to develop the meaning of Article 21 of the UDHR and Article 25 of the ICCPR. In 1991, the

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<sup>129</sup> As at September 2011, the following states have *not* ratified the International Covenant on Civil and Political Rights (ICCPR): Malaysia, Myanmar, Brunei and Singapore.

<sup>130</sup> Article 25 of the ICCPR, above n 129.

<sup>131</sup> Steiner, ‘Political Participation as a Human Right’ (1988), above n 30, 77.

<sup>132</sup> *Ibid.*, 77–134.

<sup>133</sup> The Human Rights Council replaced the Human Rights Commission in 2006.

General Assembly adopted a resolution entitled ‘Enhancing the effectiveness of the principle of periodic and genuine elections,’ which reaffirmed and detailed the electoral entitlement outlined in the UDHR. The Resolution stressed:

the member nations’ conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.<sup>134</sup>

The resolution also declared:

that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, as provided in national constitutions and laws.<sup>135</sup>

At its next session, the Assembly, with only four dissents, passed Resolution 46/137 of 17 December 1991, which declared that ‘periodic and genuine elections’ are a ‘necessary and indispensable element’ and a ‘crucial factor in the effective enjoyment ... of a wide range of other human rights.’<sup>136</sup>

In 1996, the United Nations Human Rights Committee adopted General Comment 25, which explicates the rights set out in Article 25 of the ICCPR. According to this general comment, the conduct of public affairs is a broad concept, which relates to the exercise of

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<sup>134</sup> UNGA Res. 45/150 (21 February 1991).

<sup>135</sup> Ibid.

<sup>136</sup> A/RES/46/137, ‘Enhancing the effectiveness of the principle of periodic and genuine elections’ available at: <http://www.un.org/documents/ga/res/46/a46r137.htm> [accessed 13 September 2011]. In 1993, the Vienna World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, above n 2. Paragraph 8 of Section I of the Vienna Declaration asserts that ‘Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. ... The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.’ Three years later, United Nations Secretary-General Boutros-Boutros Ghali submitted ‘An Agenda for Democratization’ to the United Nations General Assembly: B. Boutros-Ghali, ‘An Agenda for Democratization, Supplement to the Reports A/50/332 and A/51/512 on Democratization’ (17 December 1996).

political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels. The Comment provides that allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the Constitution and other laws. The General Comment maintains that democracy requires freedom of expression, assembly, and association (paragraph 12); enshrines non-discrimination with respect to the citizen's right to vote (paragraph 3); rejects any condition of eligibility to vote or stand for office based on political affiliation (paragraph 15); calls for voters to be free to support or oppose the government without undue influence or coercion of any kind (paragraph 19); and requires states reporting under the Covenant to explain how the different political views in the community are represented in elected bodies (paragraph 22).<sup>137</sup>

In 1999, the Human Rights Commission adopted a resolution, sponsored by the United States, titled 'A Right to Democracy', which stressed the connection between democracy and human rights, maintaining that 'democracy fosters the full realisation of all human rights, and vice versa.' The resolution, which was adopted by 51 votes in favour to none against (with two abstentions: China and Cuba), lists a number of specific aspects of the 'right of democratic governance.'<sup>138</sup> Significant debate accompanied the title of the resolution. Cuba, for example, proposed that the words 'right to democracy' be removed—

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<sup>137</sup> General Comment No. 25, 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' 12/07/1996. CCPR/C/21/Rev.1/Add.7, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb> [accessed 13 September 2011]. See: Same Varayudej, 'Right to Democracy in International Law: Its Implications for Asia' (2006) 12 *Annual Survey of International and Comparative Law* 1. General Comment 25 has been applied in the Human Rights Committee's review of State Reports submitted under Article 40 of the ICCPR and in its decisions on applications under the Optional Protocol.

<sup>138</sup> Commission on Human Rights, 'Promotion of the right to democracy' Res 1999/57 available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.res.1999.57.en?opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.res.1999.57.en?opendocument) [accessed 10 September 2011].

Cuba's resolution on the subject was only narrowly rejected.<sup>139</sup> China criticised the title as 'premature and not balanced,' and argued that disparate historical backgrounds made different forms of democracy possible.<sup>140</sup> In the end, the words 'right to democracy' appear only in the title, not in the text. The following year, the Human Rights Commission again addressed the issue of democracy in its Resolution 2000/47, 'Promoting and Consolidating Democracy.' Resolution 2000/47 expanded on the 1999 document,<sup>141</sup> adding a new notion: the right to vote in 'a free and fair process ... open to multiple parties.'<sup>142</sup> Bhutan, China, Congo, Cuba, Pakistan, Qatar, Rwanda and Sudan abstained on the final vote. Cuba, China and Pakistan were particularly vocal critics of the Resolution, arguing that 'it imposed a single model of democracy upon member states.' Nonetheless, the General Assembly reviewed and approved this document with only minor modifications.<sup>143</sup> We can see, in these international developments, the progressive move towards an international understanding of democracy as popular sovereignty. At its core, this means that the coercive power by the state must only be exercised with the consent of citizens. This is most clearly evidenced by periodic elections conducted in circumstances where civil and political liberties are protected.

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<sup>139</sup> Varayudej, above n 137, 9.

<sup>140</sup> Ibid.

<sup>141</sup> UN Commission on Human Rights, Res 2000/47: 'Promoting and Consolidating Democracy' Res 2000/47, E/CN.4/RES/2000/47 (25 April 2000) available at:

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.47.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.47.En?Opendocument) [accessed 10 September 2011].

<sup>142</sup> Ibid, paragraph 1(d)(ii).

<sup>143</sup> UNGA Res 55/96, 'Promoting and Consolidating Democracy' (4 December 2000). See: Michael Dennis, 'The Fifty-Sixth Session of the UN Commission on Human Rights' (2001) 95(1) *American Journal of International Law* 213–221. Christian Tomuschat draws attention to the political character of the countries who abstained from voting: Bahrain, Bhutan, Brunei Darussalam, China, Cuba, Democratic Republic of the Congo, Honduras, Laos, Libya, Maldives, Myanmar, Oman, Qatar, Saudi Arabia, Swaziland, and Vietnam. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2008) Oxford, Oxford University Press, 61.

## **2.5. Democracy in Southeast Asia**

The model of electoral democracy that has been progressively articulated by the Human Rights Committee does not predominate in the Southeast Asian region. For some states, such as Vietnam and Laos, such a model is not even an aspiration. It is arguable that Indonesia, the Philippines and Thailand aspire to political systems and processes that meet international norms of democracy. Indeed, in the eyes of many observers, Indonesia has already successfully established a modern liberal democracy.<sup>144</sup> Yet even those countries that aspire to become liberal democracies are constrained by serious impediments to inclusiveness and participation, such as high levels of poverty, which militate against political participation, particularly in rural areas, the continuing influence of the military and business elites in shaping government policy, and corruption and absence of the rule of law, which undermines responsible government.

The unravelling of democracy in Thailand in 2006 and 2014 is a reminder of the fragility of democratic gains. In 2001, Thaksin Shinawatra was elected to power under Thailand's 1997 'People's Constitution' and then re-elected in 2005, introducing a raft of policy reforms which challenged, amongst other things, the continuing influence and power of three of Thailand's key (unelected) institutions: the military, the king, and the senior bureaucracy.<sup>145</sup> In 2006, Shinawatra was unseated by a military coup. Thaksin's sister Yingluck Shinawatra became Prime Minister following general elections held in 2011. In 2014, the Constitutional Court deposed Yingluck on grounds of corruption and two weeks later there was (another) military coup d'état. In the wake of the chaos, street protests and deaths that followed the two coups, calls came for a return to 'Thai-style democracy', based

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<sup>144</sup> Marco Bunte and Andreas Ufen *Democratization in Post-Suharto Indonesia* (2008) Routledge.

<sup>145</sup> Mark Askew (ed), *Legitimacy Crisis in Thailand* (2010) Chiang Mai, Silkworm Books.

on moral and king-centred politics,<sup>146</sup> a form of politics different to the Western-style, electoral-based democracy, which was perceived (by many) to have failed Thailand.

In Malaysia and Singapore, competitive multi-party politics is constrained by press censorship and by laws that restrict the rights of opposition political parties to associate, assemble, and communicate. The use of these laws—in certain cases, to arrest and charge opposition leaders—has entrenched single-party dominance in both states since independence from Britain in 1957. Ruling party tactics to consolidate power include the intimidation of voters, such as the July 2011 arrest of protestors in Malaysia calling for electoral reform prior to Malaysian elections.<sup>147</sup> Other pervasive strategies for the consolidation of power include the exclusion from business enterprises and civil service opportunities of those known not to support the ruling party and the perpetuation of a climate of fear through the use of informants. Against this backdrop, election results that would normally be seen as a resounding victory for the party in power—such as the 52 per cent of the popular vote recorded for the ruling Barisan Nasional coalition in Malaysia's 2008 elections—are instead seen as a victory for the opposition.<sup>148</sup> Malaysia's 2008 election results were hailed by opposition leader Anwar Ibrahim as 'a defining moment, unprecedented in our nation's history,' which for the first time left the ruling party without its two-thirds majority; 'the psychological threshold of its political dominance.'<sup>149</sup> Similarly, Singapore's elections in

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<sup>146</sup> Surin Maisrikrod, 'Leering from the 19 September Coup: Advancing Thai-style democracy?' in Lorraine Carlos Salazar (ed), *Southeast Asian Affairs* (2007) 340-59, Singapore, Institute of Southeast Asian Studies. See also Kevin Hewison, 'Constitutions, Regimes and Power in Thailand' (2009) 14(5) *Democratization* 928-45, 354.

<sup>147</sup> Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia' (2011) 1 *Asian Journal of International Law* (2011), 165–198. On 15 September 2011, Malaysian Prime Minister Datuk Seri Najib Razak announced the repeal of the Internal Security Act 1960 (ISA) and Malaysia's three Emergency Declarations. See <http://www.themalaysianinsider.com/malaysia/article/najib-announces-repeal-of-isa-three-emergency-declarations/> [accessed 19 September 2011].

<sup>148</sup> C. S. Kuppaswamy, 'Malaysia General Elections 2008—an Analysis' Paper No. 2627 (16 March 2008) available at:

<http://www.southasiaanalysis.org/%5Cpapers27%5Cpaper2627.html> [accessed 14 September 2011].

<sup>149</sup> Anwar Ibrahim, Malaysian Opposition Leader, *The Straits Times* quoted in Kuppaswamy, *ibid.*

2011 saw the ruling People's Action Party gain 60 per cent of votes, which in other democracies would be considered a convincing win. Yet this result was the People's Action Party (PAP)'s worst poll result in 40 years, throwing the ruling party into 'a turmoil of disappointment and shock.'<sup>150</sup> Larry Diamond characterises Singapore and Malaysia as 'semi-authoritarian' states.<sup>151</sup>

Of the other ASEAN states, Brunei is an absolute monarchy and does not hold elections.<sup>152</sup> In Cambodia, Hun Sen's Cambodian People's Party (CPP) has ruled since 1993. From the time of the 1998 elections, the CPP has used 'coercion, patronage, media control and other means to deny formally legal opposition parties any real chance of competing for power.'<sup>153</sup> Vietnam and Laos have since 1975 held elections every five years for their respective National Assemblies. In both countries, political parties other than the Communist Party are not permitted to stand for election, although independent candidates and self-nominees (either belonging to the party or not) have been permitted to stand. In both countries, the communist party maintains a super-majority in the National Assembly and its members hold all central decision-making roles. The press is government controlled and rights of assembly and association are limited.<sup>154</sup>

But it is Myanmar that diverges most from the idea of participatory and inclusive electoral democracy. In 1990, the results of what were widely recognised as fair elections were ignored by the Myanmar's generals, who began a period of rule by decree and extreme

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<sup>150</sup> Catherine Lim, 'Political Commentary—GE 2011's Real Winners—The People (But Who are We?)' (26 May 2011) available at: <<http://catherinelim.sg/2011/05/26/ge-2011%E2%80%99s-real-winners-the-people-but-who-are-we/>> [accessed 13 September 2011].

<sup>151</sup> Larry Diamond, 'Thinking About Hybrid Regimes' (2002) 13(2) *Journal of Democracy* 21.

<sup>152</sup> In 1991, an opposition party was formed, but faded from prominence soon afterwards and was disbanded.

<sup>153</sup> Duncan McCargo, 'Cambodia: Getting Away with Authoritarianism?' (2005) 16(4) *Journal of Democracy* 98 106.

<sup>154</sup> Ronald St John, *Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam* (2005) Routledge.

political repression. On 30 August 2003, Myanmar embarked on its 'roadmap to democracy.' Step 5 of the Roadmap was the holding of elections under the new 2008 Constitution, which reserves a quarter of the seats in the 440 seat *Pyithu Hluttaw* (People's Assembly) for non-elected military representatives.<sup>155</sup> On 7 November 2010, these elections were held. Those opposition parties and individuals which were permitted to stand against the military-backed Union Solidarity and Development Party (USDP) and National Unity Party faced high registration fees, restrictions on freedom of speech and assembly (which included an election-specific injunction against criticism of the Constitution and the polling process) and 'a pervasive environment of fear and intimidation.'<sup>156</sup> Amid widespread reports of 'ballot-stuffing, voter intimidation, irregular advance voting, obstruction of opposition supporters, and other fraud'<sup>157</sup> and the boycott of the election by Aung San Suu Kyi's National League for Democracy (NLD), the USDP won 80 per cent of the seats in which it stood. ASEAN, chaired at the time of the 2010 Myanmar elections by Vietnam, issued a statement recognising the 2010 elections as a 'significant step' in Myanmar's 'seven point road-map for democracy.'<sup>158</sup>

Myanmar continues to present a conundrum for ASEAN. Most careful observers now agree that little would be gained if ASEAN adopted a condemnatory stance toward Myanmar.<sup>159</sup> But tolerating Myanmar's policies of repression, intimidation, electoral irregularities and voter control through violence makes ASEAN's claim to endorse a regional

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<sup>155</sup> Constitutional amendments require approval of 75 per cent of parliamentary members. The Constitution also assigns ministerial portfolios such as Defence and Home Affairs to military representatives and grants extraordinary powers to an unelected 'commander in Chief off the Defence Services' who has the power to assume all legislative, executive and judicial authority in the event of a (self-declared) state of emergency.

<sup>156</sup> Sean Turnell, 'Myanmar in 2010' (2011) 51(1) *Asian Survey* 148, 150.

<sup>157</sup> *Ibid.*

<sup>158</sup> *New Light of Myanmar*, (11 November 2010) XVIII (204) available at: <<http://www.burmalibrary.org/docs09/NLM2010-11-11.pdf>> [accessed 13 September 2011].

<sup>159</sup> Michael Christopher, 'Reflections on a Visit to Burma' (1997) 37(6) *Asian Survey* 540; Ian Holliday, 'Extending a Hand in Myanmar' (2011) 58(2) *Dissent* 14.

principle of democracy, highly implausible.<sup>160</sup> On those few occasions where the regional association's auspices have been used to attempt to influence political action within Myanmar, the Association has subsequently retreated to its former position of non-interference. In September 2007, for example, Singapore's Foreign Minister and then ASEAN Chair, George Yeo, publicly expressed the Association's 'revulsion' at the government of Myanmar's use of violence to suppress the peaceful 'saffron revolution' led by Myanmar's monks. Yeo urged Myanmar to 'work towards a peaceful transition to democracy'<sup>161</sup> and to 'cooperate fully and work with' the UN Secretary-General's special envoy for Myanmar, Ibrahim Gambari. But at the East Asian Summit held in Singapore a mere two months later, at Myanmar's request ASEAN cancelled its invitation to Ibrahim Gambari to brief the heads of state gathered there on the situation in Myanmar.<sup>162</sup>

## 2.6. Conclusion

It might be argued that the divergent practices of governance, and the democratic deficits which exist within *all* ASEAN states, sufficiently explain the region's reluctance to endorse the substantive, clearly articulated principles of democracy that have been described in section 2.4 of this Chapter. To different extents, all ASEAN states—with the possible exception of Indonesia—possess an attitude described by Aung Bwa, Myanmar's representative to the High Level Task Force (HLTF) charged with drafting the ASEAN Charter, 'Those who live in glass houses should not throw stones!'<sup>163</sup> But beyond this

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<sup>160</sup> See the discussion in Chapter 4 of this dissertation.

<sup>161</sup> Statement by ASEAN Chair, Singapore's Minister for Foreign Affairs George Yeo in New York, 27 September 2007 available at: [http://app.mfa.gov.sg/2006/press/view\\_press.asp?post\\_id+3125](http://app.mfa.gov.sg/2006/press/view_press.asp?post_id+3125) [accessed 14 September 2011].

<sup>162</sup> Emmerson, *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia*, above n 51, 26-34.

<sup>163</sup> Aung Bwa, 'The Jewel in My Crown' (2009) in Tommy Koh, Rosario G Manolo and Walter Woon (eds), *The Making of the ASEAN Charter* (2009) Singapore, World Scientific Publishing Co, 33.

## *Chapter 2: Democracy and Human Rights*

sentiment, there lies deep currents of resistance to the idea of liberal democracy as promoted by the West and by the United Nations. Thus, while the post-World War Two international legal order, by upholding the right of self-determination of former colonial peoples, has been effective at promoting democracy in Southeast Asia in its broad sense—as the right of a people to govern themselves—attempts at the international level to specify the precise form of governance have been unsuccessful. Part 1 of Chapter 3 explains the reasons why this is the case. Part 2 explains the effects in terms of the legitimacy of Southeast Asia’s regional institution for the promotion of human rights.

## **Chapter 3: Resisting Democracy**

### **3.1 Introduction**

### **3.2 Explaining Southeast Asia's Scepticism about Democracy**

#### *3.2.1 The Legacy of Colonialism*

#### *3.2.2 Asian Values*

#### *3.2.3 Communism*

### **3.3 Can We Separate Democracy From Human Rights?**

### **3.4 Why 'Democracy' in the ASEAN Charter?**

### **3.5 The Legitimacy of Regional Human Rights Regime *sans* a Commitment to Democracy**

#### *3.5.1 Legitimacy of the ASEAN Charter in the Absence of the Consent of Democratic States*

#### *3.5.2 Democracy in the Charter Drafting Process*

#### *3.5.3 Democracy and Compliance*

#### *3.5.4 Democracy's Lack of Determinacy*

### **3.6 Conclusion**

### **3.1 Introduction**

This chapter draws together the reasons why the model of electoral democracy that has been progressively articulated by the Human Rights Committee does not predominate in Southeast Asia, focusing particularly on (a) Southeast Asia's colonial history; (b) the idea that Southeast Asia operates in conditions of 'situational uniqueness' that debilitates democracy (otherwise known as 'the Asian Values' debate); and (c) the persistence of communist ideology in the regimes of Laos and Vietnam. I conclude this chapter by considering the argument that human rights and democracy should be separated, and in this context test the ideas of political philosophers such as Rawls and Cohen, who have argued that non-liberal states are able to protect human rights, provided they are 'decent'. I raise the possibility that if this is the case, then a regional institution designed to protect human rights, established by decent, non-liberal states, might yet possess legitimacy. I explain why, in the case of Southeast Asia, the arguments of Rawls and Cohen do not apply. These reasons can be traced to the absence within the region of a preponderance of states that possess consultative schemes for political decision-making, schemes 'that permit the expression a range of opinions (including political dissent) and ensure representation of the fundamental interests of all.'<sup>1</sup>

I then consider the question of why, given all this, the word 'democracy' was included in the ASEAN Charter and in the TOR of AICHR, and I grapple with the question of why ASEAN states agreed to include references to 'democracy and human rights' in these instruments, given the contested understandings of democracy within the region.

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<sup>1</sup> Joshua Cohen, 'Is There a Human Right to Democracy?' (2006) in Christine Syrowich (ed), *Essays in Honour of G.A. Cohen* (2006) Oxford, Oxford University Press, 228.

Finally, I return to the concept of legitimacy, and consider the implications of the foregoing discussion about ‘human rights and democracy’ for the legitimacy of the emerging regional human rights regime in Southeast Asia. Following the argument in Chapter 1 that both normative and subjective conceptions of legitimacy are important in understanding the potential influence of international human rights institutions, I conclude that AICHR lacks what is said to be one of the key normative elements of legitimacy, which is the ongoing consent of democratic states.<sup>2</sup> I discuss the implications of this for prospects of states complying with the reports and recommendations of AICHR. I also consider whether or not the term ‘democracy’ within the ASEAN Charter and the TOR of AICHR lacks ‘determinacy’, in Thomas Franck’s sense of the word. Franck argues that if a term such as ‘democracy’ does not convey a clear message, and is not ‘transparent in the sense that one can see through the language to the meaning,’<sup>3</sup> then the prospect of the norm being successfully deployed to regulate the conduct of those to whom it is directed (in Thomas Franck’s language, exert a ‘compliance pull’ on state behaviour), is greatly diminished. Koskeniemi views this kind of indeterminacy as inevitable.<sup>4</sup> My argument in this chapter is that because of the symbiotic relationship between democracy and human rights, democracy’s indeterminacy has consequences for perceptions about the appropriateness of the institution’s mandate and powers to promote and protect human rights.

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<sup>2</sup> At 2.7(a) I consider whether the consent of democratic states as a basis for legitimacy might not be essential provided an institution is independent, and establishes by its practices and decisions, a pattern of principled decision-making removed from the vicissitudes of politics.

<sup>3</sup> Thomas Franck, ‘Legitimacy in the International System’ (1988) 82(4) *American Journal of International Law* 705.

<sup>4</sup> Martti Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* Cambridge, UK, Cambridge University Press (2005) 591.

### 3.2 Explaining Southeast Asia's Scepticism about Democracy

This section considers the major themes in Southeast Asia's opposition to the Western idea of democracy. Each theme has roots in the complex political and social history of the region, and each is worthy of a dissertation in itself. My aim is simply to trace some of the major patterns of resistance to liberal democracy that have emerged in Southeast Asia in the period since the end of the Second World War and decolonisation.

The first theme has its origins in Southeast Asia's colonial past. For many within Southeast Asia, liberal democracy remains associated with the West, and the West was responsible for the oppression and atrocities of colonialism.<sup>5</sup> The charge of 'hypocrisy' is the one most frequently levelled against Western proponents of liberal democratic ideals by leaders within Southeast Asia.<sup>6</sup> In Sienho Yee's words, the effect of Asia's colonial history 'is often unelaborated in writing but can hardly be overestimated.'<sup>7</sup>

The second theme derives from what are thought to be significant cultural differences between the West and Asia, a debate that takes form in arguments about 'Asian values'. In part, 'Asian values' has been projected as a rejoinder to the idea that individual liberty and autonomy, as conceived by the West, are 'universal' standards. Elsewhere, 'Asian values' have been linked to ideas about the overriding imperative of security for developing nations with unstable economies and social unrest.

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<sup>5</sup> See Xue Hanqi, 'Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar World' (2010) 1 *Asian Journal of International Law* 13.

<sup>6</sup> Mahathir Mohamad complained that 'it would seem that Asians have no right to define and practice their own set of values about human rights.' Mahathir Bin Mohamad, Keynote Address, JUST International Conference, 'Rethinking Human Rights', Kuala Lumpur (1994), 9.

<sup>7</sup> Sienho Yee, 'The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: the European and Asian Models as Illustrations' (2004) 8 *Singapore Year Book of International Law* 157.

The third theme is surprisingly one that has *not* emerged (in the literature), as an obstacle to developing a regional understanding about the meaning of democracy. This is the Marxist character of Vietnam and Laos. Both countries, despite embracing an economic *perestroika* since the mid-1990s, still formally uphold principles of communism.

### 3.2.1 *The Legacy of Colonialism*

Authoritarian leaders within Southeast Asia, attempting to deflect Western criticism of their non-democratic practices, have often referred to the past human rights violations committed by Southeast Asia's former colonial oppressors.<sup>8</sup> They have charged the West with hypocrisy in its exhortations that Southeast Asian nations adopt democratic principles of 'liberty' and 'equality', because the powers now commending liberty and equality are the same powers which once conquered and ruled most of Southeast Asia.<sup>9</sup> The charge of neo-imperialism meets many exogenous attempts at political reform. In 1953, Indonesia's Vice-President Mohammad Hatta wrote that 'the memory of the colonial status that bound them for centuries made them resist anything they consider an attempt to colonise them again, whether by economic or ideological domination.'<sup>10</sup> In 2004, Myanmar's Deputy Minister for Foreign Affairs, U Khin Maung Win, stated that:

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<sup>8</sup> In Joanne Bauer and Daniel Bell, *The East Asian Challenge for Human Rights* (1999) Cambridge, UK, Cambridge University Press, Bauer and Bell quote Onuma Yasuaki, Professor of International Law at the University of Tokyo. Yasuaki writes (9) that: 'For those who have experienced colonial rule and interventions under such beautiful slogans as 'humanity and 'civilization', the term 'human rights' looks like nothing more than another beautiful slogan by which great powers rationalize their interventionist policies.'

<sup>9</sup> Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' (1979) in Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (1979) New York, Praeger Publishers, 2-4.

<sup>10</sup> Mohammad Hatta, 'Indonesia's Foreign Policy' (1953) 31(3) *Foreign Affairs* 451-452. ASEAN's constituent document, the Bangkok Declaration of 1967, made a point of affirming that 'all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development.' See Association of Southeast Asian States, Bangkok Declaration, (1967) Preamble.

Myanmar has existed as an independent kingdom for thousands of years. It has always been proud of its culture, traditions and values. Therefore, colonisation by Great Britain was a great shock to the psyche of the Myanmar people. After the regaining of independence in 1948, the Myanmar people are deeply jealous of their independence and sovereignty and are determined that they will never be subjugated by an alien power. Sense of patriotism and nationalism still runs very deep in Myanmar. A case in point, Myanmar became the first nation that refused to join the Commonwealth following the regaining of independence due to nationalism that refused to accept the British sovereign as head of state.<sup>11</sup>

The significance of colonialism extends beyond its strategic invocation by Southeast Asian leaders to quell domestic demand for Western-style reform. Many Southeast Asian nations fought wars of independence against their imperial rulers, which had enduring consequences for the new nations. The Marxist-Leninist ideology which penetrated much of Southeast Asia (successfully taking hold in Laos, Vietnam, Myanmar and Cambodia), was explicitly anti-colonialist, drawing on notions of revolutionary liberation as well as economic redistribution.<sup>12</sup> The Communist Party of Vietnam, for example, continues to derive legitimacy from its thirty-year struggle against its French colonial rulers, and then from its struggle against the United States following the Second World War. Pham writes: ‘The Vietnam-American war was the mother’s milk, the school and the testing ground of Vietnamese communism. It provides historical justification for the indispensable leadership of the Communist Party, endowing it with the “mandate of heaven”.’<sup>13</sup>

The practices of colonial powers provided fertile ground for Marxism. In the classic *Philippine Society and Revolution*, Amado Guerrero describes what happened to the Philippines under the colonial rule of the United States, ‘the Mighty and Humane North

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<sup>11</sup> H.E. U Khin Maung Win, Deputy Minister for Foreign Affairs of the Union of Myanmar, ‘Myanmar Roadmap to Democracy: The Way Forward’ (2004) Paper presented at the Seminar on Understanding Myanmar Yangon, 27–28 January 2004, Myanmar Institute of Strategic and International Studies.

<sup>12</sup> See Damien Kingsbury, *Southeast Asia: A Political Profile* (2001) Oxford, Oxford University Press.

<sup>13</sup> T.H. Pham, ‘What Remains: Vietnam in My Heart’ (28 April 2005) *Open Democracy* available at: <<http://www.opendemocracy.net/node/2464>> [accessed 19 October 2005].

American nation' who had aided the Philippines in gaining independence from the Spanish in 1898:

The U.S. imperialist aggressors practised genocide of monstrous proportions. They committed various forms of atrocities such as the massacres of captured troops and innocent civilians; pillage on women, homes and property; and ruthless employment of torture, such as dismemberment, the water cure and the rope torture. Zoning and concentration camps were resorted to in order to put civilians and combatants at their mercy.<sup>14</sup>

One aspect of the significance of such readings of history lies in their rhetorical power to shape opposition to the values and ideals of the former imperialists. This is, perhaps, a significance too easily overlooked by those outside the region. But the era of colonialism has had other, far-reaching consequences for the states of the region. In many cases, wars of liberation were fought in order to gain independence. These wars cemented the central role of the military in nation-building and generated extreme forms of nationalism. The role of the military in the politics of ASEAN states—in some cases, a role preserved in state constitutions<sup>15</sup>—has deeply influenced the political evolution of these states. The Philippines, Thailand, Indonesia and Myanmar provide particularly strong examples of this, and of the deleterious effect of military dominance on democratic development.

Colonial rule also exacerbated religious and ethnic divides, and leaders of some of Southeast Asia's authoritarian states have continued to connect the region's colonial legacy to problems of national unity and state-building. In the Philippines, for example, the geographically orientated north-south divide between the Muslim population (the Moros) and the Christians, was reinforced by a US imperial policy that implemented a practice of civilian justice for the Christians and military justice for the Muslims, and policies of unequal land

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<sup>14</sup> Amado Guerrero, *Philippine Society and Revolution* (1970), originally published in Mimeograph by the Revolutionary School of Mao Tsetung Thought, available at: <http://www.geocities.ws/kabataangmakabayan64/psr.pdf> [accessed 14 September 2011], 12.

<sup>15</sup> Such as the 2008 Constitution of the Republic of the Union of Myanmar, Chapter 7 'Defence Services'.

distribution that benefitted Christians. Colonial policies alienated and radicalised Muslim populations, who resisted post-colonial efforts directed toward assimilation.<sup>16</sup> In Malaysia, the race riots of 1969 led to the strengthening of security laws such as the Internal Security Act, the Official Secrets Act and the Sedition Act, which had originally been introduced by the British in the wake of the 1948 ‘State of Emergency’. The history of Myanmar also illustrates the effects of colonial rule on ethnic relationships. The British divided ‘Burma proper’ from the frontier areas, (‘Scheduled areas’, populated by non-Bamar ethnic groups). This had ‘far-reaching implications for the subsequent creation of an independent Myanmar state.’<sup>17</sup> Indigenous nationalities of Myanmar were denied the opportunity to develop a sense of ‘bonding and belonging, culminating in an “imagined community” that could forge a modern nation-state out of disparate ethnic “nations”.’<sup>18</sup> In the 2010 Myanmar elections, voting in some ethnic border states was suspended by the military, on the grounds that ‘free and fair elections could not be guaranteed.’<sup>19</sup> Myanmar’s Deputy Minister for Foreign Affairs, His Excellency U Khin Maung Win writes:

Myanmar is a Union composed of more than one hundred different national races, each with its own culture and traditions. Politically, there cannot be lasting peace and stability in the country without national unity. Unfortunately, the divide and rule policy practiced by the British colonialists resulted in suspicion and discord among the national races. This subsequently led to armed insurgency that spread to various parts of the country for decades. The question of achieving national unity and bringing to an end the armed insurgency are vital issues for any government, past, present and future.<sup>20</sup>

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<sup>16</sup> George notes that the attitudes of the north and south had been ‘poisoned by the fears and hatreds planted in their mind by colonial masters.’ TJS George, *Revolt in Mindanao: the Rise of Islam in Philippine Politics* (1980) Kuala Lumpur, Oxford University Press, 119.

<sup>17</sup> Anek Laothamatas (ed), *Democratisation in Southeast and East Asia* (1997) Singapore, Institute of Southeast Asian Studies.

<sup>18</sup> Ibid; see also Benedict Anderson, *Imagined Communities: Reflection on the Origin and Spread of Nationalism* (1991) London, Verso.

<sup>19</sup> Bernd Musch-Borowska, ‘Myanmar Officials Cancel Vote in Ethnic Minority Areas’ (2011) *Deutsche Welle* available at: <<http://www.dw-world.de/dw/article/0,,6196668,00.html>> [accessed 27 July 2011].

<sup>20</sup> Win, above n 11.

As Lawson writes, ‘the memory of the colonial period sustained a continuing resentment against “Europe”, partly manifest in the “Asian values debate” as well as in the broader phenomenon of “Asianism”.’<sup>21</sup> Sienho Yee describes colonialism as ‘the overriding/most important reason’ why a human rights system like that in Europe will not be established in Asia, as the ‘staunch adherence to the principle of non-interference in the domestic affairs of another State as a reaction to the experience of being under colonial control. This principle is ingrained in the Asian psyche and constitutes an essential part of it at the present anyway.’<sup>22</sup>

From outside the region, the charge of neo-colonialism is often perceived as a strategic invocation by authoritarian rulers to impede democratic reform. But its effects are more complex. The shared experience of colonialism has translated into respect for the territorial integrity of state borders and for different political systems that exist within states, and into a deep suspicion of claims about the moral superiority of Western ethical traditions. Colonialism has also had real and enduring effects on the creation of national self-identities, and has disrupted autochthonous movements toward democracy. Prospects for achieving consensus about ideas of democracy at the regional level are consequently complicated.

### **3.2.2 Asian Values**

Then there is the school of thought particularly current in ASEAN member nations, that says that political stability is something that ought to be protected even more than human rights. To this, we say that political stability by itself is meaningless if it is not utilized to widen the practice of democracy and to enhance the institutions of civil

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<sup>21</sup> Stephanie Lawson, ‘Asia/Europe and Regional Governance’ (2011) in Nicholas Thomas (ed), *Governance and Regionalism in Asia* (2011) London, Routledge, 301 – 320, 310.

<sup>22</sup> Yee, above n 7, 163.

society. If political stability is touted purely on the platform of economic prosperity, then autocrats and dictators can get away with murder.<sup>23</sup>

Lecture by Anwar Ibrahim at the University of the Philippines-Diliman, Manila, 5 August 2011.

The idea put forward by some Asian leaders, that economic development is a necessary precursor to the realisation of civil and political rights, forms one thread in the broad school of thought that has become known as the ‘Asian Values’ debate. The apogee of the debate was the Bangkok Declaration, drafted by the leaders of forty Asian governments in preparation for the 1993 Vienna World Conference on Human Rights. The Declaration emphasised the right to development,<sup>24</sup> identified the main obstacles to the realisation of the right to development as lying at the international macroeconomic level, reflected in the widening gap between the North and the South,<sup>25</sup> and affirmed that poverty is one of the major obstacles hindering the full enjoyment of human rights.<sup>26</sup> The argument was made that ‘for the vast number of developing countries, to respect and protect human rights is first and foremost the full realization of the right to subsistence and development,’<sup>27</sup> and that it was permissible for governments to focus on fulfilling economic and social rights before addressing issues of civil and political rights. Many Asian leaders agreed with the Chinese representative to the Vienna Conference, who argued that ‘human rights is a product of

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<sup>23</sup> Anwar Ibrahim, Ibrahim, Anwar, Lecture at the University of the Philippines, (5 August 2011) available at: <<http://anwaribrahimblog.com/2011/08/06/jose-rizal-and-ninoy-aquino-and-their-impact-on-asean-leadership/>> [accessed 13 September 2011].

<sup>24</sup> Article 17, Bangkok Declaration. The Ministers and representatives of Asian States met at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights, and Adopted the Declaration, ‘Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Report of the Regional Meeting for Asia of the World Conference on Human Rights A/Conf.1 57/ASRM/ 8-A/Conf.157/PC/59 (7 April 1993) (Bangkok Declaration).

<sup>25</sup> Ibid, Article 18.

<sup>26</sup> Ibid, Article 19.

<sup>27</sup> Liu Huaqiu, ‘Proposals for human rights protection and promotion’, Vienna (1993), published in *The Beijing Review* (28 June – 4 July 1993), 9, quoted in Joseph Chan, ‘The Asian Challenge to Universal Human Rights’ (1995) in James Tang (ed), *Human Rights and International Relations in the Asia Pacific* (1995) London, Pinter, 25-53, 38.

historical development, closely associated with specific social, political and economic conditions’, and that ‘different historical development stages have different human rights requirements.’<sup>28</sup> Indonesia’s Foreign Minister called for ‘greater recognition of the immense complexity of the issue of human rights due to the wide diversity in history, culture, values system, geography and phases of development among the nations of the world.’<sup>29</sup>

The claim in the Bangkok Declaration which caused most consternation in the West—that ‘while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds’<sup>30</sup>—seems less remarkable in historical perspective. After all, the Bangkok Declaration does not challenge the universality of human rights, and the idea of national specificity in the implementation of rights is well recognised by the West in doctrines such as the ‘margin of appreciation.’<sup>31</sup> That the human rights articulated in the Universal Declaration and the two Conventions have a historical specificity—for example, that the right to ‘a fair trial’ presupposes the establishment of modern institutions—is undeniable. The Bangkok Declaration’s claim to specificity is not in fact far removed from the thinking of some liberal philosophers. Tasioulas, for example, holds that:

Human rights enjoy a temporally-constrained form of universality, so that the question concerning which human rights exist can only be determined within some specified historical context. For us, today, human rights are those possessed in virtue of being human and inhabiting a social world that is subject to the constraints of modernity. This historical constraint permits very general facts about feasible institutional design in the modern world, e.g. forms of legal regulation, political

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<sup>28</sup> Ibid.

<sup>29</sup> Ali Alatas, ‘Indonesia against dictators on rights and wants better mechanism for rights’, speech by the Minister of Foreign Affairs of the Republic of Indonesia given at the Second World Conference on Human Rights, Vienna (1993). Quoted in Chan, *ibid.*, 17.

<sup>30</sup> Bangkok Declaration, above n 24.

<sup>31</sup> E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1988) 31 *New York University Journal of International Law and Policy* 843.

participation and economic organization, to play a role in determining which human rights we recognise.<sup>32</sup>

What lent such venom to the debate between Asian leaders and ‘the West’ at the time of the Vienna World Conference was the charge by Asian governments of Western hypocrisy. The leaders of Asian states blamed ‘colonialism, foreign domination and poverty’<sup>33</sup> for the economic conditions that made it difficult for them to realise full-blown civil and political rights, and they resented the West compounding past injustices by insisting that Asian states respect rights which the West had ignored during past ages of imperialism, exploitation and slavery. Examples of the West’s ‘double standards and politicization’ (in the language of the Bangkok Declaration<sup>34</sup>) in 1993 were readily at hand: the United States and NATO hesitating in coming to the aid of the Serbs in Yugoslavia, remaining silent over events in Algeria, and linking economic aid and trade privileges to worker’s rights in Malaysia and Indonesia in circumstances where it benefited United States industry demands for protectionism.<sup>35</sup>

The West, for its part, read the claim that it was *poverty* that ‘makes a mockery of all civil liberties,’<sup>36</sup> against a back-drop of events in Asia that included: the Malaysian government’s 1987 arrest of opposition political party leaders in 1987; the 1989 massacre of protestors in Tiananmen Square; the refusal of Myanmar’s military junta to accept the results of the 1990 elections; and the shooting of civilian mourners in an East Timorese cemetery by

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<sup>32</sup> John Tasioulas, ‘The Moral Reality of Human Rights’ (2007) in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007) Oxford, Oxford University Press, 76-77.

<sup>33</sup> Chan, above n 27, 31.

<sup>34</sup> Bangkok Declaration, above n 24, Preamble.

<sup>35</sup> Mely Caballero-Anthony, ‘Human Rights, Economic Change and Political Development: a Southeast Asian Perspective’ (2001) in James Tang (ed), *Human Rights and International Relations in the Asia Pacific* (1995) London, Pinter, 39-53. See also Yash Ghai, ‘Human Rights and Governance: the Asia Debate’ (2000) 1 *Asia-Pacific Journal of Human Rights and the Law* 9, at 42.

<sup>36</sup> Won Kang Sen, Singapore’s Foreign Minister, Speech at the UN World Conference on Human Rights in Vienna, reported in the *Straits Times* (17 June 1993). Quoted in Caballero-Anthony, above n 35, 43.

the Indonesian army in November 1991.<sup>37</sup> Western observers (and many within Asia) viewed the idea of an ‘alternative Asian standard’ of human rights as a dangerous capitulation to relativism. The West was willing to respect pluralism, a degree of ‘situational uniqueness’<sup>38</sup> and what the Thai Prime Minister called ‘greater recognition of the immense complexity of the issue of human rights due to the wide diversity in history, culture, value system, geography and phases of development among the nations of the world.’<sup>39</sup> But the argument that economic development might necessitate restrictions on human rights in order to provide a secure political framework in which rights can be pursued appeared to be a thinly disguised apology for authoritarianism and oppression.<sup>40</sup>

Writing in 1999, Frances Fukuyama declared that the Asian Values debate was over.<sup>41</sup> He, like many others, consigned the ‘Asian Values’ debate to the dustbin of history in the wake of the Asian Financial Crisis. The reasoning was that Asian leaders had rested their case for ‘Asian Values’ on the strength of their burgeoning economies, and with these economies in ruins, the claim to ‘Asian Values’ was weakened beyond repair.

Yet the ‘Asian Values’ dispute, politicised and rhetorical though it was, threw into sharp relief an unresolved challenge to the legitimacy of international human rights law. As Peerenboom writes, it is impossible to dismiss the ‘fundamental reality’ that:

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<sup>37</sup> Michael Vatikiotis and Robert Delfs, ‘Cultural Divide: East Asia Claims the Right to Make its Own Rules’ (17 June 1993) *Far Eastern Economic Review*.

<sup>38</sup> *Far Eastern Economic Review*, (17 June 1993). See also *Jakarta Post*, 16 and 17 June 1993, and the *Straits Times*, 17 June 1993.

<sup>39</sup> Ali Alatas, *A Voice for a Just Peace* (2001) Singapore, Institute of Southeast Asian Studies, 474.

<sup>40</sup> Although it must be noted that Asian arguments not without support from Western intellectuals: H.P. Schmitz, ‘Domestic and Transnational Perspectives on Democratization’ (2004) 6(3) *International Studies Review* 403-426. Samuel Huntington and Joan M. Nelson write that: ‘Political development must be held down, at least temporarily, in order to promote economic development.’ Samuel Huntington and Joan M. Nelson, *No Easy Choice: Political Participation in Developing Countries* (1976) Cambridge, MA, Harvard University Press (23). See also: Karl de Schweinitz, ‘Industrialization, Labor Controls, and Democracy’ (1959) 7 *Economic Development and Cultural Change* 385-404; Adrian Leftwich, ‘Two Cheers for Democracy?’ (1996) 6 *Political Quarterly* 7, 334-339, 239.

<sup>41</sup> Francis Fukuyama, ‘Asian Values in the Wake of the Asian Crisis’ (1999) in Farrukh Iqbal and Jong-Il You (eds), *Democracy, Market Economics and Development, an Asian Perspective* (1999) World Bank Publications, 149-68, 151.

differences in values (whether in Asia or Western countries) undermine to some degree the universality of the human rights regime as an empirical matter and present a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere. In many cases, differences in values and other contingent circumstances will and should lead to differences in the ways human rights are interpreted and implemented. The overly politicized arguments of some Asian governments in the first round should not lead to the premature and false conclusions that differences in values either do not exist or do not matter.<sup>42</sup>

This challenge does not lie in the idea that the implementation of rights might need to be staggered, or that the mix of economic, social, civil and political rights might vary depending on the context of a nation's development. It lies in a challenge to the idea of democracy itself, and to the value and importance of the civil and political rights, which democracy supports and democracy presupposes. The debate references what Singapore's Senior Minister, Lee, has described as 'the Asian will to differ' on questions of democracy, human rights, tradition and development:

We are all in the midst of very rapid change and at the same time we are all groping towards a destination which we hope will be identifiable with our past ... It can be seen as a working out of collective rights to a cultural heritage. It is the exercise of the internationally recognized right to determine one's own system of culture and politics.<sup>43</sup>

Some of the themes selected from Asia's 'past' have been inimical to democracy. For example, a White Paper produced by the Singapore government in 1991, *Shared Values*, drew on Confucian ideas of political order. In *Confucian Traditions in East Asian Modernity*, Tu Wei-ming writes, 'In its political philosophy the Confucian tradition lacks concepts of liberty, human rights, privacy, and due process of law.'<sup>44</sup> Drawing on such ideas, the White Paper questioned the philosophical emphasis of Western liberal democracy on 'the individual' and the political emphasis on competition and majority rule, which it argued were

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<sup>42</sup> Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates about 'Values in Asia' (2003) 14(1) *Indiana International and Comparative Law Review* 1, 7.

<sup>43</sup> Quoted in Simon S.C. Tay, 'Human rights, culture, and the Singapore example' (1995) 41 *McGill LJ* 743, 768.

<sup>44</sup> Tu Wei-Ming (ed), *Epilogue, Confucian Traditions in East Asian Modernity* (1996) Cambridge, Mass., Harvard University Press, 347.

destructive of harmony and cooperation. Instead, the Paper emphasised the individual's linkages to family, community and nation through notions of obligation and duty. The Singapore paper questioned not only the Western means of ordering society, but also its goal (individual freedom and the pursuit of individual interests). The White Paper held up an ideal of social cohesion and fulfilment of the individual through a chain and hierarchy of duties. It drew on a family of philosophical ideas about the nature of man and society, which are linked by the idea that the individual is not atomistic and self-interested but is defined in terms of his or her connection with others. Ties of kinship and community should be the basis of political and social life, the aim of which is stability and the elevation of communitarian interests through consensus. Singapore's Ambassador-At-Large Tommy Koh (Singapore's member of the HLTF which drafted the ASEAN Charter and the Task Force's chairman from August-November 2007), states that:

East Asians do not believe in the extreme form of individualism practiced in the West. We agree that every individual is important. However, he or she is not an isolated being, but a member of a nuclear and extended family, clan, neighbourhood, community, nation and state. East Asians believe that whatever they do or say, they must keep in mind the interests of others. Unlike Western society, where an individual puts his interest above all others, in Asian society the individual tries to balance his interests with those of family and society.<sup>45</sup>

On such a view, elections are (somewhat) important because they select leaders, but once elected, it is the task of a governing elite to exercise independent judgement on what is in the long-term interest of the people and act on that basis. With the mandate of the people, leaders are able to adopt a long-term orientation to policy, rather than for what will please the people in the short term, free from the vicissitudes of popular opinion. Singapore's Prime Minister Goh put it this way:

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<sup>45</sup> Tommy Koh, '10 Asian Values that Help East Asia's Economic Prosperity' (14 December 1993) *The Straits Times*.

Because the Government has acted as an honest, competent, and successful trustee of the people, we have been returned to power in 10 general elections since 1959. With a comfortable majority and a strong mandate, we have been able to take a long-term view in addressing our economic problems. We are not hostage to the multiplicity of narrow interest groups; to the clash and clamour of contending opinions that have sometimes made it difficult for countries to have the flexibility to adapt to the rapidly changing global economy; and to critics and wisecracks from outside the country.<sup>46</sup>

Leaders from other parts of Southeast Asia have also drawn on religious teachings that support the idea of benevolent leaders who act in the best interests of the people. In predominantly Muslim Indonesia, President Sukarno outlined an alternative conception of democracy to the West's 'majoritarian' or '50 per cent plus one' democracy.<sup>47</sup> According to Sukarno, 'true democracy' was 'guided democracy' based on traditional village procedures of reaching unanimous decisions (*mufakat*), through deliberation and consultation (*musjawarah*). The spirit of *gotong rojong* (mutual aid) was intended to ensure that everyone's views were considered in a spirit of tolerance and generosity, with one's own views put aside in the interests of all.<sup>48</sup> In Thailand, Buddhism is practiced by 95 per cent of the population, and has underpinned both pro-democratic and authoritarian movements within Southeast Asia.<sup>49</sup> Within Myanmar, Buddhism is practised by over 90 per cent of the people. H E U Khin Maung Win, Myanmar's Minister of Foreign Affairs, writes that:

wealth in Myanmar not only means material affluence but also spiritual advancement, especially peace of mind and contentment. The Myanmar people are by nature kind, gentle, and tolerant. Moreover, good society to Myanmar is the equilibrium of *atta* (individual desire) and *para* (working for the good of the community). Thus

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<sup>46</sup> Quoted in Surain Subramaniam, 'The Dual Narrative of Good Governance: Lessons for Understanding Political and Cultural Change in Malaysia and Singapore' (2001) 23(1) *Contemporary Southeast Asia* 65. See also former Singaporean Prime Minister Lee Kuan Yew, *From Third World to First: The Singapore Story 1965–2000 Memoirs of Lee Kuan Yew* (2000) Singapore, Singapore Press Holdings, 542.

<sup>47</sup> C.D. Neher, 'Asian Style Democracy' (1994) 34(11) *Asian Survey* 949.

<sup>48</sup> Ranjoo Seodu Herr, 'Democracy in Decent Non-liberal Nations: a Defense' (2009) *The Philosophical Forum, Inc.* 332 309-338.

<sup>49</sup> The Thai word for constitution, *thamma*, means 'karma', or 'ethical value'.

democracy is not just conferring basic rights but also obligations and duties to the state.<sup>50</sup>

Approaching the issue from various perspectives, critics of ‘Asian values’ have attacked the idea that there is or should be a separate Asian standard of democracy. At the simplest level, critics have pointed to the contradiction between ‘claims of a consensus and harmonious society and the extensive arming of the state apparatus’<sup>51</sup> in Asian states. In relation to the ‘communitarian’ arguments of Asian leaders, Yash Ghai (amongst others) has argued that they overstate the individualism of the West’s tradition of democracy (Rousseau, for example, strongly asserts the claims of the community) and that Asian governments wrongly conflate themselves (or ‘the state’) with ‘the community’.<sup>52</sup> Critics have also drawn attention to the disingenuous use of religious values to support political authority: as a matter of ethnography, for example, Confucianism does not resonate particularly strongly with the majority of Singaporeans, and in any regard the regulation of society as in Singapore and Malaysia is not particularly Confucian: ‘Confucius argued against reliance on law or coercion, and advocated a government of limited powers and functions.’<sup>53</sup> Judge of the International Court of Justice, Christopher Weeramantry has described values such as equality, justice, and peace being present in all religions of the world,<sup>54</sup> and Amartya Sen has pointed out that there is conscious theorising about tolerance and freedom in substantial and important parts of most Asian traditions.<sup>55</sup> From the discipline of political philosophy, Josh

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<sup>50</sup> Win, above n 11.

<sup>51</sup> Yash Ghai, ‘Human Rights and Governance: the Asia Debate’ (2000) 1 *Asia-Pacific Journal of Human Rights and the Law* 9, 62.

<sup>52</sup> Yash Ghai, ‘Asian Perspectives on Human Rights’ (2001) in James Tang (ed), *Human Rights and International Relations in the Asia Pacific* (1995) above n 35, 54-70, 61.

<sup>53</sup> *Ibid*, 62.

<sup>54</sup> Christopher G. Weeramantry, *Universalising International Law* (2004) Leiden, Martinus Nijhoff, 2.

<sup>55</sup> Amartya Sen, ‘Human Rights and Asian Values’ (July 1997) *The New Republic* available at: <<http://www.mtholyoke.edu/acad/intrel/sen.htm>> [accessed 19 May 2009]. See also Stephanie Lawson, ‘Democracy and the Problem of Cultural Relativism: Normative Issues for International Politics’ (1988) 12(2) *Global Society* 25.

Cohen has demonstrated that proponents of Islam and Confucianism can occupy the ‘terrain of deliberation’ about the nature and content of human rights (and their basic democratic premises).<sup>56</sup>

Most destructive of the credibility of an ‘Asian values’ approach to democracy have been the deep contradictions that have resulted from the economic policies of many Asian governments (which uphold the market, capitalism and individual property rights), and simultaneous claims that social and economic rights should take precedence over liberal ideas of democratic governance. Instead of upholding economic and social rights as a way of ‘mediating between the market and the community, to soften the impact of market forces, to act as a safety net,’<sup>57</sup> many Asian governments have in fact restricted social and economic rights in order to enhance economic competitiveness.<sup>58</sup> Left without a democratic voice to oppose these restrictions, violations of economic, social and cultural rights continue. Consciousness of rights remains low because of poverty, lack of education and social division and capacity to challenge systems of oppression remains diminished.<sup>59</sup>

### 3.2.3 Communism

The first scholarly work published on AICHR is Tan Hsien-Li’s *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia*.<sup>60</sup> Tan’s book concentrates on the five member states of Indonesia, Malaysia, the Philippines, Singapore and Thailand, ‘as they have been more supportive ASEAN members of AICHR’s establishment’ while ‘the political structures of the other five ASEAN

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<sup>56</sup> Joshua Cohen, ‘Minimalism About Human Rights: The Most We Can Hope For?’ (2004) 12(2) *Journal of Political Philosophy* 190.

<sup>57</sup> Ghai, ‘Asian Perspectives on Human Rights’, above n 52.

<sup>58</sup> Ibid.

<sup>59</sup> Peerenboom, above n 42, 6.

<sup>60</sup> Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (2011) Cambridge UK, Cambridge University Press, 11–12.

states cases—Cambodia, Laos, Myanmar, Vietnam and Brunei—are at present, relatively speaking, not as open to the scrutiny of human rights.<sup>61</sup> Tan hopes that ‘regard for human rights will grow within ASEAN and that in time all ASEAN members will agree to adhere to human rights in creed and action as AICHR’s operations get underway.’<sup>62</sup> But in the meantime, conscious that ‘the establishment of a successful human rights system is so tricky,’ Tan avoids ‘considering the issue in absolute terms.’<sup>63</sup>

Tan is concerned with how states that are constitutionally and practically built upon foundations *other* than liberal democracy can engage with a regional human rights system predicated upon a particular vision of Western multi-party liberal democracy. I will concentrate here on the two ASEAN countries whose political ideology diverges radically from liberal democracy: Vietnam and Laos.<sup>64</sup> The Socialist Republic of Vietnam and the Lao People’s Democratic Republic have both, since the mid-1980s, pursued policies of economic liberalisation, permitting privatisation of commerce and agriculture, and opening their markets to foreign trade, aid and investment. Accompanying these moves toward a capitalist market system have been attempts to implement the practices of ‘good governance’: to end corruption, increase transparency, separate government from party organs and promote respect for the rule of law.

But Laos and Vietnam remain single party communist states. The Constitution of the Socialist Republic of Vietnam provides that the nation ‘adheres to Marxism-Leninism and Ho Chi Minh’s thought’ and that the communist party ‘is the force assuming leadership of the State and society.’<sup>65</sup> Article 5 of the 1991 Laos Constitution notes that the National Assembly

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<sup>61</sup> Ibid, 11–12.

<sup>62</sup> Ibid, 12.

<sup>63</sup> Ibid.

<sup>64</sup> The case of Myanmar is considered in Chapter 4 of this dissertation.

<sup>65</sup> The Constitution of the Socialist Republic of Vietnam 1992, Article 4.

and all other state organisations ‘function in accordance with the principle of democratic centralism.’<sup>66</sup> These strictures refer to the Marxist-Leninist principles that call for open discussion within a unit, but demand that the minority accede to the will of the majority, and that lower echelons obey the decisions of higher ones. The political systems of Laos and Vietnam derive from an understanding of democracy that is based on mass participation through local grass-roots organisations, which are responsible for selection of parliamentary candidates and for policy implementation at the local level. Within this system, ‘democracy’ operates within a single party, not *via* multiple political parties.<sup>67</sup> Tolerance of dissent is limited and democratic activism is curtailed. During meetings held to discuss the ASEAN Charter’s contents, a Vietnamese delegate noted that although his country was not a multiparty democracy in the Western sense, it still deserved the title because it practiced democracy *within* its one party system.<sup>68</sup>

Since 1989, scholars have not been overly concerned with the question of communism’s compatibility with international human rights regimes. They seem to have assumed, as Tan does, that inevitably all such regimes will succumb to liberal democracy. But a study of the legitimacy of a regional human rights regime that includes within its geographical parameters single-party states such as Vietnam and Laos, cannot leave to one side the question of how such states view the articulation of international human rights through a regional framework. If we accept for the purposes of argument in this section that

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<sup>66</sup> Constitution of the Lao People's Democratic Republic 2003 No. 25/NA (6 May 2003) (Lao People's Democratic Republic).

<sup>67</sup> Laos and Vietnam take similarly narrow approaches to contestation. The Lao People’s Revolutionary Party (LPRP), for example, is the only vehicle permitted to organize politically. In 2010, of the Assembly’s 115 seats, the LPRP holds 113, leaving but two for independents. William Case, ‘Laos in 2010’ (2011) 51(1) *Asian Survey* 202.

<sup>68</sup> Kyaw Yin Hlaing, ‘ASEAN’s Pariah: Insecurity and Autocracy in Myanmar (Burma)’ in Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (2008) Baltimore, The Walter H. Shorenstein Asia-Pacific Research Centre, Freeman Spogli Institute for International Studies, Stanford University, 151–190, 187.

the political systems of Vietnam and Laos satisfy the broad definition of democracy adopted in Chapter 2, as political systems that provides for the ultimate authority of the people in determining their own political, economic, social and cultural systems, what purchase does ‘human rights’ have in these countries?<sup>69</sup>

The starting point is Marx’s theory of class struggle and capitalism, in which liberal ideas about human nature and abstract rights are ‘bourgeois hypocritical moral absolutism.’<sup>70</sup> For Marx, the ‘human right of liberty’ is based not on human relations between individuals, but rather on their separation in the marketplace where they are free to compete. Because of this (apparent) disrespect for liberty, scholars such as Bertrand Russell are succinct on the question of whether communism is democratic: ‘Communism is not democratic. What it calls “the dictatorship of the proletariat” is in fact the dictatorship of a small minority, who become an oligarchic governing class. ... Communism restricts liberty, particularly intellectual liberty, more than any other system except fascism.’<sup>71</sup>

More recently, Rhoda Howard and Jack Donnelly have argued that communist regimes are entirely inconsistent with international human rights norms:

communist society thus rests on a social utilitarianism fundamentally incompatible with human rights. The good of the society, as determine by the state/party, always takes precedence over all else. Because individual ‘rights’ must always yield to social purposes, as enunciated by the state, such ‘rights’ are worthless; no matter what the state does, it cannot be guilty of violating them. Whatever the opportunities and benefits citizens may (contingently) receive – and they are undeniably substantial in some communist regimes – communism represents a thorough denial of human rights.<sup>72</sup>

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<sup>69</sup> Rawls would remind us that there is a difference between states that do not *have* multiple parties, and states that do not *permit* them.

<sup>70</sup> Lin Chun, ‘Human rights and Democracy: the Case for Decoupling’ (2001) 5(3) *The International Journal of Human Rights* 19-4, 23.

<sup>71</sup> Bertrand Russell, *In Praise of Idleness* (1935) Oxon, Routledge, 73.

<sup>72</sup> Rhoda Howard and Jack Donnelly, ‘Human dignity, human rights, and political regimes’ (1986) 80(3) *The American Political Science Review* 801,810.

Communism is seen as subjugating the liberty and autonomy of the individual to a greater socialist purpose, so that the individual is not the respected, rights-bearing, citizen imagined by liberal thinking. Under communist regimes, enjoyment of rights is held to be contingent on the discharge of social duties, rather than on recognition of the equal and inalienable entitlements of all individuals.<sup>73</sup>

This is indeed a *thorough* denial of human rights, as Howard and Donnelly claim, if human rights are inalienable natural attributes of being human. But the argument I make in Chapter 1 is that this is *not* what human rights are. I argue that human rights are in fact evolving political agreements between free and equal citizens about the shape of society and the protection that it should offer its members. On this view, it is not sufficient to point out, as Bertrand Russell does, the historical evidence that communist regimes use political coercion, repression, and pressure to force individuals to conform to behavioural norms specified by the state. Nor is it sufficient to point out, as Rhoda Howard and Jack Donnelly do, that the state's 'social purpose', to which individuals must yield under communist regimes, is not one that a majority, given freedom, would elect for themselves, because it contradicts essentialist human traits. Instead, it is necessary to grapple directly, and in a different way, with the question of what it is about single-party states such as Laos and Vietnam that inhibits the evolution of regimes that respect human rights.<sup>74</sup>

Marx and Engels provide no guidance on the question of multiple political parties in socialist societies. They assume that when the transition to socialist society takes place, the proletariat will constitute an overwhelming majority of the population, and the ideas and ideals of the workers will guide the functions of the state. In their view, different political parties are only necessary to represent the different interests of conflicting economic classes

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<sup>73</sup> Ibid, 811.

<sup>74</sup> Laos and Vietnam do not currently permit the establishment of opposition political parties. William Case, above n 67, and Ramses Amer, 'Vietnam in 2010' (2011) 51(1) *Asian Survey* 196.

within a society. On Marx and Engels' view, if economic classes are done away with, politics and political classes would also be done away with (and of course ultimately the state, as well). What is envisaged is a condition of social harmony, where 'in place of the old bourgeoisie society, with its classes and class antagonisms, we shall have an association in which the free development of each is the condition for the free development of all.'<sup>75</sup> As Robert Dahl points out, this is a vision that sits in paradoxical fashion with Marx and Engels' central idea of the dialectical process of development.<sup>76</sup> The historical dialectic—the idea of development through conflict—is, on Engels' view, 'a permanent feature of human history, embedded in the very structure of the universe,' a 'law of development, nature, history and thought, a law which ... holds good in the animal and plant kingdom, in geology, in mathematics, in history and philosophy.'<sup>77</sup> On this view, even communist or socialist societies would contain inner conflicts, forcing continual development. Yet Marx and Engels maintained that 'with adequate knowledge and economic reconstruction social conflict would be eliminated.'<sup>78</sup>

The importance of opposition political parties is that they liberate discourse about social values, their priorities and implementation, by providing political alternatives that challenge the policies and values of the ruling party. They provide autonomy in the sense of meaningful choice for citizens about the shape of society and their role within it. The Communist governments of Vietnam and Laos have not eliminated social conflict (evident in ongoing challenges from civil right organisations, when they are permitted to establish

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<sup>75</sup> Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848).

<sup>76</sup> Robert Dahl, *Democracy, Liberty, and Equality* (1986) Norwegian University Press, Oxford and New York, 60-61.

<sup>77</sup> Engels, *Herr Eugen Duhring's Revolution in Science* [Anti-Duhring] (1939), New York, quoted in Robert Dahl, *ibid*, 60.

<sup>78</sup> Dahl, above n 76.

themselves),<sup>79</sup> or economic conflict (resulting from the growing disparities in wealth as a consequence of policies of economic liberalisation and market capitalism). In these circumstances, it is implausible to prohibit the establishment of political alternatives to communist party rule, on the grounds that genuine democracy is practiced ‘within a single party structure.’

### 3.3 Can We Separate Democracy from Human Rights?

In the 1993 Bangkok Declaration, Asian leaders did not resile from the principles of the Universal Declaration on Human Rights.<sup>80</sup> But they insisted that all countries have the right to determine their political systems and to control and freely utilise their resources, and freely pursue their economic, social and cultural development,<sup>81</sup> and they stressed that the promotion of human rights should be encouraged by cooperation and consensus, ‘and not through confrontation and the imposition of incompatible values.’<sup>82</sup> Thus, it would ‘pre-empt the charge of cultural imperialism,’ suggest writers such as Nathan, if there was a separation of human rights from democratisation, which would permit a focus on compliance with international human rights law (an ‘international idea’) rather than democracy (a Western one).<sup>83</sup>

There would appear to be political advantages in cleaving the linkage between liberal democracy and human rights. John Rawls argued that a political society *can* protect human

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<sup>79</sup> Interview of Mr Vo Van Ai, Speech on Receipt of Special Prize for Freedom by the Società Libera in Italy (June 2011) available at: <<http://www.fidh.org/Conversation-with-Vo-Van-Ai>> [accessed 20 September 2011].

<sup>80</sup> Bangkok Declaration, above n 24. The Declaration states: ‘Reaffirming their commitment to principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights’.

<sup>81</sup> Bangkok Declaration, *ibid*, Article 6.

<sup>82</sup> *Ibid*. The Declaration states: ‘Recognizing that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values.’

<sup>83</sup> Andrew J. Nathan, ‘China: Getting Human Rights Right’ (1997) 20 *Washington Quarterly* 135–51, 137–40.

rights (and be ‘decent’), without being a liberal democracy.<sup>84</sup> Some form of participatory politics (democracy in its broad sense) is necessary for the protection of core human rights. For example, the different voices of rights-holders must be heard in order for their rights to be adequately protected; different groups with their diverse interests and opinions must be represented; there must be processes for consultation between these groups and those in authority; those in authority must respond fairly to the concerns of different groups and their ideas about how to realise their own and communal interests; there must be public explanation of decisions; and decisions must be motivated by ‘a conception of the common good of the whole society.’<sup>85</sup> Such a political society clearly could not be a totalitarian state.<sup>86</sup> But it need not necessarily be a ‘liberal’ democracy. That is, human rights—in the abstract—could exist within such a system. After all, governments representing a very diverse range of political systems were involved in drafting (and they eventually signed) the Universal Declaration of Human Rights in 1948. The drafters imagined (or hoped) that the rights articulated in the Declaration were capable of being upheld by communist states, monarchies, and religious autocracies, as well as by the democracies of the West.<sup>87</sup>

The difficulty is that practically, empirically, in what James Griffin describes as ‘typical modern conditions of highly pervasive government, large population, advanced technology, concentration of coercive power at the centre, ethnic diversity, educated citizenry, the sort of social cohesion necessary for a tolerably successful democracy,’<sup>88</sup> it seems that it is very hard for a society to protect human rights unless it is a democracy. The essence of Griffin’s argument is that the enjoyment of human rights depends on the certainty

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<sup>84</sup> John Rawls, *The Law of Peoples* (1999) Cambridge, Mass. Harvard University Press, 62-70.

<sup>85</sup> *Ibid.*

<sup>86</sup> Rawls, for example, hypothesised that an ‘associational’ Muslim nation (Kazanistan) might qualify; *ibid.*, 64-67.

<sup>87</sup> Mary Ann Glendon, ‘Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea’ (2003) *Harvard Human Rights Journal* 16; S.E. Waltz, ‘Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights’ (2001) 23(1) *Human Rights Quarterly* 44;

<sup>88</sup> James Griffin, *On Human Rights* (2009) Oxford, Oxford University Press, 248.

and stability of government, which is necessary to ensure the promulgation of human rights, their enforcement, their protection and their institutionalisation, not just at the present moment, but into the future (when different—perhaps less benevolent and moral leaders than the present ones—might rule). Liberal democracies, with institutions and processes for the peaceful change of power, ensure this. Langlois captures this idea when he writes:

A so-called human right within an otherwise authoritarian governmental system, is not a right as such. It is a condescension, a privilege, a long leash. Ultimately, it is a form of charity that may be withdrawn at the whim of the individual or group in authority. Fundamentally, it is not something that can be insisted upon as a claim which must be met.<sup>89</sup>

### 3.4 Why ‘Democracy’ in the ASEAN Charter?

Given the discussion above about the political character of the majority of ASEAN states, and the historical and cultural sources of resistance to ideas of *liberal* democracy, it is something of a puzzle that ‘democracy’ was included at all in the ASEAN Charter and TOR of the ASEAN Intergovernmental Commission on Human Rights.

The question has interested international relations scholars.<sup>90</sup> Those of the realist persuasion have suggested that these words are meaningless, an instance of ASEAN states appeasing the international community by articulating a commitment to democracy, but at the same time ensuring that the institutions they design lack the power to actually challenge deep-seated norms which the Association wishes to preserve (sovereignty, non-

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<sup>89</sup> Anthony Langlois, ‘Human Rights without Democracy? A Critique of the Separationist Thesis’ (2003) 25 *Human Rights Quarterly* 990–1019, 1014.

<sup>90</sup> Yi-hung Chiou, ‘Unravelling the Logic of ASEAN’s Decision-Making: Theoretical Analysis and Case Examination’ (2008) 3(2) *Asia Politics and Policy* 371, 371; Maria-Gabriela Manea, ‘How and Why Interaction Matters: ASEAN’s Regional Identity and Human Rights’ (2009) *Nordic International Studies Association Online Publications* available at: [\\_<http://cac.sagepub.com/cgi/content/abstract/44/1/27>\\_](http://cac.sagepub.com/cgi/content/abstract/44/1/27) [accessed 10 July 2011]; Hiro Katsumata, ‘ASEAN and Human Rights: resisting Western pressure or emulating the West?’ (2009) 22 *The Pacific Review* 619, 628.

intervention).<sup>91</sup> From this perspective, articulating a commitment to ‘democracy’ is a cosmetic move designed to create a more positive international image for ASEAN and a largely rhetorical defence to international condemnation for the poor human rights records of states such as Myanmar.<sup>92</sup> On this reading, ASEAN states have been driven to adopt human rights policies by pressure from great powers (the United States and the European Union), whose material capabilities (economic power and trade capabilities) have provided incentives for the spread of democratic norms. On the part of ASEAN states, there is ‘at heart a reluctance to implement liberal reform’<sup>93</sup> and this disinclination explains the reason why there have been few concrete measures to implement reform plans and why the human rights institution finally created, is weak.<sup>94</sup>

If one of ASEAN’s aims in signing the Charter was to enhance the credibility of the Association in the eyes of outside observers, particularly the European Union and the United States, then it was necessary for ASEAN leaders to make a formal commitment to democracy, which is a *sine qua non* of all the regional arrangements of Europe, Africa and the Americas. The human rights conventions and treaties of Europe, the Americas and Africa, all affirm a right to democratic participation. The European Court of Human Rights has consistently stated that ‘democracy appears to be the only political model contemplated by the Convention and accordingly, the only one compatible with it,’<sup>95</sup> and has upheld the democratic principles expounded in Article 3 of Protocol 1 to the European Convention on Human Rights.<sup>96</sup> The Inter-American Democratic Charter, adopted by the Organization of American States in 2001, declares in Article 1 that ‘the peoples of the Americas have a right

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<sup>91</sup> Association of Southeast Asian Nations, Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008), Preamble.

<sup>92</sup> Yi-hung Chiou, above n 90, 371.

<sup>93</sup> Hiro Katsumata, *ibid*, 628.

<sup>94</sup> *Ibid*, 629.

<sup>95</sup> Steven Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (2006) Cambridge UK, Cambridge University Press, 199.

<sup>96</sup> *Ibid*, 18–19.

to democracy and their governments have an obligation to promote and defend it'<sup>97</sup> and the Santiago Declaration expresses an explicit commitment to democracy as a key principle of regionalism.<sup>98</sup> The Constitutive Act of African Union declares its objective as being 'to promote democratic principles and institutions.'<sup>99</sup> Article 13 of the African Charter on Human and People's Rights also provides for rights of participation in the government of the country, either directly or through chosen representatives and for rights of equal access to the public service and public property. The Organization of African Unity has endorsed democratic governance as a way of dealing with Africa's political conflicts and economic ills.<sup>100</sup>

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<sup>97</sup> Organisation of American States, The Inter-American Democratic Charter, Lima (11 September 2001).

<sup>98</sup> The International Congress on the Human Right to Peace, held in Santiago on 9 and 10 December 2010, concluded with the adoption of the 'Santiago Declaration.' In 1992, states approved the Washington Protocol to the Organisation of American States Charter, which provides for the suspension from the General Assembly of any member State whose democratically constituted government has been overthrown by force: Organisation of American States, Protocol of Amendment to the Charter of the Organization of American States (Protocol of Washington) (14 December 1992). The American Commission on Human Rights and the American Court of Human Rights, particularly over the past twenty years, has developed significant jurisprudence under Article 23 of the American Convention on Human Rights, which guarantees citizens the same rights as those set out in the ICCPR. In 1990, the Commission affirmed that it had jurisdiction to hear complaints of election fraud, rejecting Mexico's argument that doing so would violate the principle of non-intervention: Resolution No. 01/90, Cases 9768, 9780 and 9828 (Mexico), May 17, 1990, in Annual report of the Inter-American Commission on Human Rights 1989–1990, OEA/ser.L/V/II.77 rev.I, 17 May 1990, 97. The Inter-American Commission on Human Rights has insisted that elections are the core element of democracy, and that the central issue is whether an election is 'authentic': that is, whether or not it occurs in the context of 'a legal and institutional structure conducive to election results that reflect the will of the voters.' Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Haiti, OEA/ser.L/V/II.77, doc.18, rev.1 (1990), 9-27. The Commission has held that one-party states are inherently coerced, and by implication such states are incapable of holding authentic elections: Inter-American Commission on Human Rights, The Situation of Human Rights in Cuba: Seventh Report, OEA/ser.L/V/II.61, doc.29, rev.1, (1983), 25-37. The absence of pluralism results in governments that are estranged from the views of their citizens, and therefore do not embody an 'authentic' popular choice: Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Chile, OEA/ser.L/V/II.66, doc.17 (1985), 253-283. The Inter-American Court of Human Rights has been similarly active on the question of the meaning of the democratic guarantee. In the Mexico Election Decision, Inter-Am. C.H.R., the Court stated (at 108): '[t]here must be some consistency between the will of the voters and the result of the election. In the negative sense the characteristic implies an absence of coercion which distorts the will of citizens.'

<sup>99</sup> Organization of African States, Constitutive Act of the Organization of African Unity (OAU), Lome, Togo (11 July 2000).

<sup>100</sup> Akwasi Aidoo, 'Africa: Democracy without Human Rights?' (1993) 15(4) *Human Rights Quarterly* 704-715.

In certain respects, the views of some constructivist scholars meet the views of realists.<sup>101</sup> According to Katsumata, for example, ASEAN's decision to embrace liberal human rights values and their concomitant institutions is the result of institutional isomorphism. According to this view, those seeking legitimacy adopt or emulate these structures that signal legitimacy, in order to secure their identity as 'legitimate members of the community.'<sup>102</sup> Katsumata argues that ASEAN states:

have been 'mimetically' adopting the norm of human rights which is championed by the advanced industrialised democracies, with the intention of securing ASEAN's identity as a legitimate institution in the community of modern states ... for the same reason as cash-strapped developing countries have luxurious national airlines and newly independent countries institute national flags.<sup>103</sup>

There is some evidence to support these views from what is known of negotiations surrounding the drafting of the ASEAN Charter. Philippine Foreign Secretary Alberto Romulo, for example, stated that his government called for the creation of a human rights body because it would 'give ASEAN more credibility in the international community'<sup>104</sup> and Malaysian Foreign Minister Syed Hamid Albar expressed the view that ASEAN members 'should not be *seen* to be unsupportive of human rights' (emphasis added).<sup>105</sup> Statements such as these provide partial explanations for ASEAN's new commitment to democracy. But they do not adequately capture the extent to which individual ASEAN states—in particular Indonesia—lobbied for the inclusion of ideas such as democracy in the Charter in response to pressure from domestic constituents.<sup>106</sup> Rizal Sukma, one of the most influential voices within Indonesia's civil-society sector, stated at the time of the Charter negotiations that:

'[T]he inclusion of human rights and democratic principles in the charter is non-negotiable.

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<sup>101</sup> Katsumata, above n 90, 628. Cf Maria-Gabriela Manea, 'How and Why Interaction Matters: ASEAN's Regional Identity and Human Rights' (2009), above n 90.

<sup>102</sup> Katsumata, *ibid* 625.

<sup>103</sup> *Ibid* 626.

<sup>104</sup> 'ASEAN Braces for Hurdles in Formation of Human Rights Body' (31 July 2007) *Associated Press*.

<sup>105</sup> 'Southeast Asian Countries Struggle to End Differences on Human Rights' (28 July 2007) *Associated Press*.

<sup>106</sup> John Dosch, 'ASEAN's Reluctant Liberal Turn and the Thorny Road to Democracy Promotion' (2008) 21(4) *Pacific Review* 527.

Indonesia must fight for it because we will have no basis for protecting people's rights if the principles are not included in the charter.'<sup>107</sup>

Indonesian Foreign Ministry Director General for ASEAN Affairs, Dian Triansyih Djani, confirmed this position by stressing that Indonesia was continuing to insist on the inclusion of articles on human rights and democratic values in the ASEAN Charter: 'The substance of the ASEAN Charter will not be far from the recommendation of the Eminent Persons Group (EPG), which has highlighted the importance of including human rights and democratic values in the charter.'<sup>108</sup> Ikrar Nusa Bakti (Indonesian Institute of Sciences) added that it was time Indonesia, the biggest country in the region, took the lead in fighting for values in which it believes and practices: 'I think Indonesia now is the most democratic country in ASEAN. We should not let ourselves be bogged down by other ASEAN members.'<sup>109</sup> This sentiment seems to be widely shared among both state and non-state actors in Indonesia.

Indonesia had been advancing the idea of democracy as a regional norm at least since June 2003. At the ASEAN Senior Officials Meeting held that year, it was Indonesia that proposed the creation of an 'ASEAN Security Community' (ASC) with five key duties: setting norms, preventing conflict, resolving conflict, building peace after conflict, and political development. It was this last duty that caused consternation amongst other ASEAN members. Indonesia (the world's third largest democracy) defined the promotion of 'political development,' as 'people's participation, particularly through the conduct of general elections'; 'good governance'; the strengthening of 'judicial institutions and legal reforms';

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<sup>107</sup> Pseudonymity Wordpress, 'Expert says Singapore Opposes Inclusion of Principles of Democracy and Human Rights in ASEAN Charter' (16 June 2007) *Pseudonymity Wordpress* available at: <http://pseudonymity.wordpress.com/2007/06/16/expert-says-spore-opposes-inclusion-of-human-rights-and-democratic-principles-in-asean-charter/> [accessed 16 September 2011].

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

and the promotion of ‘human rights and obligations through the establishment of the ASEAN Commission on Human Rights.’<sup>110</sup> According to Indonesia, the ideological basis of ASEAN’s Security Community was to be a commitment to democracy and human rights.<sup>111</sup> This was the first time that an ASEAN state had proposed ‘democracy’ as a principle of the regional association.

Indonesia’s proposal regarding ‘political development’ was unsuccessful. The ASEAN Security Community, announced as part of its Concord II at the 9th ASEAN Summit in October 2003, contained only four aims: setting norms, preventing conflict, resolving conflict and building peace after conflict. The controversial aim of promoting ‘political development’ was deleted. Some months later, however, Indonesia achieved a partial victory in managing to secure reference to ‘political development’ in order to achieve ‘peace, stability, democracy and prosperity in the region’ as part of the ASEAN Security Community Plan of Action (ASCPA). The ASCPA stated that ‘human rights and obligations’ were part of the strategy for political development and recognised that ‘political and social stability, economic prosperity, narrowed development gap, poverty alleviation and reduction of social disparity would constitute [a] strong foundation for a sustained ASC,’ rather than one limited to ‘a defence pact, military alliance or a joint foreign policy.’ ASCPA stated, ‘ASEAN

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<sup>110</sup> Rizal Sukma, ‘Political Development: A Democracy Agenda for ASEAN?’ (2008) in Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* above n 68, 135–150.

<sup>111</sup> Ibid. The conception of democracy presented by Indonesia closely matched that found in Article 21 of the Universal Declaration of Human Rights. UNGA Res. 217 A (III), Universal Declaration of Human Rights, A/810 (10 December 1948) ‘the will of the people shall be the basis of the authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.’ The 1993 Vienna World Conference on Human Rights describes democracy, development and respect for human rights and fundamental freedoms as interdependent and mutually reinforcing (Article 8). UNGA, World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (25 June 1993).

Member Countries shall not condone unconstitutional and undemocratic changes of government.<sup>112</sup>

To summarise: the ASEAN Charter is ambiguous about democracy, and as David Martin Jones accurately notes, this ambiguity reflects the diversity and ambivalence of its authors. On the one hand, the Charter repeats and reinforces principles of non-interference and state sovereignty; on the other hand, it supports democracy, transparency and human rights—ideas that to an extent abrogate those same principles. The net effect is incoherence, or indeterminacy.

### **3.5 The Legitimacy of a Regional Human Rights Regime *sans* a Commitment to Democracy**

In Chapter 2, I described the connections between ideas of democracy and ideas of human rights. In this chapter, I have shown how and why ‘democracy’ in the Western liberal sense does not predominate amongst the political systems of Southeast Asia. In this final section, I return to the concept of legitimacy, and consider the implications of this discussion about ‘human rights and democracy’ for the legitimacy of the emerging regional human rights regime in Southeast Asia. I consider the extent to which the lack of democracy amongst ASEAN states, and the lack of consensus about the idea and value of democracy substantially undermine the legitimacy of ASEAN’s emerging regional human rights regime.

My focus in this section is on two particular aspects of legitimacy identified in Chapter 1. The first is the consent of democratic states, as a normative element of the

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<sup>112</sup> When the ASEAN Summit met in the Philippines in January 2007, however, four months after a military junta seized power from an elected government in Thailand, the junta representatives were welcomed and the ASEAN Chair’s statement did not mention the recent *coup d’etat* in Bangkok. See the discussion in Termsak Chalermpananupap, ‘Institutional Reform: One Charter, Three Communities, Many Challenges’ (2008) in Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia*, above n 68, 91–132, 112.

legitimacy of international law. The second is determinacy, as an element of law's perceived and actual legitimacy. Both elements are relevant to prospects for compliance—the likelihood that states will implement the reports and recommendations of the regional human rights commission. Compliance flows from legitimacy, but as I described in Chapter 1, compliance is also in itself an element of legitimacy, in the sense that lack of obeisance to a legal regime signals its irrelevancy, and the demise of its legitimacy.

### ***3.5.1 Legitimacy of the ASEAN Charter in the Absence of the Consent of Democratic States***

My discussion in this section concerns the legitimacy of the ASEAN Charter, which is now the foundation document of the regional order. The ASEAN Charter underpins AICHR, and the legitimacy of the former instrument affects the legitimacy of the latter institution.

In Chapter 1, I suggested that one way in which the power exercised by an international institution is justified by the consent of states, which is itself legitimated by national mechanisms (elections, parliamentary procedures) that ensure that international obligations reflect the will of domestic constituents. The argument is that democratic procedures within states have a legitimising effect on international law, because of an essential link between democracy and accountability. The idea is that the processes of democracy (particularly rule by periodically elected representatives) ensure that representatives of states act with the imprimatur of the people when they make international law. Democracy within the state is held to be an indicator that the will of domestic constituents is reflected in a state's international obligations. Risse, for example, in his discussion of transnational governance and legitimacy, distinguishes between democracies and autocratic regimes:

The former are internally accountable to their citizens and their elected representatives who can sanction governments through the normal mechanisms of liberal systems, while the latter have an internal accountability gap by definition. To the extent then that international intergovernmental regimes are based on bargains between democratically elected governments (as has been mostly the case in trade regimes, human rights regimes, less so in the environmental realm or in arms control), internal accountability should not be regarded as the main problem of international regimes.<sup>113</sup>

The argument is that without the imprimatur of the majority *vis a vis* rules and institutions which affect them, rules and institutions cannot *prima facie* claim legitimacy, because the will of the people regarding the form and powers of an international institution or international law has not been transmitted through representation at the state level.<sup>114</sup> Christiano frames the question as: ‘if a state is non-democratic, can its decisions adequately reflect the significance of the duties to and burdens imposed on its population?’<sup>115</sup>

Scholars have debated the strength of this argument. Andrew Moravcsik has argued that endorsement of international institutions by popular mandate is *not* a prerequisite for legitimacy, and that the insulation of independent institutions (such as the courts) from political processes in fact *enhances* legitimacy.<sup>116</sup> But this argument has less relevance for an institution such as AICHR, which is an ‘intergovernmental institution’,<sup>117</sup> with commissioners ‘responsible to their appointing governments,’<sup>118</sup> and, as such, lacks the initial

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<sup>113</sup> Thomas Risse, ‘Transnational Governance and Legitimacy’ (17 February 2004) available at: [http://userpage.fu-berlin.de/~atasp/texte/tn\\_governance\\_benz.pdf](http://userpage.fu-berlin.de/~atasp/texte/tn_governance_benz.pdf) [accessed 14 June 2011].

<sup>114</sup> Allen Buchanan, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) Oxford, Oxford University Press, 79-96, 96.

<sup>115</sup> Thomas Christiano, ‘Democratic Legitimacy and International Institutions’ (2010) in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law*, Oxford, Oxford University Press, 119–138.

<sup>116</sup> Andrew Moravcsik, ‘Reassessing Legitimacy in the European Union’ (2002) 40(4) *Journal of Common Market Studies* 603.

<sup>117</sup> The TOR of AICHR, Article 3, provide that: ‘The AICHR is an inter-governmental body and an integral part of the ASEAN organisational structure. It is a consultative body.’ Association of Southeast Asian Nations, TOR of the ASEAN Intergovernmental Institution on Human Rights, October 2009, available at: <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf> [accessed 14 January 2014].

<sup>118</sup> Ibid, TOR Article 5.2, states that: ‘Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.’

presumption of independence possessed by a court. The authority of Commissioners derives from non-democratic ASEAN member states which appoint them, and to which they are 'accountable' under the TOR of AICHR.<sup>119</sup>

A stronger response to the democratic consent theory of legitimacy is to point out that the bureaucratisation of the modern state means that public consent to governance occurs only at a very general level and that because of this, 'the idea that authority can be delegated from the individual to the state and then from the state to an international institution, preserving the link of accountability between citizen and the mechanism of global governance, is implausible.'<sup>120</sup> In most states, the people's elected representatives (the legislature) are not responsible for drafting, negotiating and concluding international agreements; this falls within the mandate of the (unelected) executive and their specialist bureaucrats.<sup>121</sup> In most ASEAN states, for example, treaty-making is not within the prerogative of parliament. In Singapore, the Constitution does not require the involvement or consent of Parliament before an international convention is ratified.<sup>122</sup> Brunei has no parliament with which to consult.<sup>123</sup> Emmerson writes that in Laos, legislative approval of the ASEAN Charter amounted to 'rubber-stamping what the rulers had decided to do.'<sup>124</sup> Even in states where public consultations are held and public input into policy issues is sought,

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<sup>119</sup> Ibid.

<sup>120</sup> Allan Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2010) in Rudiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (2010) Berlin, Springer 25-62, 38.

<sup>121</sup> David Kennedy, 'Challenging Expert Rule: the Politics of Global Governance' (2005) *Sydney Law Review* 27.

<sup>122</sup> Lim Chin Leng, 'Singapore and International Law' (30 April 2009) University of Singapore Law Faculty Internet Materials available at:

<http://www.singaporelaw.sg/content/IntLaw.html> [accessed 15 June 2011].

<sup>123</sup> Donald K. Emmerson (ed), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (2008), above n 68. In Thailand, Parliament approved the ASEAN Charter in three readings on 16 September 2008. The legislation to enable the Thai government to implement and comply with the ASEAN Charter was endorsed by the Thai Senate and submitted to His Majesty the King of Thailand for his royal signature before proclamation into law. The Philippine Senate approved ratification of the Charter on 8 October 2008, with a vote of 16-1, before submitting it to the President of the Republic of the Philippines.

<sup>124</sup> Ibid, 35.

interest groups (rather than ‘the people’ more broadly) are often the ones in a position to make submissions and contribute to deliberations, particularly in the case of complex policy areas such as foreign relations. In modern industrialised liberal democracies, the chain of accountability between voters and their representatives is attenuated. Apart from elections, the public has only a limited ability to influence policy deliberations.

For these reasons, it is difficult to accept that the consent of democratic states is enough *in itself* to guarantee the legitimacy of an international institution.<sup>125</sup> It is more convincing to view such consent as merely a necessary pre-requisite for legitimacy. In the words of Buchanan and Keohane: ‘the ongoing consent of democratic, rights-respecting, states helps to make global governance institutions accountable, by linking them, though indirectly, to publics who can hold their own states accountable ... ongoing consent by rights-respecting democratic states constitutes the democratic channel of accountability.’<sup>126</sup>

I maintain, then, that democratic processes within states convey a degree of authority to international institutions supported by these states. We can see an example of precisely the sort of process I am referring to, in the way that Indonesia went about ratifying the ASEAN Charter. In Indonesia, the *Derwan Perwakilan Rakyat* (DPR), People’s House of Representatives, is required to pass a bill authorising ratification of international treaties. Prior to the parliamentary vote, the bill is considered and voted upon by the Commission on Foreign Affairs of the Indonesian Parliament. On the question of whether or not to support the bill for the ratification of the ASEAN Charter, the Commission was divided. The ruling government coalition (the Golkar Party and the Democrat Party), who held 17 of the 48 seats on the Commission (8 votes short of a simple majority), were of the view that the Charter should be ratified. But several prominent members of the ruling party held the view that

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<sup>125</sup> See Gerry Simpson, ‘Imagined Consent’ (1994) 15 *Aust. YBIL* 103.

<sup>126</sup> Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’ (2010) in Wolfrum and Roben (eds), *Legitimacy in International Law* (2010), above n 120, 38.

ratification of the Charter should be delayed until provisions for the protection of human rights could be strengthened, and these members threatened to cross the floor of parliament and vote with the opposition. Some members of parliament took the view that the lack of clarity on the issue of the mandate and powers of the human rights body, as well as ‘budgeting, the decision-making processes and mechanism, the brutality of the Myanmar junta, ASEAN integration, and the idea of ASEAN as a people-centric movement’<sup>127</sup> meant that the Charter should be rejected outright. They argued that the Charter did not make provisions for sanctioning non-complying members, decision-making was still through consensus, and enshrining in the Charter on the principle of non-interference might actually make it harder for ASEAN states to criticise members on grounds of violation of democratic rights, human rights and fundamental freedoms.<sup>128</sup>

Within Indonesia, the media devoted a significant amount of attention to the parliamentary contest between pro-ratification and anti-ratification forces. This attention, combined with the series of public hearings on the ASEAN Charter, which were held in March 2008, contributed to widespread awareness of the Charter and to a broad public discourse on its merits and shortcomings. Commentators reported on the divisions between parliamentary members and on claims from members of parliament that Foreign Ministry officials were not tough enough in negotiations with their ASEAN counterparts. Djoko Susilo, Indonesian Member of Parliament, was told that Indonesian negotiators had ‘surrendered’ to Myanmar, Laos and Vietnam, and had not taken public opinion, or the principles in the Bali Concord II, or the EPG Reports, seriously enough. Instead, they had

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<sup>127</sup> Djoko Susilo, ‘The Ratification of the ASEAN Charter: A View From a Parliamentarian’ (2009) in Pavin Chachalpongpun (ed), *The Road to Ratification of the ASEAN Charter* Singapore (2009) Singapore, Institute of Southeast Asian Studies, 64-66.

<sup>128</sup> Dewi Fortuna Anwar, ‘The ASEAN Charter: the Case for Ratification’ (2009) in Pavin Chachalpongpun (ed), *ibid*, 32-41.

taken an ‘overtly Pajambon’ (Foreign Ministry) position.<sup>129</sup> An editorial in the *Jakarta Post* in July 2008 described the Charter as a ‘betrayal’ of the EPG report, and argued that to ratify would be to ‘sell out on the values Indonesia stands for, including democracy, freedom and human rights.’<sup>130</sup> The Head of House Commission on Defence, Security and International Affairs, Theo Sambuaga, countered that the difference in views ‘was normal in a democratic process.’<sup>131</sup> Processes in Indonesia were ‘unlike in some of the other member states of ASEAN where governments can rush the ratification process.’<sup>132</sup>

Within democracies, the doctrine of separation of powers and the role of the courts can also limit the activities of the executive branch of government and bring a further level of accountability to different branches of government. Again, Indonesia provides an example for this. On 5 May 2011, a coalition of Indonesian NGOs, ‘the Alliance on Global Justice’, filed for a judicial review of Law No. 38/2008: ‘Ratification of the Charter of the Association of Southeast Asian Nations’ on the grounds that it contradicted the 1945 Constitution of the Republic of Indonesia.<sup>133</sup> The plaintiffs argued that Articles 1(5) and Article 2(2) of the Charter, which are directed toward economic integration and creating a single market and production base within the Southeast Asian region, contradict Article 33(1)(2) and (3) of the Indonesian Constitution, which provides that:

the economy shall be organized as a common endeavour based on the principle of the family system; that the branches of production which are important for the state and which affect the lives of most people shall be controlled by the state; and that land and water, and the natural resources found therein, shall be controlled by the state and shall be exploited for the maximum benefit of the people.<sup>134</sup>

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<sup>129</sup> Djoko Susilo, above n 127.

<sup>130</sup> Abdul Khalik, ‘House Divided over ASEAN Charter’ (2 June 2008) *The Jakarta Post*.

<sup>131</sup> Dewi Fortuna Anwar, above n 128.

<sup>132</sup> *Ibid*, 33.

<sup>133</sup> Ernesto Simanungkalit, ‘Judicial Review of the ASEAN Charter?’ (13 May 2011) *The Jakarta Post*.

<sup>134</sup> Constitution of the Republic of Indonesia 1945 (last amended 2002).

### *Chapter 3: Resisting Democracy*

An opinion piece published in the *Jakarta Post* characterised the lawsuit as a ‘dilemma arising from the interplay between international law and domestic law,’ where ‘the sovereignty to legislate by a country may be encroached by international agreements ... the public will question who the government is working for: another government or its own constituency?’<sup>135</sup>

It is one of the ironies of international law that the apparent concordance between the values embraced in the constitutions of liberal democracies and the norms of international human rights law, does not necessarily make it easier for liberal democracies to participate in international regimes. The parliamentary processes, media scrutiny, public consultations and judicial challenges that characterised Indonesia’s domestic negotiation of the Charter, which was not evident in the majority of ASEAN states, almost led to Indonesia’s withdrawal from the Charter process. The important question for the purposes of this chapter, is the extent to which these processes signified public endorsement (democratic consent, and consequently legitimacy), of Indonesia’s participation in the regional system.

It is clear that within Indonesia, on the subject of the Charter and AICHR, there were a range of differing opinions and these opinions were published and discussed without restriction by a free media. Indonesia’s elected parliamentarians debated and voted upon the issue, and it was on the basis of this vote that agreement was made to ratify the ASEAN Charter. There was fairly widespread knowledge of the Charter amongst the public, and the government sponsored public forums to disseminate information, including different opinions about the merits or otherwise of ratification. Indonesia’s active civil society published their own opinions and held their own independent forums about ratification. Finally, NGOs issued

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<sup>135</sup> Juwana Hikmahanto, ‘The Constitution and Treaty’ (23 May 2011) *The Jakarta Post*. Hikmahanto’s opinion piece continues: ‘To take an example, when Indonesia amended and introduced many of its intellectual property rights law, was such action due to the obligation imposed by the World Trade Organization agreement, or a response to Indonesian societal need?’

their own challenge to the legality of the Charter through an independent court system. To the extent that legitimacy is a function of the consent of democratic states, then it could be argued that these processes did in fact increase the legitimacy of Indonesia's assent to the Charter, and that correspondingly, the absence of such public debate and discussion in other ASEAN states, most importantly in their parliaments, signifies a corresponding *lack* of legitimacy.

### ***3.5.2 Democracy in the Charter Drafting Process***

The ASEAN Charter's lack of a democratic foundation could perhaps have been remedied by a determinedly inclusive process in the drafting of the Charter. The EPG, appointed to make recommendations on the ASEAN Charter, engaged in a series of consultations and meetings with the public and with civil society representatives.<sup>136</sup> Most agree that these public deliberations influenced the Final Recommendations of the EPG and were reflected in its Final Report.<sup>137</sup> In contrast, the drafting process of the HLTF appointed by ASEAN states to draft the Charter, was 'rather obscure, leading to the belief that it lacked legitimacy'<sup>138</sup> and 'did not reflect public opinion.'<sup>139</sup> On the subject of human rights, for example, the EPG recommended:

members states should ultimately advance to form an ASEAN Union comprising the three pillars of security, economic and socio-cultural integration, that are closely intertwined and mutually reinforcing, in which human rights and fundamental freedoms for all shall be protected by the rule of law and regional integration, and human security is guaranteed to every ASEAN citizen. This would ensure enduring

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<sup>136</sup> The Eminent Persons Group (EPG) Report was transmitted to the High Level Task Force in January 2007, which then submitted the final text of the ASEAN Charter to ASEAN leaders in November that year.

<sup>137</sup> John Dosch notes that a comparison of the recommendations in the Eminent Persons Group Report and the submissions made by the most active of civil society organisations, Solidarity for Asian Peoples Advocacy Working Group on ASEAN (SAPA), shows 'a striking convergence of core concepts.' Dosch, above n 106, 78.

<sup>138</sup> Chachapalpongpun (ed), above n 127, 64-66, 9.

<sup>139</sup> Ibid.

peace, stability, security, equitable prosperity and human dignity for every individual to enjoy and to pursue the worthy aspirations of human potential in the 21<sup>st</sup> century.<sup>140</sup>

The ASEAN Charter merely states that ‘ASEAN shall establish a human rights body,’<sup>141</sup> which shall operate in accordance with terms of reference to be determined by the ASEAN Foreign Ministers Meeting. The TOR are still further removed from the ideal described by the EPG. The TOR make clear that AICHR is an inter-governmental body and is consultative only.<sup>142</sup> By specifying the inter-governmental nature of the body, the Foreign Ministers delimited aspirations toward ‘regional integration’ in the implementation and oversight of human rights. By specifying that AICHR is ‘consultative’, the Foreign Ministers made clear that human rights of individuals and groups within the region would *not* be guaranteed by an impartial third party (a court or commission), but would remain at the discretion of state parties.

The process of Charter-drafting, captured in the reflections of the HLTF on the Drafting of the ASEAN Charter in *The Making of the ASEAN Charter*, reflect the extent to which the Charter and its provisions relating to a human rights mechanism were a political compromise of state interests, which were channelled through representatives beholden to their state appointees. As the representative from Brunei Darassalum, Penigran Dato Paduka Osman Patra, pointed out, the EPG ‘were given the luxury to be bold and visionary in expressing the ASEAN leaders wishes.’<sup>143</sup> In contrast, the HLTF, which was comprised mainly of practitioners and serving bureaucrats ‘was at the opposite end of the process’ and was ‘treading a fine line, particularly in striking an acceptable balance of competing pressures

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<sup>140</sup> Article 23, ‘Report of the Eminent Persons Group on the Establishment of the ASEAN Charter’ (December 2006) available at: <<http://www.asean.org/archive/19247.pdf>> [accessed 15 September 2011].

<sup>141</sup> Article 14, ASEAN Charter.

<sup>142</sup> Article 3, ASEAN Charter.

<sup>143</sup> Penigran Dato Paduka Osman Patra, ‘Heart Labour’ (2009) in Tommy Koh, Rosario G Manolo and Walter Woon (eds), *The Making of the ASEAN Charter* (2009) Singapore, World Scientific Publishing Co, 1–16, 2.

such as the need to conform to the leaders declarations, Ministerial decisions, the EPG Report and instructions from capitals.<sup>144</sup> Aung Bwa, Myanmar's representative on the HLTF, described the process of negotiations as 'give and take,' but 'never compromising on the vital issues that could be detrimental to the national interests.'<sup>145</sup> Termsak Chalermpanupap, special assistant to the Secretary-General of ASEAN, writes that 'the drafters had to follow official instruction from their respective superior' in a 'government-to-government negotiation exercise' in which 'public participation in the drafting was not possible.'<sup>146</sup>

In the Charter drafting process, discussion about the proposed human rights body was 'of all our debates, the most explosive and tense of all,'<sup>147</sup> the 'most sensitive, controversial and difficult subject.'<sup>148</sup> Aung Bwa, Myanmar's representative on the HLTF, describes how 'the discussions on the issue were most heated and at times we almost came to blows—literally speaking.'<sup>149</sup> From the reflections of the HLTF members, there appears to have been a 'common understanding that ASEAN needs to establish its own standards for human rights protection and promotion, and that human rights should not be left as an excuse for outsiders to interfere into ASEAN's own affairs.'<sup>150</sup> Beyond this common understanding, there was clearly a division of opinion on the issue of the human rights body, between the members from Cambodia, Laos PDR, Myanmar and Vietnam (CLMV), who 'got along very well most of the time'<sup>151</sup> and Indonesia, Malaysia, the Philippines and Thailand, states which had already established their own national human rights commissions and were pressing for a more robust human rights body.

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<sup>144</sup> Ibid, 3.

<sup>145</sup> Aung Bwa, 'The Jewel in My Crown' (2009) in Koh, Manolo and Woon (eds), Ibid 27-36, 33.

<sup>146</sup> Termsak Chalermpanupap, 'In Defence of the ASEAN Charter' (2009) in Koh, Manolo and Woon (eds), ibid 117-135, 129.

<sup>147</sup> Penigran Dato Padulka Osman Patra, above n 143, 7.

<sup>148</sup> Ibid, 13.

<sup>149</sup> Aung Bwa, above n 145, 33.

<sup>150</sup> Ngyuyen Trung Thanh, 'The Making of the ASEAN Charter in My Fresh Memories' (2009) in Koh, Manolo and Woon (eds), above n 143, 95-105, 103.

<sup>151</sup> Aung Bwa, above n 145, 31.

In the end, the issue of a human rights body—whether it should exist and what form it should take—was not decided by the HLTF. Members were unable to reach agreement on the point. Penigran Dato Paduka Osman Patra states that ‘by the time of the Manila AMM in July 2007, consensus did not seem possible. They [sic] was no way forward. The Foreign Ministers, however, had other views. They grasped the political nettle and they reached a consensus that ASEAN should establish such a body.’<sup>152</sup> After this, when the ‘battle line moved to the question of the TOR of the AHRD, particularly as to whether it should perform a consultative or a monitoring role and so on,’ again, the Foreign Ministers removed the issue from the HLTF, deciding that ‘they themselves would determine the AHRD’s TOR.’<sup>153</sup> In the end, the ASEAN Charter merely states that ‘ASEAN shall establish a human rights body’<sup>154</sup> to operate in accordance with terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

The TOR of AICHR are still further removed from the ideal described by the EPG. The TOR made it clear that AICHR is an inter-governmental body and is consultative only.<sup>155</sup> By specifying the inter-governmental nature of the body, the Foreign Ministers delimited aspirations toward strong regional oversight of human rights. By specifying that AICHR is ‘consultative’, the Foreign Ministers made clear that human rights of individuals and groups within the region would *not* be guaranteed by operation of the rule of law, overseen by an impartial third party (a court or commission), but would remain at the discretion of state parties.

In the absence of democracy within a majority of Southeast Asian states, and in the absence of the involvement in treaty-making by representative parliamentarians who are

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<sup>152</sup> Penigran Dato Paduka Osman Patra, above n 143, 13.

<sup>153</sup> Ibid.

<sup>154</sup> Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008), Article 14.

<sup>155</sup> ASEAN Charter, *ibid*, Article 3.

responsive to the wishes of the people, there is a disjuncture between the interests of the region's people, and the form and powers of international institutions such as AICHR. It could be argued that this disjuncture undermines the institution's legitimacy from the perspective of the people of the region, and from the perspective of civil society. My argument is that *at the time of the institution's creation*, the absence of a (democratic) culture of debate and deliberation signifies the exclusion of key stakeholders and, because of this, undermines perceptions that the institution will be able to meet the need of these groups, thus undermining legitimacy.

But international institutions, once established, are 'more than instruments of statecraft and the products of regional stability.'<sup>156</sup> They can shape the boundaries of state action, and may have unintended consequences; for example, 'the weakening of national sovereignty and the gradual ceding of authority to supranational institutions were not what most of the European leaders sought at the start, but rather were the product of the institutions they established.'<sup>157</sup> Despite the legitimacy deficit that exists at the birth of the ASEAN Intergovernmental Commission of Human Rights, it is plausible that the institution could garner support through a pattern of principled decisions, which are complied with by a majority of ASEAN member states. But as I discuss in the next section, there are several problems with prospects for compliance.<sup>158</sup>

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<sup>156</sup> Simon S.C. Tay, 'The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment' (2008) 12 *Singapore Year Book of International Law* 151, 164.

<sup>157</sup> Ibid.

<sup>158</sup> I canvass these hypothetical possibilities very briefly: it is impossible to say with certainty how human rights commissioners might act and how states might respond to their reports. Tom Farer writes of the 'murderous political projects' of the Latin American regimes, which, to the surprise of governments, were investigated, uncovered and condemned by the Inter-American Commission in the early years following its creation. Tom J. Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19(3) *Human Rights Quarterly* 510, 510.

### 3.5.3 Democracy and Compliance

In Chapter 1 of this dissertation, I noted that compliance in the absence of coercion is viewed as an indicator of legitimacy. In recent years, scholars have argued that democracy improves the chances of states complying with international norms, because democratic processes provide avenues for civil society to raise political demands about compliance with international norms in order to secure domestic policy change.<sup>159</sup> The freedom granted to civil society organisations within democracies permits them to agitate for state compliance with international norms. In addition, as many democracies are at a more advanced stage of economic evolution and are more prosperous than their authoritarian counterparts, they have greater *capacity* to comply with international law. If we accept these arguments, then given the lack of democracy in the region, there would seem to be reduced prospects of ASEAN states complying with the reports and recommendations of AICHR.

One scenario is that the absence of democratic systems of government within most ASEAN states will lessen the likelihood of states being successfully pressured *via* domestic politics to comply with the reports and recommendations of AICHR. Because they face little electoral pressure to comply with regional or international human rights norms, civil society's ability to leverage compliance through publicity is very limited. Non-compliance has no domestic political repercussions and so is avoided when compliance is perceived by states as costly.

Another scenario is that regional members that are democracies, such as Indonesia, will devalue the merits of compliance with the regional human rights body, on the grounds that the body is primarily composed of non-democracies, and that the states' own constitutional rights guarantees and independent international human rights obligations offer

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<sup>159</sup> Beth Simmons, *Mobilizing for Human Rights* (2009) Cambridge Mass, Cambridge University Press.

more constructive human rights protection. Why should a democracy support a body that has been constituted by a majority of non-democratic states? In these circumstances, a state like Indonesia might justifiably resist or avoid compliance on the grounds that the state's own internal, electorally mandated measures to protect rights are superior to those of the regional institution.

We can see some evidence of the extent to which different ASEAN states are likely to be responsive to domestic pressure vis-à-vis AICHR by considering the appointments that have been made by different states to the regional human rights body. It is notable that most states have made extremely conservative appointments, of career diplomats or former bureaucrats. Notable exceptions are Indonesia and Thailand, who appointed, respectively, a civil society representative (Rafendi Djamin) and an academic and former Human Rights Commissioner (Sriphapa). The majority of appointments add to the perception that AICHR is not constituted with the will or capacity to challenge states on human rights issues, particularly on issues that concern the means by which governments of the region attain power and the methods by which they hold on to it. Rafendi Djamin, has already spoken of the 'flaws' in AICHR, of his concern to make AICHR 'more effective and credible' and the difficulties he has encountered: 'Until now, AICHR has never [held a] conference. Why? I cannot impose on AICHR members to meet the media [and will] leave it for others to judge.'<sup>160</sup>

#### ***3.5.4 Democracy's Lack of Determinacy***

This chapter is about the link between democracy and human rights, and the extent to which limited democracy amongst the states of Southeast Asia affects the legitimacy of ASEAN's

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<sup>160</sup> Pravit Rojanaphruk, 'ASEAN Commission Fails Miserably in Promoting, Protecting Human Rights' (8 August 2011) *The Nation*.

regional human rights institution. So far, I have been concerned with explaining how democracy influences the way states order and protect human rights, and by extension, why a regional human rights institution constituted by a majority of non-democratic states is unlikely to reflect the interests and wishes of a majority of peoples in the region, and so will lack legitimacy. The argument is fairly simple. Democracy undergirds human rights, and where commitment to democracy is weak and ideas about democracy are incoherent, the authority of institutions constructed to promote ‘human rights and democracy’—or human rights alone—is extremely weak.

This section approaches the legitimacy question from a different perspective, focusing specifically on the legitimacy of the norm of democracy, as it is referred to in the ASEAN Charter and the TOR of AICHR. This section considers whether or not the norm of democracy, as described in the Charter and TOR of AICHR, is sufficiently ‘determinate’. Thomas Franck argues that one of the elements of the legitimacy of a norm is ‘the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning.’<sup>161</sup>

I will outline at the outset two obvious objections to the following discussion about the determinacy of democracy as a regional norm in Southeast Asia. The first objection is that it is too early to judge the norm’s determinacy, and that the meaning of the norm will become clearer (or not), as regional practice around it develops. About this, I agree, and the discussion proceeds with the caveat that state practice, and decisions made by AICHR and the ASEAN Summit, will alter evaluations of the norm’s determinacy. It is possible that the Commissioners of AICHR will use their mandate to initiate discourse about the meaning and value of democracy, and to begin a process of deliberation at the regional and state levels

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<sup>161</sup> Thomas Franck, ‘Legitimacy in the International System’, above n 3, 714.

about how to implement principles of equality and justice in circumstances of economic uncertainty and political insecurity.

The second objection is that *all* norms of international law are indeterminate, and that this lack of clarity is fundamental to their nature. Koskeniemmi makes this argument in the ‘Epilogue’ to *From Apology to Utopia*, when he contends that inevitable indeterminacy is the result of the political processes that create international law, where ‘participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future.’<sup>162</sup> For Koskeniemmi, the fact that it is ‘possible to defend *any* course of action—including deviation from a clear rule—by professionally impeccable legal argument that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards,’ is in no way a ‘deficiency’ of international law, but an ‘absolutely central aspect of international law’s acceptability.’<sup>163</sup> Koskeniemmi also accepts that indeterminacy undermines the force of international law, in a ‘fundamental’ way.<sup>164</sup> It is acceptable to states because it is weak. Democracy’s ambiguity in the ASEAN Charter is certainly, as Koskeniemmi reminds us, the outcome of the region’s complicated politics. It is useful nonetheless to investigate the scope and degree of determinacy of ‘democracy’ at the beginning of the norm’s regional life. In this way, we can trace its meaning as it evolves through practice and discourse.

On Thomas Franck’s view, if democracy is to function as a basis for the rule of law, it must be framed with a degree of precision. Institutions designed to promote the norm—such as AICHR and the ASEAN Summit—must be able to communicate its meaning and to shape

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<sup>162</sup> Martii Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* above n 4, 591, 590.

<sup>163</sup> *Ibid.*, 591.

<sup>164</sup> *Ibid.*

specific ‘situational commands’. Determinacy is relevant to prospects for compliance. Those to whom a principle is addressed need to know precisely what is expected of them, and if a principle is broad and vague, then it will be open to different and contradictory interpretations, and applied in an arbitrary, and political, manner. In these circumstances, those to whom a law is addressed are easily able to justify noncompliance.

Article 5 of the ASEAN Charter obligates ASEAN Member States to take all necessary measures, including the enactment of appropriate domestic legislation, to implement the provisions of this Charter effectively and to comply with all obligations of membership.<sup>165</sup> Included among the broad compass of Charter provisions that ASEAN Member States are expressly obligated to implement under Article 2(2) of the ASEAN Charter are:

- (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States; ...

In addition to these specific obligations, the Preamble to the ASEAN Charter refers to ‘the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms’ and Article 1 includes amongst the Purposes of ASEAN:

- 4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;
- ...
- 7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN; ...

The TOR of AICHR provide that AICHR will be guided by the principles of:

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<sup>165</sup> ASEAN Charter, above n 154, Article 5.

### Chapter 3: Resisting Democracy

- d) Adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- e) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- f) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States; ...

How determinate is the norm of ‘democracy’ in the ASEAN Charter and the TOR?

We can seek guidance on this from two sources. The first is the context in which ‘democracy’ is placed in the text of the ASEAN Charter and the TOR of AICHR. The second is the way in which ASEAN has attributed meaning to the word ‘democracy’ in the past.

As this chapter has already shown, the context in which the word ‘democracy’ is placed leads to contradictory interpretations. On the one hand, the word is placed alongside terms such as ‘sovereignty’ and ‘non-interference’, which have an unambiguous meaning and a long pedigree in ASEAN discourse and practice. This would suggest that ‘democracy’ should be seen as hortatory, and primarily understood as the right of ASEAN states to continue to determine for themselves how they realise principles of democratic governance, according to their own subjective standards. As to what these standards might be, this chapter has described the disparate understandings of democracy in Southeast Asia and the reasons for these plural understandings (3.2) and some of the different motivations behind ASEAN states including ‘democracy’ in the ASEAN Charter (section 3.4). This discussion points to the different attitudes and intentions of states when they were negotiating the Charter and TOR of AICHR, which *prima facie* leads to multiple and contradictory understandings of democracy amongst the different ASEAN states, and resulting ambiguity about the meaning of the word in the Charter and in the TOR of AICHR.

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On the other hand, the ASEAN Charter also references the United Nations Charter and international law, which would seem to support the idea that ASEAN states were attempting to import some kind of objective global standard into the regional conception of ‘democracy’. We return here to the discussion in section 4 of this chapter (3.5.4). Over the past twenty years, we have seen elaborated by the various institutions of the United Nations, a progressively clearer idea of periodic elections as instrumentally important parts of ensuring public influence of governmental action, a means of ensuring that those who exercise power are responsible to an electorate who can periodically hold them accountable.

The second place to look in order to gain an understanding of what democracy means is ASEAN’s prior statements and conduct in relation to issues of democracy. As I discussed earlier in this chapter, the first time ‘democracy’ was referred to in official ASEAN discourse was in the 2004 ASEAN Security Community Plan of Action. In that document, ASEAN leaders promised to ‘bring ASEAN’s political and security cooperation to a higher plane,’ and to this end, stated that they would:

promote political development in support of ASEAN Leaders’ shared vision and common values to achieve peace, stability, democracy and prosperity in the region. This is the highest political commitment that would serve as the basis for ASEAN political cooperation. In order to better respond to the new dynamics within the respective ASEAN Member Countries, ASEAN shall nurture such common socio-political values and principles. In this context, ASEAN Member Countries shall not condone unconstitutional and undemocratic changes of government or the use of their territory for any actions undermining peace, security and stability of other ASEAN Member Countries.

The reference to ‘unconstitutional and undemocratic changes of government’ provides the kernel of a definition of democracy. From these words, we can deduce that there is regional agreement that democracy means, at a minimum, that power should change hands according to and under the law of a country, and that elections are the means by which this should occur. But this is difficult to reconcile with the fact that in September 2006, a military

junta seized power from an elected government in Thailand and at the ASEAN Summit, which met in the Philippines in January 2007, no mention was made of Thailand's very recent 'unconstitutional and undemocratic change of government.' The case of Myanmar is considered in detail in Chapter 4 of this dissertation, and that chapter provides further evidence of the contradictory and inconsistent manner in which ASEAN has approached issues of 'democracy.'

One aspect of determinacy is that there must be an authority capable of resolving ambiguity. Franck puts this requirement as the need for 'an effective, credible, institutionalized interpreter of the rules,' meaning, 'in various instances.'<sup>166</sup> Under the ASEAN Charter, this body is the ASEAN Summit, composed of the Heads of State of the ASEAN Member States. The ASEAN Summit is the supreme policy-making body of ASEAN, with a mandate to decide on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils, and ASEAN Sectoral Ministerial Bodies.<sup>167</sup> In the case 'of a serious breach of the Charter or noncompliance,' the matter is referred to the ASEAN Summit for decision.<sup>168</sup> The Summit possesses broad and undefined emergency powers, to address emergency situations affecting ASEAN by taking 'appropriate' actions. Diane Diserato argues that the ASEAN Summit also appears to have also been vested with a form of 'quasi-judicial oversight', because it is empowered to decide on matters referred to it under Chapters VII (Decision-Making) and VIII (Settlement of Disputes) of the ASEAN Charter.<sup>169</sup> Under the Charter, ASEAN continues to observe a strict

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<sup>166</sup> Thomas Franck, *Power of Legitimacy Amongst Nations* (1990) Oxford, Oxford University Press, 81.

<sup>167</sup> ASEAN Charter, above n 154, Article 7.

<sup>168</sup> *Ibid*, Article 20.

<sup>169</sup> Diane A. Desierto, 'Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia' (2008) 36 *Int'l J. Legal Info* 387.

consultation-and-consensus rule in decision-making (*musyawarah-mufakat*).<sup>170</sup> However, the Charter also provides that if consensus cannot be achieved, ‘the Summit may decide how a specific decision can be made.’<sup>171</sup> The Charter does not provide any recourse from an ASEAN Summit decision, such as suspension or expulsion of a member who fails to comply with a Summit decision. This ambiguity hardly meets the criteria of an ‘effective, credible, institutionalized interpreter.’

In Chapter 1, I argue that one of the benefits of a regional human rights regime is its ability, amongst a limited membership, to create processes through which broad norms become progressively more specific, their meaning and applicability sketched in ever-increasing detail, until the contours of a norm are apparent to those to whom the norm is addressed. The preceding argument in this section would seem to foreshadow difficulties in achieving this in Southeast Asia, in relation to the norm of democracy, because of tension between the norm of ‘democracy’ and other principles, and the lack of an authoritative decision-making institution.

### 3.6 Conclusion

We in ASEAN never disputed that democracy for the people and opportunity for the individual to develop his or her own greatest potentials are indeed important principles. We disagree, however, that political systems qualify as democratic only when they measure up to certain particular yardsticks. Similarly, the norms and precepts for the observance of human rights vary from society to society and from one period to another in the same society. Nobody can claim to have the monopoly of wisdom to determine what is right and proper for all countries and peoples.<sup>172</sup>

Malaysian Prime Minister Mahathir Mohamad, quoted in the *New Strait Times*, 20 July 1991.

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<sup>170</sup> ASEAN Charter, above n 154, Article 20.

<sup>171</sup> Ibid, Article 20(2).

<sup>172</sup> Malaysian Prime Minister Mahathir Mohamad, quoted in the *New Strait Times*, 20 July 1991.

### *Chapter 3: Resisting Democracy*

The history of Southeast Asia, the nature of relations between states, and the diverse political characters of ASEAN's members, seem to tell against democracy taking hold as a regional norm. My aim in this chapter has been to delve deeper into the idea of democracy, particularly in relation to human rights norms and the institutions designed to promote and protect them. I have examined democracy as a political fact (in terms of the idea that its absence in the region abrogates consent and hence legitimacy) and as a norm (the idea that democracy's lack of determinacy undermines the norm's legitimacy and hence prospects for compliance). My conclusion is that democracy's limitations in the region abrogate (at present) the legitimacy of the regional order and that the ambiguity of the term 'democracy' undermines (again, at present) its legitimacy as a regional norm. Because of the idea of human rights put forward in Chapter 1, these conclusions have implications for my hypothesis about regional human rights regimes.

I argue in Chapter 1 that human rights are not 'grounded in our humanity', contingent on nothing except 'the laws of nature, the nature of humanity and that the right-holder is a human being.'<sup>173</sup> I argue that human rights are instead principles of respect and recognition that societies agree upon, through deliberative processes, which occur in circumstances of liberty and equality. Following Rawls, I argued that these processes require the guarantee of certain rights (minimally, rights of political participation, liberty and freedom of speech). Without these guarantees, it is not possible to arrive at a fair agreement about human rights (what rights should be implemented and how). The consequence of this is that where states lack these guarantees, the circumstances do not exist for citizens to formulate freely their understanding of rights, to express the social values that they wish to guide governance, and to set the limits of state power. It is not possible for a society to deliberate on how it wishes to

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<sup>173</sup> See Chapter 1 of this dissertation, particularly the discussion of Joseph Raz's arguments in 'Human Rights Without Foundations' in Besson and Tasioulas (eds), *The Philosophy of International Law* (2010) Oxford, Oxford University Press, 321-338.

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order the relationship between groups, individuals and the state, and how it wishes to prioritise different values.

My hypothesis that regions possess special significance as purveyors of human rights norms assumes that between states and regions, iterative processes of norm-elaboration occur. But if the peoples of states within the region are constrained from engaging in discourse about the meaning and value of rights, then the role of a regional institution such as AICHR in facilitating the processes of norm emergence will be limited. It will be limited most particularly in respect of rights that are political, such as rights of association, expression and participation. Concomitantly, rights perceived as non-political may meet with greater acceptability. In the final chapter of this dissertation, I give an example of a broadly non-political norm, the regional movement to end trafficking in persons.

But given the importance of the relationship between human rights and democracy, described in this chapter and in Chapter 1, democracy's deficits significantly undermine the legitimacy of the nascent human rights regime in Southeast Asia, and raise questions about the strength of my hypothesis in relation to regions where democracy is not widely practiced and no shared meanings attach to the concept. In the following chapter, which involves a case study of Myanmar, we see the way in which democracy's deficit affects the ability of the regional order to influence change in ASEAN's 'pariah' state.

## Chapter 4: Regional Institutions and Democratic Consolidation:

### ASEAN and Myanmar<sup>1</sup>

#### 4.1 Introduction

#### 4.2 Myanmar: History and Transition to Democracy

##### *4.2.1 Entering Democracy's 'Grey Area'*

##### *4.2.2 The Architecture of Transformation*

#### 4.3 Regionalism and the Consolidation of Democratic Transformation

##### *4.3.1 Modes of Engagement: Myanmar and ASEAN*

##### *4.3.2 Myanmar and the International Community*

#### 4.4 Regional Organisations and the Consolidation of Democracy

#### 4.5 Conclusion

#### 4.1 Introduction

In Chapter 3, I argued that the degree of legitimacy enjoyed by a regional human rights institution depended in part on whether or not the region was comprised of democratic states. This is because of the symbiotic relationship that exists between democracy and human rights, and the problems that arise in respect of notions such as 'consent' and 'determinacy' in non-democratic regional organisations. I argued that a lack of normative legitimacy leads to problems with an institution's authority, with the consequence that states are less likely to act against their own interests in order to comply with the institution's decisions or

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<sup>1</sup> In 1988, the government changed the English-language name of the country from 'Burma' to 'Myanmar'. Throughout this chapter, I use 'Burma' when referring to events before 1988, and 'Myanmar' for the post-1988 period. According to Nardi, this usage reflects accepted academic practice in Burmese Studies: Dominic Nardi, 'Discipline-flourishing Constitutional Review: A Legal and Political Analysis of Myanmar's New Constitutional Tribunal' (2010) 12(1) *Australian Journal of Asian Law* 1, 1.

recommendations, and more likely to pursue a path of partial, or incomplete compliance. Non-compliance further undermines the institution's authority. For this reason, a (normative) legitimacy deficit has the potential to undermine the effectiveness of a regional human rights institution. These concerns underpin civil society critiques of AICHR,<sup>2</sup> and the critiques that have emanated from some external audiences.<sup>3</sup>

From the arguments in Chapters 2 and 3, we can conclude that AICHR began its life with a lack of legitimacy and that the absence of regional democracy is the primary explanation for this. The next task is to demonstrate the *effect* of the lack of democracy and the consequent lack of legitimacy on the power of regional institutions to effect change. It is difficult to examine this *via* a study of AICHR's influence on ASEAN states, because the institution is so young. But another way of examining this question, from a broader historical

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<sup>2</sup> Simon Roughneen, 'ASEAN Human Rights Body Launched' (23 October 2009) *The Irrawaddy* available at: [http://www.irrawaddy.org/article.php?art\\_id=17051](http://www.irrawaddy.org/article.php?art_id=17051) [accessed 29 February 2011]; Task Force on ASEAN and Burma, 'Open Letter to ASEAN Nations: Widespread Human Rights Violations In Burma Ignored by ASEAN UPR Delegates' (11 February 2011) available at: <http://www.burmapartnership.org/2011/02/open-letter-to-asean-nations-widespread-human-rights-violations-in-burma-ignored-by-asean-upr-delegates/> [accessed 29 February 2011]; International Working Group for Indigenous Affairs, 'ASEAN Intergovernmental Commission on Human Rights' (2011) available at: <http://www.iwgia.org/human-rights/regional-bodies-and-mechanisms/asean-intergovernmental-commission-on-human-rights> [accessed 29 February 2011]; L. Salaveria, 'Toothless rights body would hurt ASEAN group' (30 June 2009) *Philippine Daily Inquirer*, available at: <http://newsinfo.inquirer.net> [accessed 21 October 2010]; 'Questions Raised About ASEAN's Commitment to Human Rights' (3 August 2011) *Jakarta Globe*; Yap Swee Seng, Atnike Nova Sigiuro, Haris AzharTel 'AICHR: A window dressing for ASEAN's Commitment to Human Rights' (27 October 2010) *Forum-Asia* available at: <http://www.forum-asia.org/?p=6901> [accessed 29 February 2011]; Atnike Nova Sigiuro, Joey Dimaandal, Anelyn de Luna, 'Southeast Asian NGOs give the ASEAN Human Rights Body a failing mark as 17th ASEAN Summit starts' (27 October 2010) available at: <http://www.forum-asia.org/?p=6900> [accessed 14 February 2011].

<sup>3</sup> Andrea Durbach, Catherine Renshaw and Andrew Byrnes, 'A Tongue But No Teeth? ASEAN's New Human Rights Body' (2009) 31 *Sydney Law Review* 211; Yuval Ginbar, 'Human Rights in ASEAN—Setting Sail or Treading Water?' (2010) 10(3) *Human Rights Law Review* 504; Tan Hsien Lee, 'The ASEAN Human Rights Body: Incorporating Forgotten Promises For Policy Coherence and Efficacy' (2008) 12 *SYBIL* 239–255; 'ASEAN's Toothless Council' (22 July 2009) *Wall Street Journal* available at: <http://online.wsj.com/news/articles/SB10001424052970203517304574303592053848748> [accessed 21 October 2010]; and K Percy, Australia Broadcasting Corporation (ABC) interview with Rafendi Djamin, 'Critics Dismiss ASEAN Human Rights Charter' (21 July 2009) *ABC* available at: <http://www.radioaustralia.net.au/international/radio/onairhighlights/critics-dismiss-asean-human-rights-charter> [accessed 21 October 2010]; Tim Johnston, 'Criticism of Asian Rights Body Rebuffed' (20 July 2009) *Financial Times*.

perspective, is to consider past regional efforts to influence human rights and democracy in a particular state. That is the task of the present Chapter.

The arguments in Chapter 2 and 3 about the importance of democracy are consistent with a large body of international relations scholarship on the regional organisations of Europe, the Americas and Africa, which demonstrates that the effectiveness of regional efforts at democracy-promotion and human rights protection depends in large part on the existence of prior ideological and institutional commitments to democracy and human rights within states themselves.<sup>4</sup> According to liberal scholars, this is because international influence works (whether through sanctions, shaming or ‘co-optation’), by shifting the domestic balance of power in favour of reform.<sup>5</sup> Governments are forced to respond to this shift by recalculating their interests along the lines of protection of civil liberties and human rights. Thus ‘[w]ithin a community of established Liberal democracies,’ writes Andrew Moravcsik, ‘international regimes can contribute to the harmonisation, perfection and adjudication of human rights, which can lead, over generations, to the emergence of the transnational rule of law.’<sup>6</sup>

Following this logic, the success of the European and Inter-American systems lies not in the transformation of undemocratic regimes, but in the improvement of already democratic

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<sup>4</sup> Andrew Moravcsik, ‘Explaining International Human Rights Regimes: Liberal Theory and Western Europe’ (1995) 1(2) *European Journal of International Relations* 157; Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *Eur. J. Int’l L.* 503; Anne-Marie Slaughter, Andrew Tulumello and Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92(3) *American Journal of International Law* 367; Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe’ (2000) 54(02) *International Organization* 217; Jack Goldsmith, ‘Should International Human Rights Law Trump Domestic US Law?’ (2000) 1 *Chicago Journal of International Law* 327, 337.

<sup>5</sup> Beth A. Simmons, ‘International Law and State Behavior: Commitment and Compliance in International Monetary Affairs’ (2000) *American Political Science Review* 819; Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) Cambridge, Cambridge University Press.

<sup>6</sup> Moravcsik, (1995) above n 4, 184.

ones.<sup>7</sup> In circumstances where political systems do not reflect the popular will, governments have no need and no incentive to reshape policy on the basis of domestic demand. Thus we find that regional human rights enforcement is *least* effective when directed against the least democratic states and the worst human rights offenders.<sup>8</sup> Andrew Moravcsik terms this phenomenon ‘the tyranny paradox.’<sup>9</sup>

If the tyranny paradox is evident, even in relation to engagement between highly democratic regional organisations and pariah states (for example, the Council of Europe and the Greek military junta, 1967–1974), or moderately democratic regional organisations (the Organisation of American States and Haiti, 1991), then we would expect it to be even more evident in relation to a non-democratic regional organisation such as ASEAN, and a state such as Myanmar, which between 1962 and 2010 was ruled by successive military governments. We would expect ASEAN’s influence (and the influence of its nascent institutions such as AICHR) on the progress of Myanmar toward popular governance and political freedom, to be extremely limited. This is particularly so given the fact that unlike these other regional organisations, ASEAN’s original purpose was not to encourage or promote democracy among its members.

Liberal scholars would support the hypothesis about the tyranny paradox and non-democratic regional organisations with arguments along the following lines. First, non-democratic regional organisations have only a limited ability to muster the moral opprobrium

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<sup>7</sup>Ibid, 180.

<sup>8</sup> Research suggests that this is because the power of a regional human rights regime lies in its ability to either (i) expel members, depriving them of the tangible security and economic benefits of membership, or (ii) to ‘shame’ offenders, by attaching opprobrium to the actions of norm violators, threatening the reputation of authorities and jeopardizing domestic support for their regime. But highly authoritarian regimes are often resistant to both the threat of expulsion and the impact of shaming. First, for authoritarian rulers, the costs of reform are often higher than the economic and security costs of losing membership in a regional organisation. The former usually involves the complete relinquishment of power. Second, suppression of civil society organisations and opposition political forces limits the ability of actors within the state to generate a domestic response to regional pressure. Ibid.

<sup>9</sup> Ibid.

necessary to ‘shame’ a non-democratic member into altering its behaviour.<sup>10</sup> Shaming plays to the self-identity of states that see themselves as liberal, democratic, rights-respecting nations, who belong to a community of similar nations.<sup>11</sup> If a member of the community’s behaviour is inconsistent with the identity to which they aspire, then (so the argument goes) the state will be deeply offended and will (eventually) alter its behaviour. This process cannot occur in a context where no community of democratic nations exists.<sup>12</sup> In short, reputation still matters to non-democratic states. But when they are among a group of non-democratic peers, it matters less.

Second, the character of transnational relations within democratic regional organisations is thought to support and reinforce the maintenance of democratic norms. Keohane and Nye have argued that communication between governmental elites and bureaucrats in different liberal states produces complex interdependencies and informal ties between actors at different levels of government within different states.<sup>13</sup> Communication between these groups occurs based on a set of assumptions about the ideological and structural principles of a liberal state, contributing to a ‘transnational society’ that further socialises members to dominant liberal norms. Anne-Marie Slaughter has taken these ideas further, showing how the component parts of disaggregated (liberal) states (the legislative, executive, administrative and judicial units of the state) interact with one another in ways that

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<sup>10</sup> Here, the phrase ‘non-democratic’ means organisations comprised of a majority of non-democratic states, rather than referring to the ways in which the organisation functions.

<sup>11</sup> On shaming, see Thomas Risse and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge, Cambridge University Press, Chapter 1: ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’.

<sup>12</sup> Oran Young, ‘The Effectiveness of International Institutions: Hard Cases and Critical Variables’ (1992) in James N. Rosenau and Ernst-Otiel Czempiel (eds), *Governance Without Government: Order and Change in World Politics*, 160–194, Cambridge, Cambridge University Press; Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1996) Cambridge, MA, Harvard University Press; Douglass Cassel, ‘Does International Human Rights Law Make a Difference?’ (2001) 2(1) *Chicago Journal of International Law* 121–135; Alastair Johnston, ‘Treating International Institutions as Social Environments’ (2001) 45(4) *International Studies Quarterly* 487.

<sup>13</sup> Robert Keohane and Joseph Nye, *Power and Interdependence* (1977) 25–26.

reinforce social pressures and social incentives to comply with group norms.<sup>14</sup> Slaughter argues that one of the reasons that international organisations are important is because they often provide the structures within which these interactions can take place.<sup>15</sup> Part of my theory about regional organisations is that they provide particularly fertile environments within which these interactions can occur. But these socialisation effects depend on whether or not there exists a reasonably homogenous, liberal, rule-of-law culture amongst the group of states.<sup>16</sup> If such a culture does not exist, then an international organisation will possess only a limited ability to foster links between domestic institutions, and to influence and ultimately ‘co-opt’ elites within less democratic institutions along a path of liberal reform.

Third, political scientists such as Jon C Pevehouse have argued that the increased range of common interests and similar preference structures within democratic regional organisations means that they are more likely to exert pressure on authoritarian regimes (which assists in transitions to democracy) and are more likely to make democracy a condition of membership of the regional organisation (which encourages the consolidation of democracies).<sup>17</sup> Furthermore, democratic regional organisations are more likely to enforce conditions regarding the democratic practices of members, because of shared understandings about the importance of democracy for trade, peace and cooperation with other democracies.<sup>18</sup> The transparency that characterises democracies makes it more difficult for them to avoid their responsibility (for example, to impose trade sanctions against an offending regime). In summary, outside a community of liberal democracies, ‘the instruments

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<sup>14</sup> Anne-Marie Slaughter, *A New World Order* (2004) Princeton and Oxford, Princeton University Press.

<sup>15</sup> Anne-Marie Slaughter, ‘Government Networks and Traditional International Organisations: Interconnected Worlds’ (2004) in Anne-Marie Slaughter, *A New World Order* (2004) *ibid*, 152–161.

<sup>16</sup> *Ibid*, 198–200.

<sup>17</sup> Jon C. Pevehouse, *Democracy From Above: Regional organisations and Democratisation* (2005) Cambridge, Cambridge University Press, 47.

<sup>18</sup> See Chapter 2.

of international human rights statecraft remain more primitive and the results correspondingly more modest.<sup>19</sup>

This chapter examines Myanmar's tentative transition from military rule to democracy, which began (in earnest) in 2008 with the adoption of a new Constitution. It focuses specifically on the period 2010–2012, during which political attention was concentrated on issues concerning the consolidation of democracy, such as: how to avoid a democratic breakdown; how to institutionalise democracy; and how to complete and deepen democracy.<sup>20</sup> I argue that in the context of Myanmar's uncertain consolidation, and the concurrent evolution of ASEAN into a more rules-orientated, more democratically conscious and human rights-aware regional grouping, ASEAN possesses a not-insignificant degree of power and influence in relation to Myanmar. My argument is not that the regional organisation constrains or conditions the behaviour of Myanmar's leaders through its coercive powers (it has none) or normative legitimacy (which is extremely limited). Rather, my argument is that ASEAN assists Myanmar's leaders with the problem of 'credible commitments' and thus provides crucial legitimisation for the government's plans for a controlled and circumscribed evolution towards democracy.

I draw attention to two particular causal factors that account for regional effects in the Myanmar/ASEAN dynamic. The first factor concerns the nature and character of military regimes in general, of which Myanmar's regime in the period 1962–2010 is a typical example. I argue that military regimes are guided by the imperatives of preserving national

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<sup>19</sup>Moravcsik (1995) above n 4, 184.

<sup>20</sup>In this chapter, I use 'consolidation' to mean avoiding the breakdown of the kind of democracy that Myanmar became after the Constitutional referendum in 2008 and the 2010 elections, rather than consolidation in the sense of deepening a fully liberal democracy or completing a semi-democracy. See: Andreas Schedler, 'What Is Democratic Consolidation?' (1998) 9(2) *Journal of Democracy* 91–107; Andreas Schedler, 'Concepts of Democratic Consolidation', Paper prepared for delivery at the 1997 Meeting of the Latin American Studies Association (LASA), Guadalajara, Mexico, (17–19 April 1997); Andreas Schedler, 'Measuring Democratic Consolidation' (2001) 36(1) *Studies in Comparative International Development*, 66–92.

unity, security and stability. For this reason, military regimes are more likely to initiate controlled, gradual processes of democratisation and liberalisation, in which the military retains a significant and independent role in politics.<sup>21</sup> The success of democratic reform led by the military depends on bargains struck between the military and opposition forces. Such bargains will only be effective if the reform process is perceived by the opposition as genuine. In this regard, I suggest that even relatively non-democratic regional organisations such as ASEAN play an important role in supporting and legitimising the efforts of reformers. Specifically, I argue that ASEAN's decision to allow Myanmar to take the chairmanship of ASEAN in 2014 provided Myanmar's reformist government with credibility at a crucial time in its early democratic consolidation.

The second factor is the role and influence of ASEAN's most powerful member and leading democracy, Indonesia, in providing an example for Myanmar's democratic consolidation. I suggest that Myanmar's leaders have taken careful note of the commonalities between the two countries (their histories of colonialism, post-war struggles for independence, cultures of authoritarianism and military dominance and problems with reconciling ethnic communities). Myanmar's rulers are in certain respects attempting to follow the path of limited democratic reform (and rapid economic development) embarked upon by Indonesia's President Suharto in 1971. Myanmar's leaders hope to avoid Suharto's ignominious end, twenty-six years after he first came to power, by managing expectations and change in 'top-down' fashion.<sup>22</sup> My theory is that even non-democratic regional

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<sup>21</sup> Samuel Huntington, 'How Countries Democratize' (1991) 106(4) *Political Science Quarterly* 579.

<sup>22</sup> 'Burma eyes Indonesia-style reforms' (3 October 2011) *Radio Free Asia* available at: <<http://www.unhcr.org/refworld/docid/4e9d7350c.html>> [accessed 29 February 2012]. In this interview, Nay Zin Latt, President Thein Sein's political adviser, stated that Burma wanted to emulate once military-ruled Indonesia's transition to democracy, including the process that ended a long-standing insurgency in the northern Indonesian province of Aceh. However, Nay Zin Latt said that the transition process for Burma could not be the exactly same as that of Indonesia, and that as the 'style is a top-down change we may go faster [in adopting changes] than Indonesia.' See also: Jonathan Head, 'What next for Burma's generals?' (27 September 2007) <<http://news.bbc.co.uk/2/hi/asia-pacific/7017162.stm>> [accessed 29 February 2011].

organisations can exert significant influence on the direction taken by regimes in the early stages of democratic consolidation, if the region's 'leader' nation is (like Indonesia) strongly (and newly) democratic.

This chapter is structured in the following way. In the first part of this chapter (4.2) I describe and explain Myanmar's transition from authoritarianism to an uncertain semi-democracy, in the period from the gaining of independence from Britain after the Second World War, to the 'fair and free' federal by-elections of 2012. I provide an historical overview of Myanmar's political history, drawing attention to the realities that have shaped the character of Burmese governance: the nation's location between China and India; its economic underdevelopment; its memories of colonial exploitation; the suffering and destruction of the Second World War; its internal political instability; and its ethnic and political disunity.<sup>23</sup> I then (in 4.2.1) describe Myanmar's recent move toward democracy, and offer explanations why, after forty years of authoritarian rule, Myanmar's generals decided to slowly relinquish their grip on power. I argue for a multi-causal explanation that attributes 'the well-springs of liberalization'<sup>24</sup> to elements of both process and structure. I point specifically to the changing economic and security priorities of Myanmar's elites, and their desire to move away from economic dependence on China. Finally (in 4.2.2), I locate these

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<sup>23</sup> I have drawn on the many writings of Robert H. Taylor in my study of Burma's history, particularly *The State in Burma* (1987) London, C. Hurst & Company; 'Burma's National Unity Problem and the 1974 Constitution' (1979) 1(3) *Contemporary Southeast Asia* 232; 'Finding the Political in Myanmar, aka Burma' (2008) 39(2) *Journal of Southeast Asian Studies* 219; 'Myanmar in 2009: On the Cusp of Normality?' (2010) *Southeast Asian Affairs* 200; 'Myanmar: Roadmap to Where?' (2004) *Southeast Asian Affairs* 169. See also: Joseph Silverstein, *Burma: Military Rule and the Politics of Stagnation* (1977) Ithaca and London, Cornell University Press, 169; Nick Cheesman, Monique Skidmore and Trevor Wilson (eds), *Ruling Myanmar: From Cyclone Nargis to National Elections* (2009) Singapore, Institute of Southeast Asian Studies.

<sup>24</sup> Donald Emmerson, 'ASEAN's 'Black Swans'' (2008) 19(3) *Journal of Democracy* 70, 77.

developments within the literature on democratic transitions, considering how ideas about democracy's 'third' (or fourth) waves might apply in the case of Myanmar.<sup>25</sup>

In the second part of this chapter, I consider the influence of regionalism in democratic transitions. First, I survey the political science literature on regionalism and democratisation, drawing attention to the conclusion reached by Jon C Pevehouse and others that states located within regions with a high democratic density are more likely to transition to democracy (4.3). Following on from this, I consider ASEAN's attempts to influence Myanmar's behaviour (towards liberalisation and democratisation) (4.3.1). I describe how in the period from 1997 (the year of Myanmar's admission to ASEAN) until 2007 (the year in which some ASEAN members called for Myanmar's suspension because of gross violations of human rights), ASEAN largely failed in its attempts to change the behaviour of its 'pariah' state. I suggest that the Association's few successes in this regard (convincing Myanmar to relinquish the chair of ASEAN in 2006, and ASEAN diplomacy in the aftermath of Cyclone Nargis in 2008) in general serve to underline Myanmar's lack of regard for the regional association and the association's consequent ineffectuality. However, I also point out (4.3.2) that the influence of the international community was of equally little influence. Next, I consider whether and how Myanmar's responsiveness to ASEAN changed in the period spanning the adoption of Myanmar's 2008 Constitution, designed to usher in a 'discipline flourishing democracy,' to the 2012 by-elections, in which Aung San Suu Kyi's NLD participated. I suggest that during this period, ASEAN and its institutions became critically

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<sup>25</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991) Oklahoma, University of Oklahoma Press; Larry Diamond, 'Is the Third Wave of Democratization Over? The Imperative of Consolidation' Working Paper No. 237, March 1997. The fourth wave is thought by some authors to have occurred during post-communist transitions in places such as Belarus, Moldova, Russia and Ukraine between 1992–2004: Michael McFaul, 'The Fourth Wave of Democracy and Dictatorship: Non-cooperative Transitions in the Post-communist World' (2002) 54(2) *World Politics* 212; Lucan A. Way, 'Authoritarian state building and the sources of regime competitiveness in the fourth wave: the cases of Belarus, Moldova, Russia, and Ukraine' (2005) 57(2) *World Politics* 231. Others argue that the '4<sup>th</sup> wave' is the 'Arab Spring' of 2008: Mohamad S. Olimat, 'The Fourth Wave of Democratization' (2008) 25(2) *American Journal of Islamic Social Sciences* 16.

important to key actors within Myanmar's changing political constellation. I draw particular attention to the way that Myanmar looked to the political evolution of the region's most populous nation and most economically powerful member, Indonesia, as a model for its own transition from authoritarianism, and the enormous significance attached by Myanmar's leaders to their campaign to have Myanmar take the chairmanship of ASEAN in 2014.

My conclusion is that for states consolidating democracy, even regional institutions that possess limited amounts of normative legitimacy can assist in reconfiguring the interests of ruling elites towards reform. The turn from normative legitimacy (the 'supply-side' of regional organisations) to subjective legitimacy (how the organisation is perceived and responded to by certain states and various actors within the state) suggests certain refinements might be made to existing liberal theory about the power and influence of regional organisations. But in the end, I largely concur with Emmerson's 2008 prediction about democratisation in Southeast Asia:

The key wellsprings of liberalization are likely to remain internal to the countries undergoing change. But if democratization does proceed on the ground, one may expect ASEAN to play a greater, if still marginal, role both in reflecting and facilitating such a trend. Conversely, if Indonesia's democracy fails to perform, is replaced, and thereby sets a negative example for the region, the loss is likely, if again marginally, to reinforce the ASEAN Way of privileging sovereignty, non-interference, and consensus to the benefit of regimes that are less transparent or accountable but seemingly more effective.<sup>26</sup>

## **4.2 Myanmar: History and Transition to Democracy**

Most accounts of post-colonial Myanmar present the nation's history as a sequence of defining historical moments: 4 January 1948 and independence from Britain; the coups of 1958 and 1962; the 8 August 1988 mass demonstrations and their suppression; and the

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<sup>26</sup> Emmerson, above n 24, 77.

‘Saffron Revolution’ of 2007.<sup>27</sup> Through these events, the country’s history is most commonly portrayed as a dyadic struggle between democracy (represented by Aung San Suu Kyi and the NLD) and authoritarianism (the Generals of the *Tatmadaw*, Myanmar’s armed forces).<sup>28</sup> The drama and tragedy of this struggle has, in many ways, shaped external attempts (by the ‘West’, and less consistently by ASEAN), to influence the course of events in Myanmar. Because the aim of this chapter is to understand the reach and limitations of regional efforts in this regard, this chapter’s abbreviated account of Myanmar’s history inevitably concentrates on the historic events, uprisings and constitutional moments that have brought Myanmar into focus for the world.

This focus, however, risks ignoring deeper readings of the nation’s political history, which emphasise intractable divisions between Myanmar’s majority Buddhist Bamar population, and ethnic minorities (the Arakanese, Chin, Kachin, Shan, Karenni, Karen, and Mon peoples) who inhabit Myanmar’s outlier regions.<sup>29</sup> Praetorianism and the failure of representative democracy, which are the recurrent themes of Myanmar’s post-colonial history, both in certain senses derive from the core problem of attaining national unity in the face of ethnic diversity.<sup>30</sup> Democracy’s other impediments—economic underdevelopment; the years of attempted socialism, the absence of the institutions of democracy (an

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<sup>27</sup> For example, see: Chao-Tzang Yawnghe, ‘Burma: The Depoliticization of the Political’ (1995) in Muthiah Alagappa (ed), *Political Legitimacy in Southeast Asia* (1995) 170–192, Stanford, Cal., Stanford University Press.

<sup>28</sup> Alan Saw U, ‘Reflections on Confidence-Building and Cooperation among ethnic groups in Myanmar: A Karen Case Study’ (1995) in N. Ganesan and Kyaw Yin Hlaing (eds), *Myanmar: State, Society and Ethnicity*, Singapore, Institute of Southeast Asian Studies, 219–235.

<sup>29</sup> The size of Myanmar’s ethnic population is contested. One civil society organisation claims that of a total population of around 53 million, minorities would claim to comprise around 40 per cent see: <[www.networkmyanmar.org](http://www.networkmyanmar.org)>. However, Alan Smith complicates attempts to delineate clear divides between different ethnic groups in Myanmar: ‘Burma/Myanmar: The Struggle for Democracy and Ethnic Rights’ (2005) in Will Kymlicka and Baogang He (eds), *Multiculturalism in Asia* (2005) Oxford, Oxford University Press.

<sup>30</sup> According to Smith, *ibid*, the British treated the ethnic Burmese majority (which became part of India) differently to the non-Burman minorities, playing a ‘divide and rule’ game, favouring certain minorities in the army, as well as migrant Indians in the economy, at the expense of the ethnic Burmese majority.

independent judiciary, a free press)—have exacerbated the destructive consequences of disunity.<sup>31</sup>

The British, who ruled Burma between 1825 and 1948, viewed the country ‘as a distant provincial appendage of the Indian empire.’<sup>32</sup> The British were concerned primarily with the growth of trade, and they found the administrative structure of the pre-colonial Burmese kingdom ‘so lacking in uniformity that they experienced great difficulty in understanding it.’<sup>33</sup> Therefore, they attempted to dismantle it. The colonial government ‘removed the last Burmese monarch, demobilised the indigenous military forces, ignored indigenous social and status distinctions, and abandoned constraints on economic growth as well as denigrating Buddhism.’<sup>34</sup> The British also redrew the map of Burma, creating ‘Burma proper’, inhabited by the majority Bamar population, and the ‘excluded’ or ‘frontier areas’ of the surrounding hills, inhabited by ethnic minorities.<sup>35</sup> Thus, British rule ‘set the stage for a future generation of ethnic problems.’<sup>36</sup>

The Japanese invasion of Burma in World War II brought British rule to an end. The British returned to Burma after the Allied victory in 1945, to find that an indigenous political movement had emerged, the Anti-Fascist People’s Freedom League (AFPFL), led by General Aung San.<sup>37</sup> The AFPFL won elections held in April 1947, and undertook the drafting of

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<sup>31</sup> Taylor, ‘Burma’s National Unity Problem and the 1974 Constitution’ (1979) above n 23, 236.

<sup>32</sup> Taylor (1987), *The International Law Basis of Britain’s Acquisition of Burma was Conquest* in Taylor, *The State in Burma* (1987), above n 23, 364-372

<sup>33</sup> F.S.V. Donnison, *Public Administration in Burma: A Study of Development During the British Connection* (1953) London, Royal Institute of International Affairs, 13; Martin Smith, ‘Burma’s Ethnic Minorities: a central or Peripheral Problem in the Regional Context?’ (1997) in Peter Carey (ed), *Burma: The Challenge of Change in a Divided Society* (1997) London, Macmillan Press Ltd 97–128.

<sup>34</sup> Taylor (1987), above n 23, 70.

<sup>35</sup> *Ibid*, 79.

<sup>36</sup> Smith, above n 29, 102.

<sup>37</sup> The Japanese occupation lasted between 1942 and 1945. The Japanese allowed Burma to proclaim independence on 1 August 1943. After the end of the Second World War, what Michael Aung-Thwin describes as ‘a semblance of the colonial order’ was attempted, culminating in the granting of formal independence to

Burma's first post-independence constitution, the 1947 Constitution of the Union of Burma. Aung San and six members of the Executive Council were assassinated in July 1947.

The 1947 Constitution created a central Union government, which ruled the Burman heartland and ethnic satellite states, some of which remained uncommitted to unification with Burma.<sup>38</sup> The degree of autonomy held by the states was perceived by them to be grossly inadequate, and by the end of Burma's first parliamentary period, most of the ethnic minorities were in open rebellion. This was the response to 'a growing sense of frustration, expressed by virtually all the minority peoples in Burma, with the progressively more centralized and Burmanized form of government in Rangoon.'<sup>39</sup> The Burmese army, the *Tatmadaw*, were called upon to suppress widespread ethnic (and communist) insurgencies.

Convinced that Myanmar's fledgling democracy was unable to prevent the balkanisation of the Union, the army executed its first *coup d'état* in 1958. In 1962, in the face of civil war, General Ne Win carried out a second *coup d'état*, declaring that the army had no alternative but to take drastic steps in order to avert the impending danger of the disintegration of the Union.<sup>40</sup> Ne Win's effective rule of Myanmar lasted from 1962 until 1988.<sup>41</sup> As leader of the Burma Socialist Programme Party (BSPP), Ne Win presided over the

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Burma in 1948. See: Michael Aung-Thwin, 'British 'Pacification' of Burma: Order Without Meaning' (1985) 16(2) *Journal of Southeast Asian Studies* 245, 246.

<sup>38</sup> Unlike the constitution adopted at much the same time in neighbouring India, the Burmese constitution did not reflect a classic federal structure. Those drafting Burma's constitution (principally Aung San and his Anti-Fascist People's Freedom League (AFPFL), considered full-blown federalism too costly in terms of financial and human resources. See Smith, above n 29, 268. The 'Panglong Agreement' of 1947 had allowed frontier peoples to govern themselves along traditional lines, with little interference from Rangoon.

<sup>39</sup> Smith, *ibid*, 192. Figuring prominently in accounts of ethnic grievances during this period is the decision of Myanmar's new government to promulgate Buddhism as the state religion. Buddhism played a significant role in Myanmar's independence movement against the British. Sai Kham Mong, 'The Shan in Myanmar' (2007) in Ganesan and Hlaing (eds), *Myanmar: State, Society and Ethnicity* (2007), above n 28, 256–287.

<sup>40</sup> General Ne Win published a statement to this effect in *The Nation* on 5 March 1962: Alan Saw U in Ganesan and Hlaing (eds) (2007), *Myanmar: State, Society and Ethnicity* (2007), above n 28, 265.

<sup>41</sup> Ne Win headed Burma's government as President, under the one-party 1974 Constitution until his retirement in 1981. Until 1988, he retained his dominant political role through his leadership of the Burma Socialist

drafting of the 1974 Constitution of the Socialist Republic of the Union of Burma, which provided for a one-party system of government with nominally autonomous states for the non-Burman nationalities.<sup>42</sup> In relation to foreign policy, Ne Win pursued non-alignment.<sup>43</sup> In terms of domestic policies, his regime employed an indigenous variety of Marxist-Leninist socialism. Ne Win undertook the systematic nationalisation of the economy and other institutions. Political freedoms of association and expression were extremely limited during this period, and the army was used to control ongoing ethnic violence. Nonetheless, ethnic rebellion continued, the economy declined, and a democratic opposition to Ne Win's rule began to coalesce around Aung San Suu Kyi, the daughter of General Aung San.<sup>44</sup> In the face of these challenges, the military's hold on power grew tighter. Like many leaders in the region at that time, Ne Win perceived that to permit internal strife was to invite the external intervention of the great powers. On Burma's eastern border, the People's Republic of China pressed, overtly supporting communist insurgencies.<sup>45</sup> Meanwhile in the West, the United States pursued its catastrophic Cold War policies in Vietnam.

Yet Burma remained largely ignored by the world until the events of 1988.<sup>46</sup> Ne Win's decision to devalue the currency threw commercial activity into chaos and wiped out savings, leading to a situation of political tension, uncertainty and widespread unrest.<sup>47</sup> A brawl between a small group of students and townspeople over the type of music played in a

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Program Party (BSPP), the military-dominated state party. He resigned at the height of the 1988 popular uprising.

<sup>42</sup> There was broad agreement among the 'big' ethnic minority groupings (Shan, Karen, Kachin, Chin, Karenni, Mon, and Arakan communities) concerning the appropriate number of ethnic satellite states.

<sup>43</sup> Richard Butwell, 'Ne Win's Burma: At the End of the First Decade' (1972) 12(10) *Asian Survey* 901.

<sup>44</sup> *Ibid.*

<sup>45</sup> Ashley South, 'Political Transition in Myanmar: A new Model for Democratization' (2004) 26(2) *Contemporary Southeast Asia* 238.

<sup>46</sup> John B. Haseman, 'Burma in 1987: Change in the Air?' (1988) 28(2) *Asian Survey* 223; Ja Nan Lahtaw, 'Peace Initiatives Among Ethnic Nationalities: the Kachin case' (2007) in Ganesan and Hlaing (eds), *Myanmar: State, Society and Ethnicity* (2007), above n 28, 236.

<sup>47</sup> Moksha Yitri, 'The Crisis in Burma: Back from the Heart of Darkness?' (1989) 29(6) *Asian Survey* 543; Neil Englehart, 'Regime Change Enough for Burma? The Problem of State Capacity' (2005) 45(4) *Asian Survey* 622.

café ended as widespread rioting in Yangon, Mandalay and the capitals of ethnic states, and calls for the overthrow of the Burma Socialist Programme Party.<sup>48</sup> By early August, hundreds of thousands were marching through Rangoon and other cities carrying signs calling for ‘democracy’ and the removal of the one-party system. General Saw Maung declared martial law on August 3, and combat troops were brought from fighting ethnic insurgencies to patrol the streets of Rangoon.<sup>49</sup> The demonstrators were suppressed, and many were killed.<sup>50</sup> In September, under General Saw Maung, the army deposed Ne Win’s successor, took control of the government, suppressed the demonstrations, and ended the movement toward liberalisation and democracy.<sup>51</sup>

In September 1988, General Saw Maung established the State Law and Order Restoration Council (SLORC). In his Annual Armed Forces Day Speech on 27 March 1989, Saw Maung declared that the military would help to install ‘a newly elected government comprising the elected representatives of the people ... we, the members of the *Tatmadaw*, are to go back to our barracks.’<sup>52</sup> But the statement of SLORC Secretary, Major General Khin Nyunt, was more ambiguous: ‘the military would remain in office after the next elections until a new constitution could be drafted and a stable government could be formed.’<sup>53</sup> In preparation for nationwide multi-party elections, the SLORC permitted the registration of political parties to stand in competition with the SLORC-supported National Unity Party (NUP) (a renamed BSPP). The NLD, led by a dissident former general, Tin U, and by Daw

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<sup>48</sup> Khin Zaw Win, ‘2010 and the Unfinished Task of Nation-building’ (2009) in ‘2010 and the Unfinished Task of Nation-building’ (2009) in Cheesman, Skidmore and Wilson (eds) (2009), above n 24, 19-31.

<sup>49</sup> Yitri, above n 47.

<sup>50</sup> Survivors became known as the ‘Four Eights Generation.’

<sup>51</sup> Yitri, above n 47. General Ne Win was replaced by General Sein Lwin, who was forced from office within three weeks. He was succeeded by a civilian and presumed moderate, Maung Maung, who proposed elections and attempted to negotiate with opposition groups. However, protests continued.

<sup>52</sup> Tim Maung Maung Than, ‘Myanmar Democratization: Punctuated Equilibrium or Retrograde Motion’ (1997) in Anek Laothamatas (ed), *Democratization in Southeast and East Asia* (1997) Singapore, Institute of Southeast Asian Studies, 189.

<sup>53</sup> *Ibid*, 190.

Aung San Suu Kyi, emerged as the leading opposition party.<sup>54</sup> In elections held on 27 May 1990, the NLD succeeded in gaining 392 of 485 seats, while the NUP won only 10. A 21-party coalition of ethnic parties making up the UNLD (United Nationalities League for Democracy) won a total of 66 seats.<sup>55</sup>

On the eve of a meeting of elected NLD members of the Pyithu Hluttaw (National Assembly), at which an amended version of the 1947 Constitution was to be adopted as a provisional constitution, the SLORC issued Declaration No. 1/90, stating that it held power under martial law, was not bound by any constitution, and would hold power until it had ensured that a sufficiently strong constitution was in place.<sup>56</sup> Under new SLORC chairman General Than Shwe, the SLORC put in place a National Convention charged with drafting a new constitution. On July 10th 1992 the composition of the National Convention was announced. The 702 members had been handpicked by the SLORC and included only 99 elected representatives from the 1990 elections.<sup>57</sup> The NLD ultimately boycotted the proceedings, and declared its intention to develop its own version of a new constitution. The SLORC's response was to promulgate Law 5/96, which outlawed constitution-drafting activity outside the framework of the National Convention and, in addition, outlawed any action that could be regarded as negative towards the National Convention and its work.<sup>58</sup>

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<sup>54</sup> Suu Kyi was placed under house arrest on 20 July 1989 and prevented from participating in the election.

<sup>55</sup> Smith, above n 29.

<sup>56</sup> Yash Ghai, 'The 2008 Myanmar Constitution: Analysis and Assessment' available at: [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution-analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution-analysis_and_assessment-Yash_Ghai.pdf)

<sup>57</sup> The National Convention formally opened in January 1993 charged with drawing up, not a constitution, but a set of principles on which the future constitution would be based. Six basic principles had already been laid down by the SLORC, including 'a leading role in politics for the military'. By the end of its third session (September 1993) the National Convention had 'adopted' 104 principles proposed by the SLORC, most significantly, that military appointees would make up 25 per cent of the membership of representative bodies and reservation of the position of President to a person with a military background. Further sessions were convened in 1994 and 1995, during which the regime encouraged the representatives of ethnic communities to put forward their claims for autonomy within the territories of the big ethnic minorities.

<sup>58</sup> NLD party leaders had established a 10-member Committee Representing the 'People's Parliament' (CRPP), apparently vested with power-of-attorney by more than 250 MPs (a majority of the 485-member assembly) to pass laws in the Parliament's name. The CRPP called upon the *Tatmadaw* to support the people's struggle for

There were no further moves towards a new constitution until mid-2004, when the ‘moderate’ Khin Nyunt, then Prime Minister, presented a seven-step ‘roadmap’ towards constitutional democracy.<sup>59</sup> The roadmap commenced with reconvening the National Convention, which had been adjourned since 1996. This was to be followed by drafting a new constitution in accordance with the principles laid down by the National Convention; adopting the Constitution through a national referendum; holding free and fair elections for the Pyithu Hluttaws; convening the Hluttaws; and finally, building a modern, developed and democratic nation.<sup>60</sup> The NLD maintained its boycott of National Convention proceedings. Some ethnic actors, who had signed ceasefires with the regime, decided to participate.<sup>61</sup>

Under the leadership of Khin Nyunt, in 1997, the SLORC reorganised itself into the State Peace and Development Council (SPDC), with General Than Shwe as Chairman.<sup>62</sup> But any brief glimmerings of *glasnost* under Khin Nyunt proved to be abortive. On 30 May 2003, under orders from General Maung Aye, an NLD convoy carrying Aung San Suu Kyi was

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democracy, proclaimed the annulment of decrees passed by SLORC/SPDC since 1988, and sought international recognition. See: Donald Seekins, 'Burma in 1998: Little to celebrate' (1999) 39(1) *Asian Survey* 12, 15.

<sup>59</sup> Khin Nyunt was Ne Win's close confidant and head of intelligence, and SLORC's first secretary. See: Michael Leifer, *Dictionary of the Modern Politics of Southeast Asia* (1995) London and New York, Routledge, 7–10.

<sup>60</sup> H.E. U Khin Maung Win, Deputy Minister for Foreign Affairs of the Union of Myanmar, 'Myanmar Road to Democracy: The Way Forward', Paper presented at the Myanmar Institute of Strategic and International Studies, Seminar on Understanding Myanmar, Yangon (27-28 January 2004). The *New Light of Myanmar* published Prime Minister General Khin Nyunt's address of 30 August 2003, to the Members of the State Peace and Development Councils, Government Ministers, Heads of Departments and Non-Government Organizations, announcing the Roadmap: *New Light of Myanmar*, (30 August 2003) XI (136) available at: <http://www.ibiblio.org/obl/docs/Roadmap-KN.htm> [accessed 20 January 2012].

<sup>61</sup> Ethnic groups who participated included the KIO (Kachin Independence Organization) and NMSP (New Mon State Party). But when the final session of the National Convention was held in July 2007, the Kachin Independence Organisation put forward a list of 17 points that been endorsed by the other ethnic nationalities. All of them were rejected.

<sup>62</sup> The new ruling Council of the SPDC consisted of two separate bodies: a 14-member Cabinet and a 14-member advisory board. There appear to have been two principle reasons for the regime's reorganisation. The first was an attempt to countermine growing disunity within the SLORC, between factions led by Lt-General Khin Nyunt and General Maung Aye. The second was an attempt to improve the military government's political legitimacy.

attacked, leaving four dead. Suu Kyi herself was taken into protective custody.<sup>63</sup> In July 2003, the National Convention was again adjourned.<sup>64</sup> In 2005, the capital city was suddenly and secretly moved from Yangon to Pyinmana, a move that was not advertised to foreign diplomats, or even to the government's own civil servants.

In August 2007, the junta suddenly and without warning raised fuel prices 500 per cent, threatening the livelihoods of much of the country's population. Protests originating with city dwellers spread to the Buddhist sangha (monks), who joined civilians in demonstrations against the regime. Selth writes: '[s]uch was the popular mood that some activists and foreign journalists even began to predict the downfall of the military government.'<sup>65</sup> Myanmar's government responded to the 'Saffron Revolution' with tear gas, baton charges and in Yangon, with machine-gun fire.<sup>66</sup> Yangon's Buddhist monasteries were raided and thousands of monks were forcibly detained.<sup>67</sup> The number of political prisoners doubled in the wake of the riots and came to include not only members of opposition political parties, but also monks, journalists, and community activists. Many were sentenced to

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<sup>63</sup> The complicity of the regime in the 'Depayin' incident was corroborated in a report by Special Rapporteur on Human Rights to Myanmar, Professor Paulo Sérgio Pinheiro. In a report to the United Nations Commission on Human Rights, Pinheiro said that 'there is prima facie evidence that the Depayin incident could not have happened without the connivance of State agents.' UN Commission on Human Rights, 'Situation of human rights in Myanmar: Report Submitted by the Special Rapporteur Paulo Sérgio Pinheiro', E/CN.4/2004/33 (5 January 2004) available at:

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/a1cbfc0409c5de82c1256e460055e32c?Opendocument>  
[accessed 3 January 2012].

<sup>64</sup> In October 2004, Prime Minister General Khin Nyunt was charged with refusing to obey orders and corruption and was placed under house arrest along with officers loyal to him. He was replaced by Than Shwe's protégé, General Soe Win, who was thought to have planned the Depayin incident. Stephen McCarthy, 'Burma and ASEAN: A Marriage of Inconvenience' (2010) in Lowell Dittmer (ed), *Burma or Myanmar? The Struggle for National Identity* (2010) Singapore, World Scientific Publishing Co., 341.

<sup>65</sup> Andrew Selth, 'Burma's 'Saffron Revolution' and the Limits of International Influence' (2008) 62(3) *Australian Journal of International Affairs* 281, 283.

<sup>66</sup> Saffron is the colour of the robes of Myanmar's Buddhist monks. It is estimated that 31 protestors died and some 3000 were arrested in the 'Saffron Revolution'. Ardeth Maung Thawngmung and Maung Aung Myoe, 'Myanmar in 2007: a Turning Point in the 'Road Map?' (2008) 48(1) *Asian Survey* 13–19.

<sup>67</sup> Selth, above n 65.

lengthy prison terms in closed court proceedings. At the same time, fighting against non-Burman minorities along the country's eastern border intensified.<sup>68</sup>

The international response to the 'Saffron Revolution' was immediate and unequivocal. US President George Bush and British Prime Minister Gordon Brown condemned the regime's suppression of peaceful dissent. UN officials called for the release of detained protesters, and for a peaceful dialogue between the SPDC and the civilian opposition.<sup>69</sup> The European Union (EU), the European Parliament and several ASEAN countries expressed 'deep concern', and China and India were called upon to encourage reconciliation between the SPDC and the opposition movement.<sup>70</sup>

In the shadow of the Saffron Revolution and its suppression, the 2008 Constitution of the Union of Myanmar was finally completed. Plans for the constitutional referendum, however, were thrown into chaos by Cyclone Nargis, which struck Myanmar's Irrawaddy Delta on 2 May 2008.<sup>71</sup> The international community offered assistance and relief. But, as reported by *The New Light of Myanmar*, 'the strings attached to the relief supplies carried by warships and military helicopters are not acceptable to the Myanmar people,' and the government at first refused, and then delayed and impeded, the delivery of aid.<sup>72</sup> The regime

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<sup>68</sup> See the Report of the UN Special Rapporteur on the Situation of Human Rights in Myanmar, <<http://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx>> [accessed 14 January 2010]; United States Department of State, Bureau of Democracy, Human Rights and Labor, '2008 Human Rights Report: Burma, 2008 Country Reports on Human Rights Practices' (25 February 2008) available at: <<http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119035.htm>> [accessed 14 January 2010]; Human Rights Watch 'Burma's Forgotten Prisoners', New York (2009). The United Nations, U.S. Department of State, Human Rights Watch, and other nongovernmental organizations (NGOs) have reported extensively on the military regime's record of human rights abuses, including the denial of aid, forced labour, the use of child soldiers, violence against ethnic minorities, forced displacement, systematic and widespread rape, torture and extrajudicial killings and religious persecution.

<sup>69</sup> Selth, above n 65, 284.

<sup>70</sup> Ibid.

<sup>71</sup> Cyclone Nargis devastated the Irrawaddy Delta region and left much of the region under water. Around 2.5 million people were affected by the cyclone. On 14 May, the government of Myanmar/Burma put the death toll at 43,318. 'Myanmar Cyclone Death Toll Soars Above 43,000' (15 May 2008) *Los Angeles Times*; Aung Hla Tun, 'Foreign Powers Lean on Myanmar to Open up Aid' (15 May 2008) *Reuters*.

<sup>72</sup> The paper hinted that the proposed aid missions were a ruse to cover plans to invade the country and seize its oil and gas assets.

confounded observers by its decision to press on with the referendum despite the death, suffering and chaos caused by Cyclone Nargis. From the French government, and from some within the British parliament, came calls for the implementation of the ‘Responsibility to Protect’.<sup>73</sup> The response of Myanmar’s government was suspicion and propaganda. A cartoon published in the May 11th edition of *The New Light of Myanmar* depicts a group of smiling Burmese running toward a ballot box having the following conversation: ‘When we are confronted with natural disasters we all cooperate! When internal and external saboteurs disturb us we defend ourselves together! It is because the army and the people are on the march hands joined!’ In one corner of the picture there are three figures labelled: ‘Nargis, Internal and External Saboteurs’.<sup>74</sup>

At the end of May 2008, the SPDC announced that 98.12 per cent of qualified voters participated in the referendum and the ‘yes’ vote was 92.48 per cent.<sup>75</sup> With the constitutional referendum completed, the SPDC asked the 17 cease-fire groups to lay down their arms and form political parties in order to participate in the election.<sup>76</sup>

#### **4.2.1 Entering Democracy’s ‘Grey Area’**

Larry Diamond describes a ‘grey’ area of democracy, in which authoritarian regimes make some concessions to liberal reform and multi-party politics, but by various means prevent or impede the formation of a popularly elected government.<sup>77</sup> This is the place in which

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<sup>73</sup> See Catherine Shanahan Renshaw, ‘Disasters, Despots and Gunboat Diplomacy’ (2014) in David Caron, Michael J. Kelly, and Anastasia Telesetsky (eds) *The International Law of Disaster Relief* (forthcoming) Cambridge, Cambridge University Press.

<sup>74</sup> Andrew Selth, ‘Even paranoids have enemies: Cyclone Nargis and Myanmar’s fears of invasion’ (2008) 30(3) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 379.

<sup>75</sup> Ian Holliday, ‘Beyond Burma versus the World’ (2008) 171(5) *Far Eastern Economic Review* 48.

<sup>76</sup> On the shortcomings of this process in terms of building legitimacy for constitutions, see: Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (2009) International IDEA.

<sup>77</sup> Larry Diamond, ‘The Global State of Democracy’ (2000) 99(641) *Current History* 413. The idea of a ‘grey area’ was first mentioned in studies on democratic transition by O’Donnell and Schmitter, who referred to semi-democratic stages as ‘dictablanda’ (limited authoritarianism) and ‘democradura’ (limited democracy). See:

Myanmar found itself in the period 2010–2012. The 2008 Constitution, which Taylor describes as the army government’s attempt to address issues that had grown out of Myanmar’s post-colonial history (the power and autonomy of the armed forces under the Constitution; the issue of political autonomy for ethnically designated groups; the distribution of power between the executive, legislature and judiciary at various levels of government) installs unelected military representatives in 25 per cent of seats in the new federal parliament. Yet the Constitution also opens a certain amount of democratic space for new political actors. This space, combined with other acts of liberalisation on the part of the government (ending many of the restrictions on the media, permitting the establishment of new trade unions and labour associations, enabling the registration of new and previously de-registered political parties), promises, for many, the beginning of a new political era. Kyaw Yin Hlaing, for example, suggests that ‘if fairly and sincerely implemented,’ the 2008 Constitution could ‘provide both the government and the opposition with an institutional framework and political space through which they can work towards gradual democratization of the country.’<sup>78</sup>

The Constitution of the Union of Myanmar<sup>79</sup> describes the nation’s political system as a ‘genuine, disciplined multi-party democratic system’<sup>80</sup> employing the ‘union system’.<sup>81</sup> The administrative power of the state is divided among the central government, and seven states

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Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986) Baltimore, John Hopkins University Press.

<sup>78</sup> Kyaw Yin Hlaing, ‘Setting the Rules for Survival: why the Burmese Military Regime Survives in an Age of Democratization’ (2009) 22(3) *Pacific Review* 271.

<sup>79</sup> The Constitution of the Republic of the Union of Myanmar, unlike the 1974 Constitution, does not contain the word ‘socialist’ in its official title. The Constitution specifically prohibits the nationalisation of economic enterprises (Article 36(d) of the Constitution of the Republic of the Union of Myanmar) and provides that the government will not demonetise the currency legally in circulation (Article 36(e) of the Constitution of the Republic of the Union of Myanmar).

<sup>80</sup> *Ibid*, ‘Basic Principles’, Article 7.

<sup>81</sup> *Ibid*, Article 8.

(named after ethnic groups) and seven regions.<sup>82</sup> There are also five ethnically designated Self-Administered Zones, and one Self-Administered Division.<sup>83</sup> Legislative power, though predominantly remaining with the central government, is distributed to the states, regions and the Self-Administered Zones and Division.<sup>84</sup> The approval of a majority of 75 per cent of the Pyihtuangsū Hluttaw, both chambers of the national parliament, is necessary in order to amend the fundamental principles of the Constitution, its overall structures, and the rules for forming the legislature, the judiciary or declaring a state of emergency. Amendment proposals must be put to the people in the form of a referendum.<sup>85</sup>

The President, accorded significant power under the Constitution,<sup>86</sup> chairs the National Defence and Security Council (NDSC), a body comprised of the president, Vice-Presidents, Speakers of both Hluttaws, the Commander-in-Chief and Deputy-Commander-in-Chief of the Defence Services, and key Ministers. The NDSC is established as part of the

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<sup>82</sup> Ibid, Chapter II 'State Structure' Article 49: the seven states are: Kachin State; Kayah State; Kayin State; Chin State; Mon State; Rakhine State; Shan State. The seven regions are: Sagaing Region; Taninthayi Region; Bago Region; Magway Region; Mandalay Region; Yangon Region; Ayeyawady Region. Article 50 provides that Nay Pyi Taw, the capital of the Union, is a 'union territory', is under the direct administration of the President.

<sup>83</sup> Ibid, Article 56. The Self-Administered Zones are: Naga; Danu; Pa-O; Pa Laung; Kokang. Article 56(f) provides that 'Wa', in Shan State, is a Self-Administered Division.

<sup>84</sup> Chapter IV of the Constitution of the Republic of the Union of Myanmar provides that each state or region has a single legislature and minor legislative powers are given to self-administered zones. The national legislature, known as the Pyihtuangsū Hluttaw, is composed of two chambers, but meets as a single chamber for purposes of electing the president, adopting the annual budget, and amending the constitution. The Pyihtaungsū Hluttaw is composed of the Pyithu (People's) Hluttaw with 440 members and the Amyotha (Nationalities) Hluttaw with 224 members. Of the members of the Pyithu Hluttaw, 330 are elected on the basis of one per township plus others for more highly populated townships and 110 appointed from the army. Each state or region elects 12 members of the Amyotha Hluttaw for a total of 168. The budgetary process is centralised with much of the state and regional budget being provided by the central government: Article 74 of the 2008 Constitution. Ibid.

<sup>85</sup> Ibid, Chapter XII.

<sup>86</sup> The President appoints members of the cabinet: Ministers responsible for defence, security, home affairs and border affairs must be appointed from a list provided by the Commander-in-Chief of the Armed Forces. The President also appoints the Attorney General and the Auditor General and their deputies and the Chairman of the Union Civil Service Board. The President also appoints the chief ministers, ministers and advocates generals of the state and regional governments. Ibid.

Executive and is responsible for pardons, honours, diplomatic relations, and the declaration of war, with or without reference to the Pyihtuangs Hluttaw.

The role of the military is central to the governance of the state:<sup>87</sup> 25 per cent of the members of the Hluttaw and its two chambers must be serving army officers appointed by the *Tatmadaw* commander-in-chief; the commander-in-chief has a decisive say in the appointment of the President and two vice-presidents.<sup>88</sup> Certain key cabinet positions (such as Home Affairs and Defence) are confined to active military personnel, and the army is fiscally and administratively autonomous.<sup>89</sup> During states of emergency, which are declared by the President, the legislative, executive and judicial powers of the Union are transferred to the Commander-in-Chief of the Defence Services ‘to enable him to carry out necessary measures to speedily restore its original situation in the Union.’<sup>90</sup> The Constitution provides immunity

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<sup>87</sup> Under Chapter IV of the Constitution, in the states and divisions, as in the national legislature, twenty-five per cent of seats are reserved for the *Tatmadaw*. Thus Military representatives will occupy 110 seats in the 440-seat Pyithu Hluttaw, 56 out of 224 seats in the Amyotha Hluttaw and more than 200 seats in the 14 state and regional hluttaws. *Ibid.*

<sup>88</sup> The President is elected by the Pyihtaungs Hluttaw meeting in plenary session after three candidates have been nominated by the two chambers and the army members meeting separately (Constitution of the Republic of the Union of Myanmar, Article 60). Under Article 59, there are exclusionary provisions relating to the position of President and Vice-President: the President must be at least 45 years of age and born of parents who were both citizens, and must be acquainted with the political, administrative, economic, and military affairs of the state. He or she must also have no allegiance to, citizenship of, or rights and privileges availed by a foreign power, nor can his or her parents, spouse, children, or their spouses. In addition, like members of the Hluttaw, he or she has to have lived in Myanmar for the previous 20 years unless abroad with government permission, free from convictions, of sound mind, not destitute, and not in receipt of support from foreign governments or religious organisations. Under Article 61, the Presidential term of office is five years and he or she may serve for only two terms. Under Article 71, the President can be impeached if charged by 25 per cent of either house of the Hluttaw. For his removal, a two thirds vote is required. Reasons for impeachment are: high treason; breach of the provisions of the Constitution, misconduct; disqualification; inefficiency (Article 71(a)). *Ibid.*

<sup>89</sup> In *The New Light of Myanmar*, Si Thu Aung argues that presence of the military in parliament serves as a ‘balancing weight’, or a system of checks and balances, within the fledgling parliamentary democracy. Si Thu Aung, ‘To service as balancing weight’ (21 March 2008) *New Light of Myanmar*, available at: <http://burmalibrary.org/docs4/NLM2008-03-21.pdf> [accessed 1 March 2012].

<sup>90</sup> Constitution of the Republic of the Union of Myanmar (2008), above n 79, Article 418(a).

from legal action to the SPDC, and its agents and personnel, for their decisions and activities prior to the coming into effect of the Constitution.<sup>91</sup>

Section XV of the Constitution creates a Constitutional Tribunal, with the primary task of interpreting the Constitution and scrutinising laws passed by the various Hluttaws for consistency with the Constitution.<sup>92</sup> The Constitution includes a range of civil and political rights (of expression, assembly, association, language, culture, and rights associated with *habeas corpus*), which may be limited for reasons of ‘state security, prevalence of law and order, community peace and tranquillity or public order and morality’ and all of which can be suspended during periods of emergency. The Constitution also includes social and economic rights, such as education and health.<sup>93</sup>

In November 2010, Myanmar held its first parliamentary elections under the 2008 constitution. The military-backed political party, the Union Solidarity and Development Party (USDP), contested the elections, together with several pro-democracy opposition parties. The major opposition party, Aung San Suu Kyi’s NLD, refused to participate, because of regulations that restricted former prisoners (such as Suu Kyi herself) from standing as candidates, and because of a provision that required all parliamentarians to ‘defend the

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<sup>91</sup> Ibid, Article 445: ‘No proceeding shall be instituted against the said Councils or any members thereof or any member of the Government, in respect of any act done in the execution of their respective duties.’

<sup>92</sup> On 11 February 2011, the Tribunal’s inaugural nine justices were appointed, from nominations (three each) by the President and the speakers of each chamber of the Pyihtaungsu Hluttaw. The nominations are subject to confirmation by the entire legislature. See: ‘Parliament forms Constitutional Tribunal; approves Cabinet members’ (11 February 2011) *Mizzima*. The tenure of justices is five years. The President or a quarter of either Hluttaw chamber can initiate impeachment proceedings against justices for ‘high treason,’ ‘misconduct,’ or ‘inefficient discharge of duties.’ In September 2012, members of parliament, including members of the opposition, voted to impeach all nine members of the Constitutional Tribunal, in the wake of the Tribunal’s order, in March 2012, limiting the power of parliamentary committees and commissions. The members of the Constitutional Tribunal tendered their resignations to the President. Jonathan Head, ‘Burmese MPs force out constitutional court judges’ (6 September 2012) *BBC News Asia* available at: <<http://www.bbc.co.uk/news/world-asia-19498968>> [accessed 15 December 2012].

<sup>93</sup> Constitution of the Republic of the Union of Myanmar (2008), above n 79, Chapter VIII, ss 366(a) and 367.

constitution.<sup>94</sup> During the election period, in rural areas, voting was irregular, disrupted and in cases prevented, by ongoing ethnic conflict. A suspiciously high number of ‘pre-votes’ were counted in favour of the USDP. The USDP’s decisive victory surprised no one.

Observers were greatly surprised, however, by the inaugural address to parliament of newly-appointed President Thein Sein, on 30 March 2011.<sup>95</sup> In it, the President pledged legislative reform in areas such as human rights, health-care, press-freedom and environmental protection. More surprising still, in the period from March 2011–February 2012, the government passed a raft of legislation aimed at legalising trade unions, increasing the pension rate, allowing public political gatherings, easing press censorship, and permitting the teaching of ethnic minority languages in schools across Burma. On 19 August 2011, President Thein Sein met with Aung San Suu Kyi. ‘The Lady’, as she is known within Myanmar, told foreign diplomats ‘that she is confident about the future and optimistic about the possibility of genuine change’ and that ‘Thein Sein can be trusted, he is genuinely trying to reform the country, and needs international support.’<sup>96</sup> In September 2011, President Thein Sein announced the suspension of the Chinese-funded Myitsone dam project in Kachin state, responding to broad public concern that the dam threatened the health of the Irrawaddy River.

Proceedings in parliament also confounded expectations. During the first sitting of parliament, the speaker of the Pyitthu Hluttaw (lower house), displayed robust independence, demanding that ministers actually answer the questions put to them by the few minority pro-democracy members of parliament. These questions, and the responses of government ministers, were published in *The New Light of Myanmar*. The second parliamentary sittings,

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<sup>94</sup> The NLD was subsequently stripped of its status as a legal political party.

<sup>95</sup> Available at:

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/601\\_ebopaper2\\_/601\\_ebopaper2\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/601_ebopaper2_/601_ebopaper2_en.pdf) [accessed 1 March 2012].

<sup>96</sup> Larry Jagan, ‘What Thein Sein promised Suu Kyi’ (30 September 2011) *Asia Times*, available at: [http://www.atimes.com/atimes/Southeast\\_Asia/MI30Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/MI30Ae01.html) [accessed 21 February 2012].

in August 2011, were televised, and local journalists were invited to sit in a press gallery. *The Irrawaddy* reported that ‘The willingness of Burma’s opposition parliamentarians to raise sensitive questions over the past year has thus made the Parliament a more relevant arena for political debate over the past year than observers had predicted.’<sup>97</sup> The parliament’s unelected military officers did not vote consistently with the USDP, but on occasion supported the opposition in relation to key pieces of legislation.<sup>98</sup>

Burma’s third session of Parliament, in January 2012, was dedicated primarily to discussion of the national budget. As the local media noted, this was the first time in decades that a legislative body has discussed a national budget. The 2011–2012 budget, approved by the military in secret before the parliament was convened, allocated 23.6 per cent of the budget to the military and 5.4 per cent to health and education. The budgetary bill proposed by the President for 2012–2013 included a defence budget of 14.94 per cent, an education budget of 4.91 per cent, and a health budget of 2.93 per cent.<sup>99</sup>

The new government also intensified efforts to sign cease-fire agreements with ethnic minorities. An official ceasefire with the Shan State Army-South (SSA-South) was signed at the end of 2011.<sup>100</sup> In early December 2011, President Thein Sein ordered the army not to launch attacks on ethnic armed groups in northern Kachin State<sup>101</sup> and recommenced dialogue with the Kachin Independence Organization (KIO) aimed at ending the 62-year old

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<sup>97</sup> *The Irrawaddy*, 1 January 2012.

<sup>98</sup> ‘Burma old guard adapt to new life as lawmakers’ (18 January 2012) *Bangkok Post*, available at: <http://www.bangkokpost.com/news/asia/275722/burma-old-guard-adapt-to-new-life-as-lawmakers> [accessed 14 February 2012]. The *Myanmar Times* tells a similar story: Sandar Lwin, ‘In the Hluttaws, More Green Shoots’ (2-8 January 2012) 31(608) *The Myanmar Times*, available at: <http://mmtimes.com/2012/news/608/news60802.html> [accessed 21 February 2012].

<sup>99</sup> ‘Burma’s Parliament Back in Session, Budget is Top Priority’ (27 January 2012) *The Irrawaddy*, available at: [http://www2.irrawaddy.org/article.php?art\\_id=22938](http://www2.irrawaddy.org/article.php?art_id=22938) [accessed 21 February 2012].

<sup>100</sup> Aung Naing Oo, ‘Give Peace in Burma a Chance’ (13 December 2011) *The Irrawaddy*.

<sup>101</sup> Burma Partnership, ‘2012: A Year for Cautious Optimism’ (9 January 2012) available at: <http://www.burmapartnership.org/2012/01/2012-a-year-for-cautious-optimism/> [accessed 20 February 2012].

conflict. On 12 January 2012, the government signed a ceasefire with the 19-member Karen National Union (KNU), to end hostilities between the military and the Karen National Liberation Army (KNLA).<sup>102</sup> The government also continued negotiations with the Chin National Front (CNF). These negotiations were complicated by decades of mistrust and by continuing uncertainty about whether the military was actually under the control of the government. Nonetheless, one peace activist within Myanmar wrote that:

the introduction of democracy in Burma, no matter how fragile and surreal it may seem at the moment, has made all the changes—including new peace overtures with the ethnic groups—all the more probable ... it is now possible for ethnic groups to consider peace from a different perspective. First, the Burmese armed forces are no longer the only player; there are institutions under the democratic polity that have come into the picture in bringing about peace in Burma ... There is a bicameral parliament, which has its own peace committee. It is also deeply involved in negotiations with the ethnic groups. Then there are state parliaments and governments, some of which are spearheading peace efforts in their own respective states.<sup>103</sup>

On 5 September 2011, the government announced the establishment of the Myanmar National Human Rights Commission (MNHRC), without the prior knowledge or input of parliament, media groups, or civil society.<sup>104</sup> Prior to the MNHRC, there existed for twelve years a ‘Human Rights Committee’ within the Ministry of Home Affairs,<sup>105</sup> which in November 2007 was transformed into the Myanmar Human Rights Body. In 2010, during Myanmar’s appearance before the Universal Periodic Review, Myanmar’s delegates acknowledged, ‘the Myanmar Human Rights Body is still in its initial stages and its goal is to emerge eventually as National Human Rights Commission in line with the Paris Principles.’

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<sup>102</sup> Myanmar signs ceasefire with Karen rebels’ (12 January 2012) *Reuters* available at: <<http://www.ft.com/intl/cms/s/0/b873a906-3d09-11e1-8129-00144feabdc0.html?ftcamp=rss#axzz1jHU80I6Z>> [accessed 12 February 2012].

<sup>103</sup> Aung Naing Oo, above n 100.

<sup>104</sup> Burma Partnership, ‘Burma’s NHRC: An Empty Gesture’ (10 January 2012).

<sup>105</sup> Interview with Kyaw Tint Swe, Vice-Chairman, Myanmar National Human Rights Commission, Yangon, 16 November 2011, copy on file with author.

Representatives undertook to take steps to establish an independent human rights institution in conformity with the Paris Principles.<sup>106</sup>

The MNHRC follows the ‘commission’ model of NHRI which predominates in the Asia Pacific, with investigative and protection functions rather than the ‘ombudsman’ or ‘think-tank’ model of the Americas or of Europe. It has a mandate to receive and investigate complaints of violation of the rights set out in the Constitution, and to communicate its findings to relevant government departments. Unlike the Indian National Human Rights Commission, which is prohibited from investigating the actions of the military, the *Tatmadaw* has no immunity in relation to Commission investigations.<sup>107</sup> The chairman of the (MNHRC), Win Mra, has linked Myanmar’s Commission to the human rights commissions of other ASEAN members, stating that: ‘Our Commission is the fifth of its kind in the ten-member countries of ASEAN.’ The chairman claims that the MNHRC conforms with the UN ‘Paris Principles on the Status of National Institutions’ (the Paris Principles), and is independent and autonomous.<sup>108</sup> The composition of the MNHRC clearly evinces an attempt to satisfy the *Paris Principles* requirement of pluralism.<sup>109</sup>

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<sup>106</sup> Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review—Myanmar, Seventeenth Session, Agenda Item 6, A/HRC/17/9 (24 March 2011) available at: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/123/72/PDF/G1112372.pdf?OpenElement>> [accessed 12 February 2012], [87].

<sup>107</sup> *New Light of Myanmar*, 7 October 2011.

<sup>108</sup> Win Mra, ‘We Won’t be Influenced by the Government’ (19 September 2011) *The Myanmar Times*. The MNHRC is not, however, as the Paris Principles stipulate, established by way of provision in the Constitution or by legislative text, but by Government Notification (34/2011).

<sup>109</sup> Five of the MNHRC’s fifteen commissioners were selected by the President, from ‘hundreds’ of nominations put forward by the various Ministries. Win Mra, *ibid.* Kyaw Tint Swe explains that five of the Commissioners were selected by President, and that three were former ambassadors, who had that helped establish the commission as part of an informal task force. Two others were foreign service commissioners, one of them Kachin aristocracy; three were professors (of history, international law, and international relations). Kyaw Tint Swe stated that nominations had been received from women’s organisations, one for a former Director-General of Education. The eight major ethnic groups were represented, as well as Muslims and Christians. Interview with Kyaw Tint Swe, Vice-Chairman, Myanmar National Human Rights Commission, Yangon, 16 November 2011, copy on file with author.

Since its inception, the MNRHC has received 20–23 complaints a day.<sup>110</sup> Commissioners have made visits to Insein Prison, Hlay Hlaw-Inn Yebet Prison Labour Camp and Kachin State, where fighting against ethnic groups continues.<sup>111</sup> In 2011, the MNHRC issued three statements requesting that the government ‘release prisoners of conscience’ from Myanmar’s jails,<sup>112</sup> so that prisoners ‘who do not pose a threat to the stability of state and public tranquillity in the interest of national races will enable them to participate in whatever ways they can in the nation-building tasks.’<sup>113</sup> These calls were followed by the government’s announcement of amnesties and reductions in sentences for many political prisoners.

For most pro-democracy activists within Myanmar, and for many outside observers, the issue of political prisoners was the litmus test of liberalisation. In 2011, Myanmar’s prisons contained a large (though disputed) number of prisoners of conscience, some of whom had been in jail since the 1988 uprising.<sup>114</sup> Former junta leader Than Shwe had made it clear on at least two occasions—once just after the November’s elections and again early in 2011—that the release of political prisoners was non-negotiable.<sup>115</sup> Despite this stricture, however, a motion was brought in parliament to free political prisoners. Lower house speaker Thura Shwe Mann—the former third top general in the ruling junta—steered the motion through parliament, where it was adopted by a majority.<sup>116</sup> In October 2011, the President announced an amnesty for 6359 prisoners.<sup>117</sup> On 2 January 2012, President Thein Sein signed a clemency order, commuting death sentences to life imprisonment and reducing the

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<sup>110</sup> Ibid.

<sup>111</sup> Statement by the Myanmar National Human Rights Commission on its visits to the Insein Prison and Hlay Hlaw-Inn Yebet Prison Labour Camp (30 December 2011).

<sup>112</sup> On 10 October, 12 November and 30 December.

<sup>113</sup> *New Light of Myanmar*, (11 October 2011) XXI (178).

<sup>114</sup> David Scott Mathieson, ‘Dispatches: the Political Prisoner Endgame in Burma’ (15 November 2013) *Human Rights Watch* available at: <http://www.hrw.org/news/2013/11/15/dispatches-political-prisoner-endgame-burma> [accessed 15 November 2013].

<sup>115</sup> Jagan, above n 96.

<sup>116</sup> Ibid.

<sup>117</sup> The government had not previously acknowledged that ‘prisoners of conscience’ existed in Myanmar’s prisons. Yet on 10 October 2011, *The New Light of Myanmar* published a letter from the President of the Myanmar Human Rights Commission requesting that remaining ‘Prisoners of Conscience’ also be released.

sentences of other prisoners.<sup>118</sup> Under this clemency, 6656 people who had already served the time of their reduced sentences were released.<sup>119</sup> On 13 January, Thein Sein's government released a further 651 prisoners, among them ethnic leaders, leaders of the '88 Generation' student movement, and other prominent political prisoners.

On 5 November 2011, President Thein Sein approved two crucial changes to the law on political parties. One removed the clause which provided that former prisoners (such as Suu Kyi) could not be members of a political party. The second amended the phrasing of a condition requiring all political parties to agree to 'preserve' the 2008 Constitution.<sup>120</sup> In the wake of these amendments, the NLD and Aung San Suu Kyi decided to contest seats in the 1 April by-election, when a total of 48 seats would become vacant.<sup>121</sup> The NLD won all seats, and Aung San Suu Kyi herself joined the parliament.

#### **4.2.2 *The Architecture of Transformation***

How do we account for the depth, breadth and speed of reform in Myanmar in the period 2010–2012?<sup>122</sup> For almost thirty years, political scientists have analysed the 'waves' of transformations from authoritarianism to democracy across Europe, South America, Africa

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<sup>118</sup> Those serving more than 30 years had their sentences cut to 30 years. Those serving 20 to 30 years had their terms reduced to 20 years, while those with less than 20 years had their sentences cut by one-fourth.

<sup>119</sup> However, as reported by the Assistance Association for Political Prisoners—Burma (AAPP), on 3 January, only 34 *political* prisoners were freed.

<sup>120</sup> The amendment changed the wording from 'preserve' to 'respect and obey'—a difference in nuance that would apparently allow Suu Kyi's National League for Democracy (NLD) party to criticise or suggest changes to the constitution.

<sup>121</sup> The by-election was to fill seats vacated by those elected in the November 2010 vote, who have since become ministers and deputy ministers in the government. Forty seats were vacant in the lower house, six in the upper house and two in the regional assemblies.

<sup>122</sup> Steven Lee Myers, 'In Myanmar, Government Reforms Win Over Some Sceptics' (30 November 2011) *The New York Times* available at: <[http://www.nytimes.com/2011/11/30/world/asia/in-myanmar-government-reforms-win-over-countrys-skeptics.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/11/30/world/asia/in-myanmar-government-reforms-win-over-countrys-skeptics.html?_r=1&pagewanted=all)> [accessed 21 February 2012]; Daw Cho Cho Kyaw Nyein, opposition leader and former political prisoner, said in an interview with *The New York Times* that: 'What has happened in these last few months is a miracle for us ... [T]o be frank, in the very beginning, I didn't believe a word of what they were saying ... [N]ow I believe what is happening is for the good of the people.'

and Asia, and certain patterns of transition have been clearly identified.<sup>123</sup> There remains a fundamental divide between theorists who focus on ‘structural’ explanations for change, where reform is seen as dictated by the historical constraints of economics, class and the shifting distribution of wealth and power, and those who focus on ‘process’ orientated explanations, where change is attributed to the strategic moves of actors and their responses to particularistic sequences of events. The most plausible theorising has come from scholars such as Samuel Huntington, whose work on democratic transition encompasses both structural and procedural arguments for change.<sup>124</sup> Huntington identifies a link between the nature of the incumbent political regime (personal dictatorship, single-party system or military junta) and the mode of transition, (whether elite-initiated transition, transition by ‘pact’ or agreement between ruler and opposition, or popular revolt).

Huntington identifies three models of democratisation. The first is transformation, where elites in power take the lead in bringing about democracy. The second is ‘replacement’, where change is initiated by a powerful opposition group and the authoritarian regime collapses or is overthrown. The third is ‘transplacement’, where democratisation occurs as a result of joint action by government and opposition. Huntington’s analysis of democratisation in the period 1974–1990 found that the most common form of transition from military regime to democracy involved transformation or transplacement, rather than replacement.<sup>125</sup> This means that in most cases, in comparison to other forms of undemocratic rule, the military themselves are usually responsible for transitioning their country to

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<sup>123</sup> Laurence Whitehead (ed), *the International Dimension of Democratization* (2001) Oxford, Oxford University Press.

<sup>124</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991) Oklahoma, University of Oklahoma Press; Huntington, ‘How Countries Democratize’ (1991) above n 21; Samuel Huntington, ‘After Twenty Years: The Future of the Third Wave’ (1997) 8(4) *Journal of Democracy* 3–12.

<sup>125</sup> Huntington, ‘How Countries Democratize’ (1991), above n 21, 584.

democracy, and are in effect responsible for their own demise.<sup>126</sup> However, there is a catch. Although military-led transitions to democracy often occur more rapidly and peacefully than transitions from one-party rule, or from personal dictatorships, such transformations are often impermanent. The military retain the capacity to reacquire power by non-democratic means and having done so once, stand capable of doing so again.

The explanation for why military rulers are prepared to relinquish power and embark upon processes of liberalisation and democratisation lies in the nature of the military as an institution, and the character of those who become military leaders. In most cases, as Huntington points out, military leaders ‘virtually never defined themselves as the permanent rulers of the country.’<sup>127</sup> As in the case of Myanmar, military rulers generally claim to be temporarily assuming power in order to save the country from disaster (caused by civil war, or anarchy, or the misrule of other leaders). The idea is that when these dangers have been safely averted, the military will ‘return to the barracks’ and to their normal military functions. For military rulers, the return to civilian rule is always a political possibility; the question is when this should occur. On this point, there are often differences of opinion within the military itself, and liberalisation often occurs after a change in the top leadership of the military regime. Three factors seem to hasten the military’s decision to withdraw from power: (i) the cooperation of the opposition in the timing and mode of transition; (ii) a guarantee that there will be no prosecution of military officers for acts they committed while they were in power; and (iii) guarantees about the preservation of the autonomy and role of the military.<sup>128</sup>

Huntington describes five major phases that occur during transformations from military rule. The first four of these, which occur within the authoritarian system, are: (1) the emergence of reformers, who for a variety of reasons become convinced that democracy is

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<sup>126</sup> The exceptions occurred when military regimes suffered military defeat and collapsed as a result.

<sup>127</sup> Huntington, ‘How Countries Democratize’, above n 21, 584.

<sup>128</sup> Ibid.

necessary and/or desirable;<sup>129</sup> (2) the gaining of power by reformers, which often occurs only when hard-line authoritarian leaders die; (3) the failure of moderate liberalisation, when it becomes clear that ‘liberalized authoritarianism is not a stable equilibrium’ and that ‘middle courses’ between authoritarianism and democracy do not work;<sup>130</sup> and (4) the neutralisation of standpatters, either by weakening, reassuring, or converting them.<sup>131</sup> The fifth and final stage of transformation is the co-optation of the opposition, which is essential to the success of the transition.<sup>132</sup>

The democratisation process itself is shaped by interactions between three groups of actors: reformers within government, standpatters, and members of the opposition. Within these different groups, there are likely to be diverse opinions about possibilities and prospects of reform. These opinions often evolve as reforms get underway, and the dynamics of relationships between various actors evolves further as opinions (and power) shifts. For example, standpatters within the military who oppose reform may come to accept democracy, if it transpires that moves toward democracy do not produce the dangers that they feared. Members of opposition groups, initially opposed to government-led reforms, may come to accept opportunities to participate in government if it appears to them that reformers within the military government are genuine. Huntington writes that in all transitions, three central interactions play a role: (i) those between government and opposition; (ii) between reformers and standpatters in the governing coalition; (iii) between moderates and extremists in

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<sup>129</sup> These reasons might include: the unacceptably high cost of staying in power, in terms of the ongoing repression of dissident forces; the risks associated with an unplanned exit from power (such as punishment or death); the national benefits that come from democratization, in terms of economic assistance and investment from wealthy democracies such as the US and members of the EU; even, in some cases, the belief that democracy was the right form of government ‘and that their country had evolved to the point where, like other developed and respected countries, it too should have a democratic political system.’ Ibid, 593.

<sup>130</sup> Ibid, 598. This is because ‘liberalization stimulated the desire for democratization in some groups and the desire for repression in others.’

<sup>131</sup> Ibid, 599. ‘Standpatters’ are those opposed or resistant to change.

<sup>132</sup> Ibid, 601.

opposition.<sup>133</sup> The conflictual or cooperative character of these interactions colours the democratisation process.

One of the few points of agreement amongst analysts of Myanmar's democratic reforms is that they were the result of indigenous top down change, and not the result of pressure applied in the form of sanctions and trade embargoes by the US and the EU,<sup>134</sup> nor by the inconstant 'moral pressure' applied by ASEAN (discussed later in this chapter), nor by an un-opposable groundswell of popular opposition to the former military government,<sup>135</sup> nor by the efforts of the political opposition. It is reasonably clear that Myanmar's government-led, tightly managed process of liberalisation and democratisation is 'liberation from above' or 'regime-initiated liberalisation'. In Huntington's taxonomy, this is a 'transformation'. All of the elements in Huntington's theory of transformation appear in the case of Myanmar in the period 2008–2010.

First, there appears to have been a decision on the part of military leaders, most importantly on the part of long-time ruler Than Shwe, to effect an orderly transition from power.<sup>136</sup> A number of plausible explanations have been offered to explain Than Shwe's

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<sup>133</sup> Ibid, 590.

<sup>134</sup> Sanctions did not really deter foreign investment in Myanmar; they simply blocked Western investment. Chinese, South Korean, Thai, and Indian companies invested heavily in Myanmar, particularly in the oil and gas sectors. According to *The Diplomat*, Myanmar received some \$US 20 billion in approved foreign investment in 2010 and 2011. This investment reportedly enriched the most senior generals. See: Burma Independence Advocates, 'Burma Sanctions Regime: The Half-Full Glass and a Humanitarian Myth: A Preliminary Assessment of Political and Humanitarian Conditions under Sanctions' (8 August 2011) available at: <http://www.burmaadvocates.org/Burma%20Sanctions%20Assessment.pdf> [accessed 10 February 2012]. In the Universal Periodic Review, Myanmar's state report claimed that 'Due to the economic sanctions imposed on Myanmar, over 160 garment factories had closed, 162 foreign companies had withdrawn and over 70,000 workers, mainly women, became jobless.' The Report claimed that sanctions had become a major push factor in the trafficking arena <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/123/72/PDF/G1112372.pdf?OpenElement> paragraph 90.

<sup>135</sup> Interview Dr Myo Myo Myint, Liaison Officer, Friedrich Ebert Stiftung, Yangon, 14 November 2011, copy on file with author.

<sup>136</sup> In *The Awakening*, Emma Larkin points out that historically, Burmese military rulers often meet with untimely or ignominious demises. The founder of the Burmese army, General Aung San (father of Aung San Suu Kyi), was assassinated in 1947 just months before the independence from Britain. General Ne Win, who seized power in 1962 and ruled Burma for more than a quarter of a century, saw his family charged with plotting

decision to relinquish power. Some analysts point to the likelihood of self-interested motives, such as the increased security of a controlled transition to power-sharing managed by someone trusted (such as Thein Sein), rather than the uncertainty (and the occasionally dire consequences) of less certain transitions (such as revolution, or internal coup d'état).<sup>137</sup>

Other analysts attribute changes to the frustration of Myanmar's leaders with Chinese dominance of their economy, military acquisitions, and infrastructure. Myanmar's leaders have described tacit Chinese control of the economy as encroaching on Myanmar's sovereignty and are reportedly galled by the description of Myanmar as a Chinese 'economic colony', or as the unofficial twenty-third province of China.<sup>138</sup> Thus in order to lessen dependence in China, Myanmar's military leaders embarked on a program of reform sufficient to generate rapprochement with the West and to encourage Western interest in economic re-engagement. A final set of reasons attribute to Thein Sein and like-minded reformers a genuine wish to guide the political and economic reform the country toward a system that betters the lives of Myanmar's citizens.<sup>139</sup>

Than Shwe's choice of Thein Sein as President is significant in this regard. Thein

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to overthrow the government in 2002. Other top generals have had similar fates and few have been able to retire peacefully. Emma Larkin, *The Awakening* (11 January 2012) available at: <https://www.byliner.com/emma-larkin/stories/the-awakening> [accessed 21 November 2103].

<sup>137</sup> Joshua Kurlantzick, 'How Myanmar Changed and What It Means' (1 February 2012) *Council for Foreign Relations* available at: <http://www.cfr.org/burmamyanmar/myanmar-changed-means/p27263> [accessed 10 February 2012]. Benedict Rogers, author of *Than Shwe: Unmasking Burma's Tyrant*, has suggested that: I also think that: 'he [Than Shwe] has approved the whole reform process, because his priority is to protect himself and his family and cronies, and he has seen what happened to Mubarak, Gadhaffi and other dictators who did not reform. Chit Oo Maung, 'Recognise progress, encourage reform and keep up pressure for change—Benedict Rogers' (2 February 2012) *Yangon Press International*.

<sup>138</sup> 'Why Burma Would Turn Against China' (2 February 2012) *The Atlantic* available at: <http://www.theatlantic.com/international/archive/2012/02/why-burma-would-turn-against-china/252412/> [accessed 13 February 2012].

<sup>139</sup> Interview with Tin Maung Thann, President, Myanmar Egress Yangon, 16 November 2011, copy on file with author. This final reason is also the one offered by Aung San Suu Kyi, when she is asked by foreign media to explain the change in the military leader's attitude. In an interview with foreign media on the occasion of her being awarded an honorary doctorate by Carleton University in Canada, 2 March 2012, Suu Kyi claimed that 'it was not China, not the U.S.' who was responsible for change in Myanmar, but Thein Sein, 'and the will of the people of Myanmar'. Catherine Shanahan Renshaw, 'Democratic Transformation and Regional Institutions: the case of Myanmar and ASEAN' (2013) 32(2) *Journal of Current Southeast Asian Affairs*.

Sein carries the reputation of being someone ‘less corrupt than most of the former junta leaders and a good listener’<sup>140</sup>—that is, someone who might conceivably carry some credibility with Myanmar’s people (and the outside world) as a spearhead of reform. But Thein Sein also served as Prime Minister for the junta, and proved himself to be a loyal officer to Than Shwe—that is, ‘someone unlikely to turn against Than Shwe and his family.’<sup>141</sup> Thein Sein is also a leader near retirement, at the end of his career—thus, one might think, someone unlikely to embark upon an extreme path of reform that delegitimises the work of his own generation of rulers. As Geddes writes, military officers known for ‘correctness, adherence to rules, fairness, lack of personal ambition, and low charisma’ are often seen (by the military) as excellent choices to lead military governments, ‘because they are less likely than their more ambitious and aggressive colleagues to consolidate personal power or personalize the regime.’<sup>142</sup>

In relation to the third of Huntington’s stages, Myanmar’s period of ‘moderate liberalisation’, of uncertainty about whether the early glimmerings of reform would translate into full-blown liberalisation, was relatively short-lived. By the time of Myanmar’s second parliamentary sittings in August 2011, the balance of public opinion about the genuineness of government efforts at reform had shifted, from cynicism about the 2010 elections,<sup>143</sup> to a

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<sup>140</sup> Aung Zaw, ‘The Rut and Roar Begins in Burma’ (8 July 2011) *The Irrawaddy* available at: [http://www2.irrawaddy.org/opinion\\_story.php?art\\_id=21661](http://www2.irrawaddy.org/opinion_story.php?art_id=21661) [accessed 12 February 2012].

<sup>141</sup> Ibid.

<sup>142</sup> Barbara Geddes, ‘What Do We Know About Democratization After Twenty Years?’ (1999) 2(1) *Annual Review of Political Science* 115, 123.

<sup>143</sup> See: Francis Wade, ‘Illusion of Freedom in Myanmar’ (15 June 2011) *Asia Times Online* available at: <http://www.atimes.com/atimes/Southeast Asia/MF15Ae01.html> [accessed 3 February 2012]; Aung Zaw, ‘Burma’s inconvenient truth’ (20 May 2011) *The Irrawaddy*, available at: [http://www2.irrawaddy.org/opinion\\_story.php?art\\_id=21332](http://www2.irrawaddy.org/opinion_story.php?art_id=21332) [accessed 2 January 2012]; Human Rights Watch, ‘Burma’s President is no moderate’ (9 May 2011) available at: <http://www.hrw.org/news/2011/05/09/burma-s-new-president-no-moderate> [accessed 12 May 2011]; David Scott Mathieson, ‘Burma: demographics of disciplined democracy’ (27 May 2011), available at: <http://www.opendemocracy.net/david-scott-mathieson/burma-demographics-of-disciplined-democracy> [accessed 3 June 2011]; Glenys Kinnock, ‘Back to reality with Myanmar’ (15 May 2011) *The New York Times* (Opinion Pages) available at: [http://www.nytimes.com/2011/05/16/opinion/16iht-edletmon16.html?\\_r=3](http://www.nytimes.com/2011/05/16/opinion/16iht-edletmon16.html?_r=3)

palpable sense of inevitability about further reform and optimism about prospects for democracy.<sup>144</sup> This change seems to have come about less as a result of the roll-back of repressive laws, or the speeches of political leaders about their democratic intentions, than from the easing of bureaucratic restrictions on free communication and political discourse, much of which occurred without prior announcement and without requiring legislative reform. Until 2011, for example, the government blocked the websites of exiled Burmese media. Without fanfare, these sites were made accessible in 2011. On Democracy Day, 15 September 2011, the government unblocked many previously censored international news sites, including the BBC, Democratic Voice of Burma (DVB), and Burmese language broadcasts of Radio Free Asia and Voice of America.<sup>145</sup> The move followed an earlier relaxation of blocks on Skype, Yahoo! and YouTube.<sup>146</sup> In 2011, it was possible to display and sell pictures of Aung San Suu Kyi, an activity that a short time beforehand would have risked a jail sentence. The effect was something of a collective political sigh of relief, where people ‘talk more freely; they no longer lower their voices when discussing politics; and one hears alarm-bell words—democracy, elections, dictatorship—bandied about with an uncharacteristic ease.’<sup>147</sup>

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[accessed 12 June 2011]; Bertil Lintner, ‘Burma’s leadership change to nowhere’ (16 May 2011) *Wall Street Journal* (Opinion pages) available at:

<http://online.wsj.com/article/SB10001424052748703509104576324563051987194.html> [accessed 18 May 2011]; Burma Campaign UK, ‘No mass release of Political Prisoners—Thein Sein More Hardline than Than Shwe?’ (16 May 2011) available at: <http://www.burmapartnership.org/2011/05/no-mass-release-of-political-prisoners-thein-sein-more-hardline-than-than-shwe/> [accessed 2 June 2011].

<sup>144</sup> See Larkin, *The Awakening*, above n 136.

<sup>145</sup> Larry Jagan, ‘Late Burma Spring Signals Tentative Change’ (1 January 2012) *Asian Conversations* available at: <http://www.asianconversations.com/BurmaSpring.php> [accessed 2 March 2012].

<sup>146</sup> Jagan, ‘What Thein Sein Promised Suu Kyi’, above n 96.

<sup>147</sup> Larkin, above n 136; Interview with Daw Khin Zaw Win, Yangon, 16 November 2011, copy on file with author. Daw Khin Zaw Win was a political prisoner between 1994 and 2005. In interviews conducted in Yangon in November 2011, Zaw Win stated that ‘6 months ago, I would not have met you in the open like this, in a café, because of spies. But now, it is the dawning of a new day. There is a change in the system and Thein Sein is a decent man.’

A complicated politics surrounds the fourth stage of transformation, which is the neutralisation of standpatters. First, Thein Sein and fellow reformers seem to have engaged in a conscious process of reassuring the military about the army's continuing independence and power. The terms written into the new Constitution about the continuing importance and centrality of the armed forces in the new life of the country, and the provisions relating to the non-prosecution of army officers, are a central part of this. On 4 January 2012, Myanmar's Independence Day, President Thein Sein delivered a speech, which was directed squarely at reassuring the military of their continuing importance. The speech reiterated the central role of the *Tatmadaw* in the life of the nation. President Thein Sein referred to the 'divide and rule' racial policy of the British colonial imperialists, who had discriminated between Myanmar's ethnic peoples, 'casting doubts among the national brethren with intent to disintegrate national unity.'<sup>148</sup> He reminded Myanmar that it was the *Tatmadaw* that had delivered independence to the nation in 1948, the *Tatmadaw* that had rebuilt the nation after the 1988 uprisings, and the *Tatmadaw* that had laid down the seven-step roadmap to democracy that had resulted in the new 'people's government' that had emerged after the 2010 elections. He stated that without the *Tatmadaw* the nation would disintegrate 'and again fall under foreign subjugation.'<sup>149</sup> It seems likely that for as long as the commitment of the senior military to full-blown democratisation remains uncertain, government reforms will be punctuated by substantial acts of reassurance to the military.

Second, reformers gambled on the economic and diplomatic achievements of the new government being enough to convince waverers that support for reform would place them on the winning side of history. According to Railway Minister, Aung Min, within parliament,

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<sup>148</sup> *New Light of Myanmar*, (4 January 2012) XIX (258) available at: <<http://www.burmalibrary.org/docs12/NLM2012-01-04.pdf>> [accessed 10 January 2012].

<sup>149</sup> *New Light of Myanmar*, (4 January 2012) XIX (258) available at: <<http://www.burmalibrary.org/docs12/NLM2012-01-04.pdf>> [accessed 10 January 2012]. See: Hlaing, above n 78.

‘some 20% of ministers are liberal and 20% are hardline, with 60% sitting on the fence waiting to see who wins.’<sup>150</sup> Standpatters within government, such Vice-President Tin Aung Myint Oo,<sup>151</sup> were reported to have fought hard against reformers on key issues such as the release of political prisoners.<sup>152</sup> One analyst credits the President’s courage in persisting with liberalisation in the face of standpatter resistance, to the success of peace talks with the ethnic minorities.<sup>153</sup> Around such successes, momentum for further reform gathered, and moves toward liberalisation drew yet more support, increasing the sense of inevitability about the process toward democratisation. International approbation for the President’s reform program also played a part in emboldening reformers to undertake further measures in the face of opposition.<sup>154</sup> The state-run media reported prominently on visits to Myanmar by US Secretary of State Hillary Clinton, former presidential candidate John McCain, former vice-presidential candidate Joe Lieberman and Senate Minority Leader Mitch McConnell, French Foreign Minister Alain Juppe and British Foreign Secretary William Hague. Myanmar’s politicians referred frequently to world leader’s cautious expressions of optimism about the prospects for political reform in Burma:

The US and the European Union have expressed recognition and support of the democratic reforms. Now there are signs that they are willing to review and reconsider to lift the sanctions and restrictions that they have unilaterally imposed upon Myanmar in the last 20 years.<sup>155</sup>

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<sup>150</sup> Larry Jagan, ‘Bitter Struggle Puts Reform Process at Risk’ (7 February 2012) *Bangkok Post* (Opinions) available at: <http://www.bangkokpost.com/opinion/opinion/278587/bitter-struggle-puts-reform-process-at-risk> [accessed 2 March 2012]. Reformers include: Thein Sein (President), Thura Shwe Mann (the speaker of the lower house), Aung Min (Railway Minister, responsible for peace talks with several armed ethnic groups), U Tint Swe (Head of the Press Scrutiny and Registration Department).

<sup>151</sup> Vice President Tin Aung Myint Oo is reportedly allied with Kyaw Hsan, the Information Minister, Khin Aung Myint, Speaker of the Upper House and Aung Thaung, the former industry minister, now a leading member of the ruling Union Solidarity and Development Party (USDP).

<sup>152</sup> Jagan, above n 150.

<sup>153</sup> Ibid.

<sup>154</sup> Zaw, ‘Burma's inconvenient truth,’ above n 143.

<sup>155</sup> U Soe Thane, who lead Myanmar's first official delegation at the World Economic Forum after five decades of isolation. Quoted in: Tomasz Janowski and Michele Sani, ‘Myanmar shift to democracy not over, more

Despite these internal and external indicators of confidence in Myanmar's democratic future, in the period 2010–2012, great uncertainty remained. Any failure on the part of the government would inevitably have emboldened standpatters. As civil society leader Nay Win Maung maintained in 2011: 'Thein Sein means change, but it's just as likely the situation ends in a military coup.'<sup>156</sup>

The final stage of transformation, the cooptation of the opposition, resulted from the decision on the part of the NLD, and its key leader Aung San Suu Kyi, to soften their stance towards the regime, and to accept the government's overtures to work together toward the goal of multi-party democracy.<sup>157</sup> The new government's strongest claim to credibility—both internally and externally—was Aung San Suu Kyi's endorsement of the government's path of reform. As opposition leader and former political prisoner, Ms. Cho Cho Kyaw Nyein said: '[w]hen I talk to Aung San Suu Kyi, she says, "Forget the past." She says, "Have faith in Thein Sein." If she says that, we must have faith in him.'<sup>158</sup>

Suu Kyi's endorsement of a path of gradual reform, without accountability for the acts of the former military rulers, was critical to the success of transformation. It indicated to the military that the opposition would behave 'responsibly' in the transition toward democracy. In the past, Suu Kyi had openly defied the government by orchestrating unlawful gatherings and rallies and organising campaigns of civil disobedience.<sup>159</sup> If the military held the view

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reforms ahead – minister' (28 January 2012) *Reuters*, available at: <http://in.news.yahoo.com/myanmar-shift-democracy-not-over-more-reforms-ahead-135315799.html> [accessed 13 February 2014].

<sup>156</sup> Larkin, above n 136.

<sup>157</sup> Huntington, 'How Countries Democratize', above n 21, 601.

<sup>158</sup> Myers, above n 122.

<sup>159</sup> See: Philip Kreager, 'Aung San Suu Kyi and the Peaceful Struggle for Human Rights in Burma' (1991) in Michael Aris (ed), *Freedom from Fear and Other Writings* (1991) London, Penguin Publishing, 284-321.

that ‘Burma’s Gandhi’<sup>160</sup> intended to return to these tactics, then the potential for derailment—a return to power by hardliners—would have substantially increased. The NLD appears to have been aware of this, and adopted policies of moderation and co-operation with the government, agreeing to be involved as a junior partner in the process of democratic reform. For example, the NLD ended its twenty-year old demand for a reinstatement of the 1990 election results. Instead, it made demands which aligned with the government’s own interests and which the government was able to fulfil without fundamentally weakening its grip on power, such as pressuring the military to end ethnic conflict, and calling for the release of political prisoners. In doing so, the NLD managed to contain the demands of its own hardliners, who consistently argued against any collaboration with the government. At the end of 2012, the result was an intricate dialectical relationship between Thein Sein’s government and the NLD.

Given the experiences of how other military regimes have ended, Myanmar’s rapid experience of democratisation ought not to be surprising. Moves towards democratisation from military regimes end in one of two ways: with rapid democratisation, or with the reassertion of rule by the military. Indeed, so familiar is the pattern of democratisation in the wake of military dictatorship that Huntington has provided a set of ‘Guidelines for Democratizers’ during transformations, which include the following:

1. Secure your political base. As quickly as possible place supporters of democratisation in key power positions in the government, the party, and the military;
2. Maintain ‘backward legitimacy’, that is, make changes through the established procedures of the nondemocratic regime and reassure standpatter groups with symbolic concessions, following a course of two steps forward, one step backward;
3. Gradually shift your own constituency so as to reduce your dependence on government groups opposing change and to broaden your constituency in the direction of opposition groups supporting democracy;

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<sup>160</sup> *The London Times*, 8 August 1989, quoted in Kreager, *ibid.*

4. Be prepared for the standpatters to take some extreme action to stop change (for example, a coup attempt)—possibly even stimulate them to do so—and then crack down on them ruthlessly, isolating and discrediting the more extreme opponents of change;
5. Seize and keep control of the initiative in the democratisation process. Only lead from strength and never introduce democratisation measures in response to obvious pressure from more extreme radical opposition groups;
6. Keep expectations low as to how far change can go; talk in terms of maintaining an ongoing process rather than achieving some fully elaborated democratic utopia;
7. Encourage the development of a responsible, moderate opposition party, which the key groups in society (including the military) will accept as a plausible non-threatening alternative government;
8. Create a sense of inevitability about the process of democratisation so that it becomes widely accepted as a necessary and natural course of development (even if to some people it remains an undesirable one).<sup>161</sup>

Of these guidelines, the final is perhaps the most important. On this count, Thein Sein and his advisers have moved quickly, through the speeches of the President and his ministers, and through the state-run media, to create a narrative of inexorable reform. Before domestic and international audiences, reform has been described as ‘irreversible’,<sup>162</sup> ‘incremental, systematic and dynamic.’<sup>163</sup> Myanmar is described by President Thein Sein as being ‘on the right track’ where democracy ‘can only move forward’ without ‘any intention to draw back,’<sup>164</sup> so that democracy can give ‘a brighter future for our people.’<sup>165</sup> On 4 January 2012, the *New Light of Myanmar* claimed that Myanmar’s reforms were ‘inevitable in light of the mainstream of international politics’ where ‘about 60 per cent of world nations are

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<sup>161</sup> Huntington, ‘How Countries Democratize’, above n 21, 601.

<sup>162</sup> For example, Foreign Minister U Wunna Maung Lwin said to foreign media in Delhi, in a speech titled: ‘Myanmar: A Country in Democratic Transition’, that ‘the reform process that we have started is irreversible. There will be no turning back or derailment in the road to democracy.’ Bibhudatta Pradhan and Daniel Ten Kate, ‘Myanmar Confident of Free and Fair Elections, Minister says’ (25 January 2011) *Bloomberg Businessweek*, available at: <<http://www.businessweek.com/news/2012-01-25/myanmar-confident-of-free-and-fair-elections-minister-says.html>> [accessed 3 February 2011].

<sup>163</sup> Ibid.

<sup>164</sup> Lally Weymouth, ‘Thein Sein on the sweeping changes he has brought to Burma, including freedom for Aung San Suu Kyi’ (19 January 2012) *Slate Magazine* available at: <[http://www.slate.com/articles/news\\_and\\_politics/foreigners/2012/01/myanmar\\_president\\_thein\\_sein\\_s\\_first\\_in\\_interview\\_aung\\_san\\_suu\\_kyi\\_s\\_freedom\\_sweeping\\_reforms\\_and\\_normalized\\_relations\\_with\\_us\\_among\\_topics\\_single.html](http://www.slate.com/articles/news_and_politics/foreigners/2012/01/myanmar_president_thein_sein_s_first_in_interview_aung_san_suu_kyi_s_freedom_sweeping_reforms_and_normalized_relations_with_us_among_topics_single.html)> [accessed 12 February 2012].

<sup>165</sup> Ibid.

democracies that have chosen their governments through elections.’ Present shortcomings in Myanmar’s democracy, the editorial implied, would be progressively addressed as the political system evolved.<sup>166</sup> Regarding the Constitution, for example, the editorial reported that: ‘[t]here is no constitution in the world that does not need to be amended at all. The constitution of Myanmar will be amended in accord with the law if necessary depending on necessary time and circumstances.’<sup>167</sup>

The editorial in *the New Light of Myanmar* on 4 January 2012 also contrasted the ‘violent conflicts, protests and bloodshed’ that have marked other country’s transitions to democracy, with Myanmar’s ‘rapid, peaceful transition with mutual understanding and trust and negotiations as directed by its former rulers.’ The editorial asked:

Can there be a more efficient, correct way? Hence, the Myanmar government can daringly disclose that there is no way to deviate from its democratic transition. The President and other responsible leaders have reassured the international community that they will never turn back from the country’s changes and reforms.<sup>168</sup>

### **4.3 Regionalism and the Consolidation of Democratic Transformation**

Regionalism influences the democratisation of authoritarian states in two possible ways. The first is when the state is located within a geographic zone that is experiencing rapid revolutionary political change, and the state becomes swept up in ‘the contagion’ effect of democracy.<sup>169</sup> The second is where, as in the case of Europe and to a lesser extent the Americas, the region possesses organisations which set democracy as a condition of membership, and the desirability of membership provides an incentive for reform. Neither of these applies in the case of Myanmar’s democratic transformation.

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<sup>166</sup> *New Light of Myanmar*, (4 January 2012) XIX (258) available at: <<http://www.burmalibrary.org/docs12/NLM2012-01-04.pdf>> [accessed 10 January 2012].

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Peter T. Leeson and Andrea M. Dean, ‘The Democratic Domino Theory: An Empirical Investigation’ (2009) 53(3) *American Journal of Political Science* 533–551.

In the previous section, I emphasised the endogenous causes of democratisation in Myanmar. I explained Myanmar's transformation in the period 2010–2012, primarily on the basis of re-calculations of the economic and security interests of Myanmar's military elites.<sup>170</sup> This finding would come as no surprise to scholars of Southeast Asia. While theories of democratic 'contagion' have helped to explain the temporal and spatial clustering of third-wave democratic transitions in post-communist Eastern Europe (1989–2003), or fourth wave uprisings in the 'Arab Spring' (2008–),<sup>171</sup> there has been no strong evidence of a similar pattern of democratic diffusion amongst Myanmar's neighbours.<sup>172</sup> Myanmar has been impervious, for example, to any influence towards democratisation from Thailand, even though the countries share a long border, a national religion (Buddhism), and deep economic and military ties. One can conclude that a 'neighbourhood effect' as a direct causal element of Myanmar's democratic transformation is negligible.<sup>173</sup>

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<sup>170</sup> Phillippe Schmitter, 'An Introduction to Southern European Transitions from Authoritarian Rule: Italy, Greece, Portugal, Spain and Turkey' (1986) in G. O'Donnell, P. Schmitter, and L. Whitehead, *Transitions from Authoritarian Rule: Southern Europe* (1986) Baltimore, John Hopkins University Press.

<sup>171</sup> Zachary Elkins and Beth Simmons, 'On Waves, Clusters, and Diffusion: A Conceptual Framework' (2005) 598 *Annals of the American Academy of Political and Social Science* 33, 33; Dan Slater, 'Democracy and Dictatorship Do Not Float Freely: Structural Sources of Political Regimes in Southeast Asia' (2008) in Erik Kuhonta, Dan Slater and Tuong Vu (eds), *Southeast Asia in Political Science: Theory, Region and Qualitative Analysis* (2008) Stanford, Stanford University Press, 55-79.

<sup>172</sup> In terms of regional moves toward democracy, to the west of Myanmar, one could perhaps point to Malaysia's 2008 elections, which were preceded by widespread protests and demands for electoral reform, and which were followed by Prime Minister Najib Razak's announcement of repeal of colonial-era laws on security, free speech and assembly. A few years later, the fortunes of Singapore's ruling PNP party faltered, with the party receiving a record low vote of 60 per cent in the 2010 polls. To Myanmar's east, one might point to the experience of Bangladesh. Bangladesh's history of British colonisation, followed by the failure of democracy and long periods of military rule, which ended in liberal reform by a military-backed government, and finally to competitive elections under a new constitution in 2008, might perhaps be seen as some sort of precursor to events in Myanmar. However, these events are far from representing the sort of 'uncoordinated interdependence' towards democratization described by political scientists such as Elkins and Simmons (ibid).

<sup>173</sup> Indeed, one might even argue that the perceived chaos of democracy in Thailand, with its multiple *coup d'états* and the prosecution of the country's former leaders for corruption, might in fact have swayed Myanmar's generals away from democracy. Saitip Sukatipan, 'Thailand: the Evolution of Legitimacy' (1995) in Mutiah Alagappa (ed), *Political Legitimacy in Southeast Asia: The Quest for Moral Authority* (1995) Stanford, Stanford University Press, 193-223.

At the end of this chapter, however, I argue that there is some evidence that Indonesia was influential on the course of Myanmar's democratisation, because of historical parallels between the two countries, and the position Indonesia occupies as a highly legitimated international actor. This is a different argument to that concerning diffusion. The latter references a kind of democratic *zeitgeist*, which shapes the expectations of actors at all levels within the state, particularly 'the masses'. The former refers to specific processes of interaction that occur between bureaucrats, legislators and members of the executive in different countries, leading to the adoption of similar policies and institutions within a particular temporal frame.

Regarding regional organisations and democratic conditions of membership promoting reform, we will see in the following section that the low levels of democracy amongst ASEAN's members, the fact that the Association has not made democracy a condition of membership, and Myanmar's lack of economic and security dependence on ASEAN because of its strong relationship with China (and to a lesser extent India), severely limited ASEAN's ability to influence Myanmar along a path toward democratisation.

My argument in this chapter is that the causal factors relevant to democratic transitions are not the same as those relevant to the consolidation and survival of democracy. In the case of Myanmar's transition to democracy (meaning the movement from a system of authoritarian rule to one of institutionalised, multi-party governance), regional influences were negligible. But in the case of Myanmar's democratic *consolidation*, I suggest that regional influences are not negligible—even where the regional organisation in question is, as in the case of ASEAN, not highly democratic. The explanation for this lies mainly in the problem of new democracies and credible commitments.

Newly installed democratic institutions are extremely fragile, and not all new democracies take root. Reversions to authoritarianism are common.<sup>174</sup> Indeed, Power and Gasiorowski estimate that one-third of all new democracies fail within the first five years of their establishment.<sup>175</sup> In some cases, newly elected democratic leaders exploit their power at the expense of democratic institutions (as in the case of the democratically elected Suharto, in Indonesia).<sup>176</sup> In other cases, those left out of power seek to regain control by attempting to destroy the new institutions (as has the military in Thailand, on multiple occasions).<sup>177</sup> The uncertainties of the transition period (how power will be shared, and who the players are) exacerbate these threats to democracy.

Where the transitioning regime is a former military dictatorship, as in the case of Myanmar, the military stands as the most obvious potential spoiler of a nascent democracy.<sup>178</sup> Pevehouse describes two dynamics that can induce the military to reassert itself in the wake of democratic transition. The first is where the military feels that the new democracy's leaders and institutions are too weak or disorganised to protect the state, and steps in to protect the stability and unity of the nation. The second is where attempts to establish civilian supremacy threaten the military, either by decreasing the military budget or by prosecuting members of the military for crimes committed during past periods of military rule.<sup>179</sup>

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<sup>174</sup> Scott Mainwaring, 'Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues' (1992) in Scott Mainwaring, Guillermo O'Donnell, and Arturo Valenzuela (eds), *Issues in Democratic Consolidation* (1992) South Bend, University of Notre Dame Press, 294-342.

<sup>175</sup> Timothy Power and Mark Gasiorowski, 'Institutional Design and Democratic Consolidation in the Third World' (1997) 30 *Comparative Political Studies* 123-155.

<sup>176</sup> Mochtar Pabottingi, 'Historicizing the New Order's Legitimacy Dilemma' (1995) in Alagappa (ed), above n 27 224-256.

<sup>177</sup> Sukatipan, above n 173.

<sup>178</sup> Felipe Aguero, 'Democratic Consolidation and the Military in Southern Europe and South America' (1995) in Richard Gunther, Hans-Jürgen Puhle and P. Nikiforos Diamandouros (eds), *The Politics of Democratic Consolidation* (1995) Baltimore, John Hopkins University Press.

<sup>179</sup> Pevehouse, above n 17, 31.

Pevehouse writes that a ‘delicate balance’ is required, between ‘controlling a post-authoritarian military force while simultaneously holding their loyalty to the new regime.’<sup>180</sup>

This balance is extremely difficult to achieve, because at the same time, in order to consolidate the democracy, the new government must convince ‘the people’ that it is genuinely committed to reform.<sup>181</sup> Actions which reassure the military—such as maintaining the military’s budget and desisting from prosecution for offences under the old regime—are actions unlikely to convince the masses that the new government is genuine about reform. All new governments suffer to an extent from problems of credibility and low expectations about their intention and capacity to effect reform. But this is especially the case where the new government is composed largely of officers of the old order, and where the old order has a track record of making limited moves toward liberalisation, which are then followed by rollbacks. Negative perceptions undermine prospects for consolidation. They ‘perpetuate the condition of fragility’ by decreasing the level of trust between political sectors, and reducing the motivation for full democratisation.<sup>182</sup> According to Gunther, Puhle and Diamandouros, this kind of dynamic explains why so many leaders in new democracies turn quickly to authoritarianism. It is not because of preferences or greed, but because of the instability that results from inability to make credible commitments about democracy in the consolidation phase.<sup>183</sup>

In this chapter, I argue that ASEAN holds significant power to assist the consolidation of Myanmar’s democracy. First, I argue that ASEAN, post-Charter, is in a position to assist Myanmar in making credible commitments about democracy and hence increase the

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<sup>180</sup> Ibid.

<sup>181</sup> Pevehouse, above n 17, 36.

<sup>182</sup> Laurence Whitehead, ‘The Consolidation of Fragile Democracies; A Discussion with Illustrations’ (1989) in R. Pastor (ed), *Democracy in the Americas* (1989) New York, Holmes and Meier, 79-95, 94.

<sup>183</sup> Richard Gunther, Hans-Jürgen Puhle and P. Nikiforos Diamandouros, ‘Introduction’ (1995) in Richard Gunther, Hans-Jürgen Puhle and P. Nikiforos Diamandouros (eds), *The Politics of Democratic Consolidation* (1995) Baltimore, John Hopkins University Press, 9.

confidence of two key groups—the public, and the opposition—about the prospects for successful consolidation. Second, I argue that ASEAN, and particularly its leading democracy, Indonesia, is the primary ‘reference group’ to which Myanmar’s leaders will turn when seeking models for new democratic institutions. Before I develop these arguments, however, it is necessary to traverse the history of Myanmar’s engagement with ASEAN, and to note the limited influence of the regional Association in encouraging democratic transition. I pay particular attention to the pressure exerted on Myanmar not to take the chair of ASEAN in 2006, and the consequences of this.

#### ***4.3.1 Modes of Engagement: Myanmar and ASEAN***

ASEAN leaders are wont to characterise the association as a ‘family’. The trope is in some ways a useful descriptor of relations between Myanmar and the regional organisation. For ASEAN, the potential value of having Myanmar within the family has always been very clear; because of Myanmar’s location within the region, its geostrategic importance and its rich natural resources. But since joining ASEAN in 1997, Myanmar has been ASEAN’s errant adolescent child; wayward, obstinate, immune to parental influence or censure, and something of a blight on the reputation of the family.

Having little economic leverage over Myanmar, ASEAN has attempted to use the ‘moral influence’ of its relationship to persuade Myanmar’s leaders to govern with decency. Individually and as an Association, ASEAN members have cajoled, encouraged, and supported Myanmar to become less overtly authoritarian. At times, pressure on ASEAN from the EU and the US has forced ASEAN to explicitly condemn Myanmar. But there has never been any real doubt on the part of ASEAN that Myanmar should remain part of the family, and that—in its own time—Myanmar would grow into responsible adulthood. This is because

of ASEAN's belief that Myanmar 'would rather remain a part of the ASEAN family than be by itself a buffer state sandwiched between two rising powers.'<sup>184</sup> The Association has never endorsed the sanctions policy implemented by Western countries at the behest of Aung San Suu Kyi and her supporters within their domestic constituencies.<sup>185</sup> Indeed, apart from the Association's outburst of opprobrium after the suppression of the Saffron revolution, it is difficult to discern any real moral condemnation on the part of ASEAN of Myanmar's generals. For which ASEAN country has not struggled to resolve issues of historical authoritarianism, the role of the military within the state, the reconciliation of restless ethnic minorities, or the management of development and democracy?<sup>186</sup> The lesson learnt by ASEAN nations is that the source of liberalisation and democratisation is indigenous, and that external pressure is at best irrelevant, and at worst counter-productive.

ASEAN's original five members had long held the view that all geographically proximate members of the region should belong to the regional association.<sup>187</sup> Only then, it was thought, could the Association truly represent 'one Southeast Asia' on the international stage.<sup>188</sup> Burma was offered membership of ASEAN at the time of its creation, but declined. From Burma's perspective, in 1967, ASEAN was an anti-communist organisation, comprised wholly of anti-communist regimes, the institutional heir to the explicitly anti-communist

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<sup>184</sup> Singapore Ministry of Foreign Affairs Press Release, 'Transcript of reply by Singapore's Minister George Yeo to Questions in Parliament' (22 October 2007), available at: <[http://www.sgmfa.com/content/mfa/overseasmission/washington/newsroom/press\\_statements/2007/200710/press\\_200710\\_02.html](http://www.sgmfa.com/content/mfa/overseasmission/washington/newsroom/press_statements/2007/200710/press_200710_02.html)> [accessed 2 March 2012].

<sup>185</sup> Ibid. Singapore's Minister George Yeo stated that ASEAN has recognised the ineffectiveness of sanctions in circumstances where 'Myanmar's giant neighbours, China and India, have kept the back and side gates open.'

<sup>186</sup> Dr. Termsak Chalermpanupap, Assistant Director for Programme Coordination and External Relations ASEAN Secretariat, Paper presented at the Asia-Pacific Roundtable, Kuala Lumpur (1 June 1999) <<http://www.asean.org/news/item/asean-10-meeting-the-challenges-by-dr-termsak-chalermpanupap-assistant-director-for-programme-coordination-and-external-relations-asean-secretariat-2>> [accessed 3 March 2012].

<sup>187</sup> Though the origins of this idea are unclear—the desire is not expressed anywhere in ASEAN's founding documents. See Hermann Kraft, 'ASEAN and Intra-ASEAN Relations: Weathering the Storm?' (2000) 13(3) *Pacific Review* 453. The Bangkok Declaration of 8 August 1967, states that ASEAN is 'open for participation to all States in the South-East Asian Region subscribing to the [Association's] aims, principles and purposes'.

<sup>188</sup> C.K. Wah, 'ASEAN: The Long Road to 'One Southeast Asia' (1997) 5(1) *Asian Journal of Political Science* 1.

Colombo Plan (1951) and the Association of Southeast Asia (1961) and an integral part of Washington's strategy for containing communism, outlined in the Nixon Doctrine.<sup>189</sup> China had declared that ASEAN was a tool of United States imperialists aiming at containing China and other communist powers.<sup>190</sup> Burma, committed to a precarious policy of non-alignment, had no wish to antagonise her powerful neighbour to the North by joining ASEAN. The end of the Cold War, and the United States' withdrawal from Vietnam, mitigated regional tensions and led to Myanmar's entry into ASEAN in 1997, together with Laos and Vietnam. For Myanmar, closer association with ASEAN offered Myanmar's government, the SLORC, the benefits of legitimacy, a degree of protection from external criticism, and the prospect of greater economic interaction with Southeast Asian states.

ASEAN, for its part, hoped that membership in the Association would encourage Myanmar's regime along a path of controlled liberalisation through trade and interaction.<sup>191</sup> Between 1990 and 1997, ASEAN employed a strategy of 'constructive engagement' with Myanmar, meaning a mode of dialogue and persuasion, and the pursuit of strategic and economic interests, with concomitant encouragement of 'moderate' reform along the lines of liberal democracy.<sup>192</sup> Constructive engagement meant access for Thai, Malaysian, Singaporean and Indonesian businesses to Myanmar's raw materials and markets. The 'constructive' aspect of engagement was intended to be two-pronged: (i) the socialisation of Myanmar's elite toward good governance and gradual liberal reform; and (ii) financial

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<sup>189</sup> The Nixon Doctrine is examined in Virginia Brodine and Mark Selden (eds), *Open Secret: The Kissinger-Nixon Doctrine in Asia* (1972) New York, Harper & Row. On United States perceptions of ASEAN as a component of the Nixon Doctrine, see *United States Foreign Policy for the 1970's: Building for Peace—A Report by President Nixon to the Congress*, 25 February 1971, Washington, DC, US Government Printing Office, 79-80.

<sup>190</sup> Thailand and the Philippines both allowed US forces to prosecute the Second Indochina War from their military bases. Jürgen Haacke, 'Myanmar and ASEAN' (2006) 46(381) *Adelphi Papers* 41-60, 42.

<sup>191</sup> Lee Jones, 'ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement' (2008) 4(3) *Asian Security* 271, 275.

<sup>192</sup> Stephen McCarthy, 'Burma and ASEAN: Estranged Bedfellows' (2008) 48(6) *Asian Survey* 911. For sceptical views on the effectiveness of the policy, see: Deborah Toler, 'Constructive Engagement: Reactionary Pragmatism at Its Best' (1982) 12(3/4) *Issue: A Journal of Opinion* 11; Sam C. Nolutshungu, 'Sceptical Notes on 'Constructive Engagement' (1982) 12(3) *Issue: A Journal of Opinion* 3.

investment, hopefully leading to socio-economic development and the creation of a democratically-disposed middle class. ‘Constructive engagement’ stood in marked contrast to the outright disapprobation, threats and sanctions employed by the United States and the European Union.<sup>193</sup> Underpinning the policy was ASEAN’s uncertainty about China’s growing power and regional ambitions and the imperative of bringing Myanmar within ASEAN’s sphere of influence, rather than leaving her to China.<sup>194</sup>

From the perspective of Myanmar’s ruling elite, ‘constructive engagement’ and even ‘enhanced interaction’ was perfectly suited to achieving the goals of increasing regional investment in the country, while deflecting criticism from its internal politics. Myanmar saw the benefits of broadening its economic relationships, rather than limiting itself to an uneven dependence on China. The SPDC did not accept that the goal of constructive engagement was to change Myanmar. According to Myanmar’s Foreign Minister Ohn Gyaw, constructive engagement meant that ‘ASEAN would see Myanmar as an equal.’<sup>195</sup>

ASEAN faced strong pressure from the US and the EU to refuse Myanmar’s admission to the Association until the regime had fulfilled certain conditions towards the restoration of democracy.<sup>196</sup> Outwardly, ASEAN’s existing members strongly rejected external attempts to steer the course of ASEAN policy,<sup>197</sup> and it is possible that these

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<sup>193</sup> In March 1997, the EU withdrew special trading privileges previously extended to Myanmar. In May 1997, the US announced a ban on investment by American businesses in Myanmar. When Myanmar’s leaders released Aung San Suu Kyi from house arrest on 19 July 1995, they claimed that ‘constructive engagement’ had been vindicated: see Kraft, ‘ASEAN and Intra-ASEAN Relations: Weathering the Storm?’ (2000), above n 187.

<sup>194</sup> ‘ASEAN Prefers Soft Talk to Threats in Dealing with Yangon’ (26 August 1992) *The Straits Times*.

<sup>195</sup> *Far Eastern Economic Review* (15 August 1996) 36, quoted in: Kraft, ‘ASEAN and Intra-ASEAN Relations: Weathering the Storm?’ (2000)

‘ASEAN and Intra-ASEAN Relations: Weathering the Storm?’ (2000), above n 187, 464.

<sup>196</sup> *The Sunday Times* reported a statement by the US State Department’s spokesperson, declaring that the US had ‘no objection to Laos and Cambodia. We have an objection to Burma.’ (6 April 1997) quoted in Wah, above n 188.

<sup>197</sup> The Permanent Secretary of Singapore’s Foreign Ministry stated in April 1997 that ‘We have always adopted the attitude that we do not impose any political conditions on entry. Instead, the criteria today are, first, geographical, and second, economic, and Myanmar meets both the geographical and economic criteria.’ Foreign Broadcast Monitor No 84/97 (15 April 1997).

attempts, and the desire of Southeast Asian leaders to be seen to resist them, in fact encouraged ASEAN's admission of Myanmar.<sup>198</sup> In his opening keynote address to the Annual Ministerial Meeting in 1997, welcoming new ASEAN members Myanmar and Laos, Malaysian Prime Minister Mahathir referred directly to the pressure that had been put on ASEAN by the US and the EU to 'pass judgement, deny membership and apply pressure on a potential candidate so as to force that country to remain poor and therefore unstable.' He said, 'ASEAN must resist and reject such attempts at coercion' which are 'not a part of the ASEAN way' and that 'No one, but no one, should assume that only they know the solutions to all problems. They have failed far too often for us to be convinced that only they know what is right and what is wrong.'<sup>199</sup>

Responding to Mahathir's speech, Myanmar's Minister for Foreign Affairs, U Ohn Gyaw, emphasised Myanmar's commitment to 'the principles and objectives of the Association' and Myanmar's national goal of achieving a 'peaceful, prosperous, modern and developed Myanmar' via 'harmony in political development, social cohesiveness and economic growth.'<sup>200</sup> Not all ASEAN members were as supportive of Myanmar's admission as Malaysia, which together with Singapore had pushed domestic firms to invest in Myanmar in the hope that 'ASEAN capital would lift the country up.'<sup>201</sup> In October 1996, for example,

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<sup>198</sup> Then-Prime Minister Mahathir Mohamad asserted that he had 'fought hard for Myanmar to be admitted into ASEAN.' See: 'Malaysia's Mahathir Calls for Myanmar to Release Aung San Suu Kyi' (17 June 2005) *Agence France- Presse*; Ruukun Katanyuu, 'Beyond Non-Interference in ASEAN: The Association's Role in Myanmar's National Reconciliation and Democratization' (2006) 46(6) *Asian Survey* 825.

<sup>199</sup> Keynote Address By The Honourable Dato' Seri Dr. Mahathir Mohamed, Prime Minister of Malaysia (24 July 1997) available at: <<http://www.asean.org/3992.htm>> [accessed 2 March 2012].

<sup>200</sup> Opening Statement By H.E. U Ohn Gyaw Minister for Foreign Affairs of Myanmar (24 July 1997) available at: <<http://www.asean.org/communities/asean-political-security-community/item/opening-statement-by-he-u-ohn-gyaw-minister-for-foreign-affairs-of-myanmar>> [accessed 2 March 2012].

<sup>201</sup> Lee Jones, 'ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement' (2008), above n 191, 274. Other ASEAN leaders were not as supportive of Myanmar. In the wake of Myanmar's renewed suppression of student protests in Yangon in September 1996, for example, and the closure of universities in December 1996, the Philippines President Fidel Ramos queried the effectiveness of 'constructive engagement' and suggested that the policy might be reviewed at the forthcoming ASEAN informal summit.; Donald M. Seekins, above n 58,16.

Thailand's Foreign Minister suggested that the SLORC should bring democracy to Myanmar before it was admitted as a member of ASEAN.<sup>202</sup>

Nonetheless, in July 1997, Myanmar did become a member of ASEAN.<sup>203</sup> On balance, most of ASEAN's original members held the view that constructive engagement would be enhanced if Myanmar were a member. Malaysian Prime Minister Mahathir Mohamad was a particularly strong proponent of Myanmar's inclusion in ASEAN, which he viewed as a way of 'hav[ing] a very positive effect on them,' exposing them to 'how Malaysia manages its free market and its system of democracy,' which would make them less 'afraid of the democratic process' and 'over time, they will tend to give more voice to the people ... [T]hey become a member first, then put their house in order.'<sup>204</sup> Mahathir argued that foreign investment and economic development would change the generals' 'attitude and perception' regarding democratic transformation.<sup>205</sup> Indonesia, under President Suharto, largely shared Malaysia's view in this regard.

In the period 1997–2012, Myanmar's engagement with ASEAN constituted its most important and sustained multilateral engagement. Bilateral relations with China, India and Bangladesh, though of consequence economically and for Myanmar's security, did not generate the web of institutional and diplomatic linkages spawned by Myanmar's ASEAN membership. In October 1996, even before she became a member of ASEAN, Myanmar had formed a 'Steering Committee on ASEAN Affairs' under the Department of Foreign Affairs. After assuming membership, Myanmar participated in almost all activities at various institutional levels as required by ASEAN from the summits to ministerial meetings to officials meetings. This included 'first track' diplomacy (between government officials) and

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<sup>202</sup> Ibid.

<sup>203</sup> Myanmar's application for admission to ASEAN was received by the Chairman of the ASEAN Standing Committee (Malaysia) one month after it became an ASEAN Observer in July 1996.

<sup>204</sup> 'Different concepts of democracy' (1 May 1997) 5(2) *The Irrawaddy*.

<sup>205</sup> Mahathir to Make Business Visit to Myanmar, No Talks with Suu Kyi' (16 August 2002) *Burma Today*, <[http://www.burmatoday.net/newsarchives/news\\_020816\\_mahathir.htm](http://www.burmatoday.net/newsarchives/news_020816_mahathir.htm)> [accessed 1 January 2012].

‘second-track’ engagement (between ‘think-tanks’ such as the Myanmar Institute of Strategic and International Studies (Myanmar ISIS) and its regional counterparts). First track engagement included the establishment, within each of Myanmar’s Ministries, of an ‘ASEAN Unit’ to coordinate ASEAN-related activities and to liaise with other ministries on ASEAN matters.

Kyaw Tint Swe and Aung Htoo write: ‘These units are backbones of the senior officials who participate in various ASEAN fora.’<sup>206</sup> Indeed, ASEAN membership necessitated the establishment of scores of government committees and sub-committees to assist Myanmar’s ministers in the cooperation and coordination of work in areas such as the ASEAN Industrial Cooperation Schemes (AICO)<sup>207</sup> and the ASEAN Free Trade Area (AFTA). Myanmar set up a National Committee on Informational and Culture, a National Committee on Science and Technology, and a National Committee on Social Development, a National Commission for Environmental Affairs, the Central Committee of Drug Abuse and Control, and the Public Service Selection and Training Board, to ‘be in line with existing ASEAN committees.’<sup>208</sup> The work of these units, committees and sub-committees was to coordinate with the relevant ASEAN committees and sub-committees. ‘Second track’ engagement, between the region’s analysts, policy advisers, civil servants, academics and military officials, led to participation in workshops, conferences and meetings between ASEAN state representatives.

Yet the dividends of ‘constructive engagement’, in terms of reform within Myanmar, were difficult to discern. In 1998, in the wake of the Asian financial crisis, Thailand (under a new liberal government) moved to reorient ASEAN policy toward Myanmar. This occurred against a backdrop of recurrent clashes along the Thai-Myanmar border, growing numbers of

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<sup>206</sup> Kyaw Tint Swe and Aung Htoo, ‘Myanmar in ASEAN: Cooperation for Development’, Proceedings of the Symposium on ‘Interaction for progress: Myanmar in ASEAN, Myanmar (1998), 177.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

political and ethnic minority refugees, the unchecked flow of drugs from Myanmar into Thailand,<sup>209</sup> and the fact that, from 1988 onwards, Thailand became the theatre of choice for Myanmar's dissidents attempting to draw the world's attention to their plight.<sup>210</sup> In this context, Thailand called for a new policy of 'flexible engagement', meaning a new permissiveness to publicly comment on and collectively discuss fellow ASEAN members' domestic policies where these have either regional implications or the potential to adversely affect other ASEAN members.<sup>211</sup> The Philippines supported the Thai proposal, but the perception of other ASEAN members was that the policy was ambiguous and lacked criteria for its application, and would in likelihood lead only to mistrust and resentment. To most members, it seemed a policy that would have precisely the opposite effect of an adherence to the 'ASEAN way', to which some ASEAN leaders attributed three decades of peace and stability in Southeast Asia.<sup>212</sup> Thus, the policy of constructive engagement was maintained with an additional element: 'enhanced interaction'. 'Enhanced interaction' meant that

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<sup>209</sup> Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (1993) London, Zed Books Ltd; Bertil Lintner, *Burma in Revolt: Opium and Insurgency since 1948* (1994) Boulder, Colo., Westview Press; Hazel J. Lang, *Fear and Sanctuary: Burmese Refugees in Thailand* (2002) New York, Ithaca; Pim Koetsawang, *In Search of Sunlight: Burmese Migrant Workers in Thailand* (2001) Bangkok, Orchid Press.; Yuen Foong Kong, 'ASEAN and the Southeast Asian Security Complex' (1997) in David A. Lake and Patrick N. Morgan (eds), *Regional Orders: Building Security in a New World* (1997) University Park, Penn., Pennsylvania State University Press, 326.

<sup>210</sup> In October 1989, students hijacked a Myanmar airliner, forcing it to land in Thailand. This was followed by the hijacking in November 1990 of a Thai Airways jet. In October 1999, ethnic Karens seized the Myanmar's Embassy in Bangkok and held dozens of people hostage. In January 2000, a different group of Karens seized a Thai hospital. See: Katanyuu, above n 198.

<sup>211</sup> Jürgen Haacke, 'The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural Challenges to the 'ASEAN way' (1999) 12(4) *Pacific Review* 581; Donald Emmerson, 'ASEAN's 'Black Swans' (2008) above n 24, 77; Amitav Acharya, *Constructing a Security Community in Southeast Asia* (2001) London, Routledge, 152.

<sup>212</sup> Indonesian Foreign Minister Ali Alatas argued that: '[i]f the proposition is to now talk publicly about internal problems we will be back to when ASEAN was not formed, when Southeast Asia was full of tension, mutual suspicion, and only because ASEAN was created, we have had more than 30 years of stability, of common progress.' Quoted in *The Nation* (24 July 1998) 1.

individual member states could comment on the domestic policies of other members, but not under the auspices of ASEAN.<sup>213</sup>

‘Enhanced interaction’ characterised ASEAN–Myanmar interaction between 2000 and 2003. Within Myanmar, the ascension of relatively moderate General Khin Nyunt meant that Myanmar was receptive to encouragement from ASEAN to engage with the NLD and even to accept a visit from an EU ‘troika’. During this period, a new Special Envoy was appointed, Razali Ismail, a close associate of Malaysia’s President Mahathir. Razali achieved some success, facilitating the resumption of SPDC–NLD talks in September 2000 and the release of Aung San Suu Kyi in 2002. In January 2001, Mahathir visited Rangoon as ASEAN’s representative, and returned home to announce that Myanmar would hold elections ‘in a few years.’ But he warned, ‘[W]hen elections are held, people must understand that elections have limits. And not to use elections to undermine authority.’ Asked to reconcile his involvement in Myanmar with ASEAN’s supposed non-interference policy, Mahathir explained:

Myanmar is a special case. The West is trying to pressure Myanmar, pressure ASEAN. While we do not want to interfere in the internal affairs of other countries, we feel that the benefits of the kind of liberal democracy that we have in ASEAN countries should be exposed ... to the people and Government of Myanmar so they will not reject the system.<sup>214</sup>

ASEAN held an Informal Foreign Ministers meeting in Rangoon in April 2001, during which the Philippine Foreign Minister claimed that Myanmar was moving in a positive direction: ‘because there is non-interference, we can encourage, we can persuade, but we cannot do it with publicity ... they know they have to find a solution and they know they

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<sup>213</sup> This new proposal did not in fact unleash a wave of criticism by member states against each other. See Jürgen Haacke, ‘Enhanced Interaction’ with Myanmar and the Project of a Security Community: Is ASEAN Refining or Breaking with Its Diplomatic and Security Culture?’ (2005) 27(2) *Contemporary Southeast Asia* 188.

<sup>214</sup> ‘Myanmar Problems Cannot be Solved by Confrontation’ (29 January 2001) *New Straits Times*.

ultimately have to follow the democratic process.<sup>215</sup> In August 2002, Malaysia's Foreign minister, Syed Hamid Albar, stated that Burma had promised to follow ASEAN's lead into the mainstream of the international community by 'moving to the political and democratic process.'<sup>216</sup> The joint communique of the 34<sup>th</sup> ASEAN Ministerial Meeting (AMM) in 2001 noted 'encouraging developments in the Union of Myanmar and appreciated the efforts of the Government of Myanmar towards these developments and reiterated our support to the on-going process of national reconciliation in this country.'<sup>217</sup> These sentiments were repeated in 2002.<sup>218</sup>

But the Depayin incident of 2003 showed the limits of 'enhanced interaction'.<sup>219</sup> In May 2003, Aung San Suu Kyi's motorcade was ambushed by members of the pro-military Union Solidarity and Development Association. At least four people were killed and Aung San Suu Kyi was arrested, together with her entourage. For ASEAN, the incident was deeply embarrassing. After the June 2003 Ministerial Meeting Retreat, Singapore's Foreign Minister, S. Jayakumar reported that:

it [Depayin] was a setback. It's a setback not only for Myanmar but the Myanmar foreign minister was also told that it was a setback for ASEAN. It's a setback for ASEAN because ASEAN had admitted Myanmar and the other Indochinese countries, particularly Myanmar, despite strong opposition from some of the Western countries because we felt that it's better that Myanmar be part of ASEAN and we have constructive engagement ... So we have urged the Myanmar foreign minister to stay

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<sup>215</sup> 'ASEAN's Foreign Ministers Kick off Informal Retreat' (30 April 2001) *Agence France-Presse*.

<sup>216</sup> 'Not Right Time to Meet Aung San Suu Kyi, says Syed Hamid' (20 August 2002) *Bernama*.

<sup>217</sup> ASEAN, Joint Communique of the 34th ASEAN Ministerial Meeting Hanoi (23-24 July 2001) available at: <<http://www.asean.org/communities/asean-political-security-community/item/joint-communique-of-the-34th-asean-ministerial-meeting-hanoi-23-24-july-2001-3>> [accessed 2 May 2011].

<sup>218</sup> ASEAN, Chairman's Statement the Ninth Meeting of the ASEAN Regional Forum (31 July 2002) available at: <<http://www.asean.org/communities/asean-political-security-community/item/chairman-s-statement-the-ninth-meeting-of-the-asean-regional-forum-bandar-seri-begawan-31-july-2002-2>> [accessed 3 March 2011].

<sup>219</sup> Premeditation and collusion or complicity of the regime was corroborated in a report by Special Rapporteur on Human Rights to Myanmar, Professor Paulo Sérgio Pinheiro, in his report to the UN Commission on Human Rights. Pinheiro stated that: 'there is prima facie evidence that the Depayin incident could not have happened without the connivance of State agents'. Paulo Sérgio Pinheiro, *Situation of human rights in Myanmar: Report Submitted by the Special Rapporteur*, above n 63.

on the course with national reconciliation and dialogue, with Aung San Suu Kyi and her party, and we also expressed concerns on the safety of Aung San Suu Kyi.<sup>220</sup>

In response, Myanmar's Foreign Ministry's Director of Political Affairs, Thaug Tun, asked for 'breathing space' in order to 'create democracy and stability.'<sup>221</sup> At the 2005 Annual Ministers Meeting, Myanmar's representative accepted an Indonesian proposal to send a delegation to Myanmar to encourage the junta to hasten democratic reforms, using the experience of the other ASEAN countries that have gone through a similar struggle. Philippine Foreign Secretary Blas Ople stated that: 'The goal is not merely the release of Madame Suu Kyi, but the release of the entire people of Burma from a regime of oppression and repression.'<sup>222</sup> Despite these efforts, Lee Jones marks the Depayin incident as the beginning of ASEAN's drift towards 'critical disengagement' with Myanmar.<sup>223</sup> The clearest example of the change in attitude was the Philippines' support for a resolution against Myanmar in the UN Security Council (UNSC) in 2006. When Burma asked for ASEAN's support in voting against the resolution, at the December 2005 summit, Myanmar's Secretary-General, Ong, was told, 'ASEAN has lost the credibility and ability to defend

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<sup>220</sup> S. Jayakumar 'remarks to Singapore media' (16 June 2003) available at: [http://www.mfa.gov.sg/content/mfa/overseasmission/yangon/press\\_statements\\_speeches/2003/200306/press\\_2\\_00306\\_2.html](http://www.mfa.gov.sg/content/mfa/overseasmission/yangon/press_statements_speeches/2003/200306/press_2_00306_2.html) [accessed 3 February 2012]. As Jayakumar pointed out, these kind of 'frank an open discussions' about the domestic matters of individual states would have been inconceivable in ASEAN 10 years previously. Philippine Foreign Minister Blas Ople called it a 'clean break from the past' in terms of how ASEAN states related to one another. He said that 'with the Myanmar precedent ... no country from here may claim absolute immunity from collegial scrutiny if certain policies or acts of commission or omission tended to put the whole organisation in disrepute or undermine its credibility.' 'ASEAN's Myanmar policy may face review: Philippine FM' (18 June 2003) *Agence France-Presse*. Mahathir, who repeatedly urged the release of Aung San Suu Kii, even went as far as to suggest that Myanmar might be expelled from ASEAN if it remained intransigent. Mark Baker, 'Mahathir Warns Burma over Suu Kyi' (22 July 2003) *The Age*; 'Malaysian Premier Urges Immediate Release of Burma's Aung San Suu Kyi' (10 June 2003) *Bernama*; 'Malaysia's Mahathir again urges Myanmar to release Suu Kyi' (24 June 2003) *Associated Press*.

<sup>221</sup> 'Spotlight on Burma at ASEAN Meeting' (18 June 2003) *The Nation*.

<sup>222</sup> 'Philippines Demurs as ASEAN Backs Burma' (17 June 2003) *The Nation*; 'Minister Says ASEAN Forward on Political Reforms' (20 June 2003) *Agence France-Presse*.

<sup>223</sup> Lee Jones, 'ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement' (2008), above n 191..

Myanmar.<sup>224</sup> When the issue of Myanmar was put to a vote in the United Nations General Assembly in November 2006, the Indochinese states voted against the EU draft resolution, but the other ASEAN states merely abstained.<sup>225</sup>

In 2006, ASEAN's envoy to Myanmar, Syed Hamid, returned from a visit to Myanmar and publicly vented ASEAN's frustration with Myanmar's government. In a *Wall Street Journal* editorial entitled 'It is Not Possible to Defend Myanmar', Hamid outlined the conditional nature of ASEAN's support for Myanmar and the practice of non-interference, explaining that ASEAN had only 'stood together with Myanmar to endure international criticism because we were assured that a 'step-by-step' transition process was in place.' Hamid explained that 'the majority of ASEAN members' now felt that Burma's intransigence was 'putting into question ASEAN's credibility and image,' denying it the 'maximum benefits' of cooperation with partners by holding external relations 'hostage'. Hamid concluded that 'Myanmar does not want us to stand with them ... it is best that it is handled by the UN.' He said that ASEAN expected Burma to 'be more responsive to the damage done to ASEAN by the Myanmar issue,' rather than 'digging in and maintaining that they should not be subjected to pressure from ASEAN or anybody else.' According to Hamid, ASEAN Foreign Ministers felt that they had 'been taken for a ride ... they are not getting what they want, and they are really losing their patience.'<sup>226</sup>

Myanmar had been scheduled to take the 2006–07 chairmanship of ASEAN, but ASEAN states faced intense pressure to prevent this from happening, from two quarters. The first was the ASEAN Inter-Parliamentary Caucus on Myanmar (AIPMC), formed in 2004 and based in Malaysia, which lobbied to prevent Myanmar from assuming the chairmanship. The second was the European Union and the United States, who made clear that they would

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<sup>224</sup> Eileen Ng, 'Myanmar Told that Suu Kyi's Detention a Slap to ASEAN, says Official' (11 December 2005) *Kyodo*.

<sup>225</sup> United Nations Document No. A/C.3/61/SR.52, pp. 1–6.

<sup>226</sup> 'Malaysia, in Reversal, Condemns Myanmar' (24 July 2006) *Wall Street Journal*.

boycott a Burma-chaired ASEAN. Although Laos and Cambodia provided some muted support for Myanmar, all ASEAN states were largely in agreement that irrevocable damage would be done to the prestige and credibility of the Association if Myanmar took the chair. These views were made clear to Myanmar in the lead-up to and at the 2005 ASEAN Foreign Ministers meeting in Vientiane. The official statement issued at that meeting announced that Myanmar had decided to relinquish its turn to be the Chair of ASEAN in 2006, because it wanted to focus its attention on the ongoing national reconciliation and democratisation process, in what was a critical year for the country. The statement expressed ASEAN's 'sincere appreciation' to Myanmar's government 'for not allowing its national preoccupation to affect ASEAN's solidarity and cohesiveness' and assured Myanmar that once 'it is ready to take its turn to be the ASEAN Chair, it can do so.'<sup>227</sup> In Myanmar, preparations and construction for assuming the chairmanship of ASEAN, and hosting the hundreds of ASEAN-related diplomatic meetings that were associated with the chairmanship, were already underway. The response of Myanmar's government to ASEAN's announcement was a week-long news blackout of the decision.<sup>228</sup>

Later that year, in the wake of the Saffron Revolution and its suppression, ASEAN's Foreign Ministers gathered in New York in September 2007 for the UN General Assembly. There, they had a 'full and frank discussion on the situation in Myanmar.'<sup>229</sup> Afterwards, the Foreign Ministers issued a statement expressing their 'revulsion'<sup>230</sup> over reports that demonstrations in Myanmar were being suppressed by violent force and that there had been a number of fatalities. The statement, delivered by Singapore's Foreign Minister George Yeo,

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<sup>227</sup> ASEAN, Statement of the ASEAN Foreign Ministers, Vientiane (26 July 2005).

<sup>228</sup> Jon Ungphakorn, 'The Next Move to Help Myanmar Change' (7 October 2005) *New Straits Times*. Ungphakorn writes: 'The news blackout imposed by Myanmar's military junta on its decision to forego its turn as chair of the Association of Southeast Asian Nations (ASEAN) next year shows that it has received a severe blow to its prestige. Indeed, the decision was far from voluntary ... Junta leader Senior General Than Shwe 'lost face' and promptly disappeared from public view so completely that some Myanmar thought he had died.'

<sup>229</sup> Interview with Singapore Foreign Minister George Yeo (2-3 October 2007) *New Straits Times*.

<sup>230</sup> *Ibid.*

stated that Ministers were ‘appalled’<sup>231</sup> at reports of automatic weapons being used against demonstrators, and demanded that Myanmar’s government immediately desist from the use of violence. It strongly urged Myanmar to exercise utmost restraint and seek a political solution, to resume its efforts at national reconciliation with all parties concerned, to work towards a peaceful transition to democracy, and to release all political detainees, including Daw Aung San Suu Kyi. ASEAN endorsed the decision of UN Secretary-General Ban Ki-moon to send Special Envoy Ibrahim Gambari to Myanmar, and welcomed the assurances of Myanmar’s Foreign Minister that a visa would be issued to Mr Gambari in Singapore.<sup>232</sup>

George Yeo discussed ASEAN’s September 2007 statement in an interview *The Straits Times* the following month.<sup>233</sup> According to Yeo, ASEAN had decided ‘about a year and a half ago’ that it was no longer in a position to defend Myanmar internationally, ‘in the UN or the International Labour Organisation (ILO) or anywhere else.’ Yeo described the meeting of ASEAN Foreign Ministers in New York in the hour before they were due to meet the UN Secretary General, and the common feeling amongst them that they had no choice but to express ASEAN’s condemnation of events in Myanmar: ‘If here at the UN we had no common response, how could we face the Secretary-General? Or what do we say to the other countries? We would have lost all credibility.’<sup>234</sup> Yeo explained that when he read out the statement, all the Foreign Ministers were with him ‘to show everyone that they associated themselves with the statement.’ He referred to the gathering as:

a family meeting where we had to confront one member who had behaved badly. It was unpleasant but unavoidable. Whatever others may say, it remains for us that Myanmar is a member of the ASEAN family and, good or bad, we can’t avoid a certain association, a certain responsibility, a certain connection with the fate of that

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<sup>231</sup> Ibid.

<sup>232</sup> Statement by George Yeo, ASEAN Chair, Singapore’s Minister for Foreign Affairs (27 September 2007) available at: <[http://mfa.gov.sg/2006/press/view\\_press.asp?post\\_id=3125](http://mfa.gov.sg/2006/press/view_press.asp?post_id=3125)> [accessed 12 January 2012].

<sup>233</sup> Statement of the ASEAN Foreign Ministers, above n 227.

<sup>234</sup> Ibid.

country. But we have very little leverage over the internal development there. What we have is moral influence as members of the ASEAN family.<sup>235</sup>

Yeo admitted that the turmoil in Myanmar had tested the group's cohesion and unity, and that if ASEAN avoided the issue of Myanmar:

it stood to lose all credibility and respect ... When we talked about ASEAN integration in the future, the international community would ignore us. We would feel ashamed when we looked ourselves in the mirror. So, the ministers were determined to look the challenge in the eyes and respond. We had to hold our heads up high. When we assembled that morning, each of us had this feeling in himself but we were not sure about others. However, when we started talking, it became quickly clear that all of us felt the same way. For this reason, achieving consensus that morning was not difficult.<sup>236</sup>

The strength of ASEAN's September 2007 statement took many by surprise.<sup>237</sup> ASEAN's traditional methods of 'quiet persuasion' appeared to have been replaced by strong public condemnation. Writing at the time of ASEAN's denunciation of Myanmar, Emmerson wondered whether the statement might signal an unravelling of the 'ASEAN Way', and its foundational commitment to sovereignty, non-interference and consensus as the basis for decision-making.<sup>238</sup> Emmerson's hope was that: 'Even if Yeo's statement had more to do with diplomatic damage control than with any principled commitment to democracy, it raised

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid. ASEAN's exasperation with Myanmar may have been increased by Myanmar's actions in relation to North Korea earlier in 2007. In April 2007, North Korea's Deputy Foreign Minister Kim Yong-Il visited Yangon and signed an agreement with his counterpart, Kyaw Thu. There was speculation that North Korea was seeking access to Burma's natural resources, while the *Tatmadaw* sought access to military equipment that had been blocked by US and EU sanctions. The treaty on the Southeast Asia Nuclear-Weapon-Free Zone, signed by all ASEAN members, had entered into force on 28 March that same year (Southeast Asia Nuclear-Weapon-Free Zone Treaty (Bangkok Treaty), Bangkok, Thailand (15 December 1995) reported in 1981 UNTS 129). A 2010 United Nations report accused Pyongyang of supplying banned nuclear and ballistic equipment to Myanmar, Iran and Syria. Myanmar's President Thein Sein denied that his country was trying to obtain nuclear weapons from North Korea. *The Straits Times*, 31 January 2012: 'Myanmar denies trying to obtain N. Korean nukes' (31 January 2012) available at: <<http://sg.news.yahoo.com/myanmar-denies-trying-obtain-n-korean-nukes-052659723.html>> [accessed 12 February 2012].

<sup>237</sup> Emmerson, above n 24, 73.

<sup>238</sup> Ibid.

a question for ASEAN and suggested a hope for the future. The question was whether regionalism in Southeast Asia should remain indifferent to democracy.<sup>239</sup>

ASEAN's response to Cyclone Nargis, which devastated Myanmar's Irrawaddy region in November 2008, perhaps represents the high point of the Association's engagement with the regime. In the aftermath of the cyclone, there were calls from the French Foreign Minister (and others) for the UN Security Council to invoke the 'responsibility to protect' doctrine to authorise the delivery of aid without the consent of the Myanmar government.<sup>240</sup> The ASEAN Secretary-General, Surin, was able to convince Myanmar's government to accept aid, and 'to establish a space, a humanitarian space, however small to engage with the Myanmar authorities.'<sup>241</sup> Surin told an audience in Washington that ASEAN was 'trying to work around a very, very strict resistance and mentality and mindset that have been there for a long, long time.'<sup>242</sup> ASEAN certainly enjoyed a degree of success in this regard. The Association was granted more access than any other international or regional organisation. The United Nations Secretary-General was unable to contact the military leadership in Myanmar, but ASEAN Ministers enjoyed high-level discussions with Myanmar's rulers. While access by Western aid workers was carefully monitored, a Tripartite Core Group initiated by ASEAN and composed of representatives from Myanmar, ASEAN, and the United Nations, was formed to create a mechanism for channelling international assistance into Myanmar.

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<sup>239</sup> Ibid.

<sup>240</sup> The proposal of the French was rejected out of hand by the Chinese government, which argued that the responsibility to protect did not apply to natural disasters. In similar vein, John Holmes, the UN's Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator described Kouchner's call as unnecessarily confrontational. The British Minister for International Development, Douglas Alexander, rejected it as 'incendiary' and Britain's UN ambassador, John Sawers, agreed with the Chinese view that R2P did not apply to natural disasters. Julian Borger and Ian MacKinnon, 'Bypass Junta's Permission for Aid, US and France Urge' (9 May 2008) *The Guardian*; Gareth Evans, 'Facing up to Our Responsibilities' (12 May 2008) *The Guardian*.

<sup>241</sup> Sheldon W. Simon, 'Southeast Asian International Relations: Is There Institutional Traction?' (2010) in N. Ganesan and Ramses Amer (eds), *International Relations in Southeast Asia: Between Bilateralism and Multilateralism* (2010) Singapore, Institute of Southeast Asian Studies, 48.

<sup>242</sup> Aung Hla Tun, 'Foreign Powers Lean on Myanmar to Open up Aid', above n 71.

Haacke summarises the history of ASEAN's limited ability to influence Myanmar in the following way:

Myanmar was admitted to ASEAN in part to lessen Myanmar's dependence on China. That rationale retained its salience. Furthermore, Myanmar always had the option in the last resort of leaving ASEAN. Both calculations constrained what the Association could do to influence Myanmar. If Myanmar left ASEAN, ASEAN could no longer claim to represent Southeast Asia as a whole. Such a step would damage ASEAN more than Myanmar.<sup>243</sup>

### **4.3.2 Myanmar and the International Community**

The preceding tale of ASEAN's limited influence on Myanmar should not convey the impression that some other (more robust) course of action on the part of ASEAN, such as suspending Myanmar (if such a thing were possible in an organisation which is required to make its decisions through consensus) might have led more quickly to Myanmar's democratisation. Between 1988 and 2010, Suu Kyi maintained her call for Western states to continue a policy of sanctions against Myanmar, and in 2012 continued to assert that sanctions were effective in weakening the regime and ending the rule of Myanmar's generals.<sup>244</sup> Most careful scholars and policy analysts strongly disagree with her.<sup>245</sup> Buffered by its military, diplomatic and economic ties with China and India, Myanmar's leaders proved impervious to the sanctions and embargoes of the United States and the European Union, which included trade restrictions and denying visas to Myanmar's military leaders, ministers and senior officials of Myanmar.<sup>246</sup>

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<sup>243</sup> Jürgen Haacke, 'Myanmar's Foreign Policy' (2006) *The Adelphi Papers* 381, 58-59.

<sup>244</sup> Conversation with Aung San Suu Kyi, Carleton University, Canada, 2 March 2012.

<sup>245</sup> Khin Zaw Win, 'The Sanctions Policy against Myanmar' (2007) in Ganesan and Hlaing (eds), *Myanmar: State, Society and Ethnicity* above n 28, 278-288; Morten B. Pedersen, *Promoting human rights in Burma: a critique of Western sanctions policy* (2008) Maryland, Rowman and Littlefield Publishers.

<sup>246</sup> Although sanctions created inconvenience in ASEAN's dialogue relations with some of its Western partners. For example, the US could not host the 14th ASEAN-US Dialogue meeting because it would not issue visas to Myanmar delegates; the meeting was eventually convened in Manila in May 1998. Myanmar was permitted to attend the ASEAN-EU Joint Cooperation Committee (JCC) meeting in Bangkok in May 1999 after months of negotiations, as a non-signatory country, with no speaking rights. The ASEAN-EU Ministerial Meeting in

India had expanded trade relations with Myanmar and provided military assistance (training and weapon sales) to Myanmar's generals from 1991 onwards, as part of its 'Look East' policy. India's influence in Myanmar, however, could not rival China's. From the mid-1980s, China was a critical element of the economic and military (and hence political) survival of the military regime. China was involved in the economic reconstruction of northern Myanmar, by building power stations, roads, bridges and telecommunication facilities. Myanmar, in return, agreed to the exploitation by Chinese companies of Myanmar's natural resources. At the same time, the arms deals negotiated with China allowed Myanmar's military to regain control of fighting in the ethnic-minority areas.<sup>247</sup> As Western criticism intensified after the 1988 crackdown on pro-democracy protestors, the United States and the European Union imposed increasingly stringent sanctions on Myanmar.<sup>248</sup>

Beijing's political support for the regime became correspondingly more important. At the United Nations General Assembly (UNGA) in 1990, Beijing prevented the adoption of the first draft resolution on the human-rights situation in Myanmar.<sup>249</sup> When Premier Li Peng

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Berlin in March 1999 had to be cancelled, because Germany would not issue a visa to the Foreign Minister of Myanmar for fear of violating the EU's sanction against Myanmar. The Joint Cooperation Committee (JCC) in the ASEAN-EU Dialogue had to postpone its meeting in the second half of 1997, again because of the EU's policy against Myanmar. The European Parliament refused to fund participation by Myanmar in any ongoing or new ASEAN-EU projects.

<sup>247</sup> In the mid-1980s, China ceased providing military and political support to the Communist Party of Burma (CPB), which had been waging an insurgency campaign on Myanmar's northern borders. China began, instead, the negotiation of substantial arms deals (for heavy artillery, multiple rocket launchers, patrol boats, guided missile attack craft, fighter aircraft, and air-to-air missiles) with Myanmar's generals.

<sup>248</sup> The gradual implementation of sanctions on Myanmar (Burma) began in 1988 under President Ronald Reagan, who suspended all aid to the country. It was not until May 1997 that President Bill Clinton issued comprehensive sanctions—which included additional restrictions ending all non-humanitarian assistance, banning entry visas for Myanmar government officials, and instituting a moratorium on new investments in Myanmar by US citizens—after determining that Burma was repressing democracy on a large scale.

<sup>249</sup> Stephen McCarthy, 'Burma and ASEAN: Estranged Bedfellows' (2008), above n 192; Stephen McCarthy, 'Chartering a New Direction? Burma and the Evolution of Human Rights in ASEAN' (2009) 36(3) *Asian Affairs: An American Review* 157.

visited Myanmar in 1994, the SLORC referred to China as its 'most trusted friend'.<sup>250</sup> In 2005, observers noted the symbolic significance of Myanmar's decision to move the capital closer to China and India, and away from Southeast Asia and the West.<sup>251</sup>

The efforts of the United Nations to effect reform in Myanmar have been generally unproductive. Attempts in 2005 to have Myanmar placed on the Security Council's agenda were blocked by Russia, China and Algeria.<sup>252</sup> In May 2006, the UN sent Ibrahim Gambari to Burma to raise human rights issues and the prospects for restoring democracy. Gambari met with the three senior SPDC Generals—Than Shwe, Maung Aye and Soe Win, but also met with Aung San Suu Kyi. This diplomatic thaw between the UN and Myanmar—which many believed had taken place on the advice of China, as a way of forestalling a Security Council resolution – was short-lived. Upon Gambari's return to the UN, Secretary-General Kofi Annan appealed to Than Shwe to release Suu Kyi. The following day, the SPDC extended her detention. When the Security Council finally voted on Myanmar in January 2007, Indonesia, then a non-permanent member, abstained (together with Congo and Qatar).<sup>253</sup> China, South Africa and the Russian Federation voted against the resolution. China and Russia's consistent defence of Myanmar in the Security Council also diminished the prospect of establishing a Commission of Inquiry (COI) into alleged crimes against humanity

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<sup>250</sup> Jürgen Haacke, 'Myanmar's Foreign Policy towards China and India' (2006) 46 (381) *The Adelphi Papers* 25-39, 26.

<sup>251</sup> See: Maung Aung Myoe, 'The Road to Naypyidaw: Making Sense of the Myanmar Government's Decision to Move its Capital', Asia Research Institute Working Paper No. 79, Singapore, Asia Research Institute Working Paper Series (November 2006) available at: <<http://thailandtonight.blogspot.com.au/2008/12/why-did-burmas-leaders-build-new.html>> [accessed 20 January 2012].

<sup>252</sup> In 2005, a report commissioned by Václav Havel and Desmond Tutu recommended that the Security Council pass a resolution for intervention in Myanmar, which would require Myanmar to work with the Secretary-General's office in implementing a plan for national reconciliation and restoration of democracy. The report was heavily criticized by Myanmar's government.

<sup>253</sup> UN Doc S/PV.5619 on Myanmar. Despite claiming that ASEAN shared the goal of democratizing Burma and pledging to 'do everything in our power ... to bring about positive change in Myanmar,' Jakarta insisted that Myanmar was not a security threat.

committed by the country's military rulers, as recommended by United Nations human-rights rapporteur, Tomas Ojea Quintana.

It is fairly clear that stronger measures by the international community, Western states, or ASEAN, would not have resulted in any positive change in Myanmar. Indeed, it is likely that stronger measures would only have increased the paranoia and xenophobia of the regime, and caused further impoverishment to the people of Myanmar.<sup>254</sup>

#### **4.4 Regional Organisations and the Consolidation of Democracy**

Section 4.3.1 demonstrated the ineffectiveness of ASEAN in encouraging Myanmar's *transition* to democracy. In this section, I suggest that ASEAN is nonetheless important to Myanmar during the period of its democratic *consolidation*. There are two reasons for this.

First, Myanmar's presence within ASEAN increases her ability to make credible commitments (to domestic and international audiences) about reform. Under duress from the United States and the European Union, in 2006 ASEAN effectively denied Myanmar the chairmanship of the Association, because of the anti-democratic and oppressive practices of Myanmar's government. In 2011, Myanmar was awarded the 2014 chairmanship of the Association because of ASEAN's confidence in her program of reform. The prestige attached to the chairmanship significantly increases the costs for Myanmar of backtracking on reform. Because of this, the promises made by Myanmar's leaders about reform are more credible.

Second, ASEAN represents a group of states which share histories of colonialism, conflict and difficult (and in some cases incomplete) transitions to democracy. Because of this, and because of the facts of proximity and geography, it is to examples within the region

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<sup>254</sup> Scholars continue to debate whether or not gentler measures, of the 'aid, trade and diplomacy' variety, would have led to earlier efforts to liberalise in Myanmar. Ian Holliday, *Burma Redux: Global Justice and the Quest for Political Reform in Myanmar* (2012) Hong Kong, Hong Kong University Press; New York, Columbia University Press.

that Myanmar turns when looking for precedents for democratic consolidation. We see this most clearly in Myanmar's relationship with Indonesia. In this final section, I consider these two ideas.

Were Myanmar's generals humiliated, or merely disappointed, when they were forced to renounce the 2006–2007 Chairmanship of ASEAN?<sup>255</sup> The chairmanship involves hosting not just the annual ASEAN Summit, but also scores of ASEAN ministerial meetings, the Post-Ministerial Conference (ASEAN PMC) meetings with the ASEAN Dialogue Partners, the ASEAN Regional Forum (ARF), and the East Asian Summit (EAS), the latter of which includes Australia, China, India, Japan, New Zealand, the Republic of Korea, the United States and Russia. Myanmar strongly resisted early calls from the United States and the European Union to give up the chairmanship.<sup>256</sup> At the time she renounced the chairmanship, at the July 2005 ASEAN Ministerial Meeting in 2005, construction work had already commenced in Yangon and Naypidaw, to prepare the city for the hundreds of government representatives, dignitaries and journalists who would inevitably flock to the city.<sup>257</sup> When the announcement of Myanmar's 'decision' to forgo the chairmanship was made, there was a week-long black-out of the news in Myanmar.<sup>258</sup>

All of this suggests that General Than Shwe's government would have enjoyed the prestige and legitimacy that flowed from hosting such an important diplomatic event, and would have used the chairmanship to improve the domestic legitimacy of the government. If this is the case, then being constructively denied the chairmanship would have been a source of (a) embarrassment to the generals (b) vindication for Aung San Suu Kyi and the NLD,

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<sup>255</sup> The alphabetically rotating chairmanship was held in 2005–2006 by Laos.

<sup>256</sup> 'Defiant Myanmar Refuses to Give up ASEAN Chair' (10 April 2005) *Agence France-Presse*.

<sup>257</sup> Alternative ASEAN Network on Burma, 'Pressure Works: Burma Backs Off From ASEAN Chair' (6 August 2005) available at:

<http://www.altsean.org/Docs/PDF%20Format/Thematic%20Briefers/Pressure%20Works%20-%20Burma%20Backs%20Off%20From%20ASEAN%20Chair.pdf> [accessed 20 October 2013].

<sup>258</sup> See Ungphakorn, above n 228.

both of whom had lobbied ASEAN parliamentarians, and the US and the EU, to pressure ASEAN into refusing Myanmar the chair.

Rodolfo Severino, former Secretary-General of ASEAN, posited that Myanmar would have been brought more quickly to the path of reform if it had assumed the chairmanship of ASEAN in 2006. He argues that the regime in likelihood would have taken measures of reform sufficient to enable it to fulfil its duties as host of important diplomatic events, such as the Post-Ministerial Conference and the ASEAN Regional Forum, events usually attended by representatives from the United States.<sup>259</sup> Severino is not alone in this view. AFP reported that Myanmar's foreign diplomatic community was disappointed that Myanmar had not taken the ASEAN chair in 2006. One diplomat was quoted as saying that the result was 'a hollow victory, ... not serving the causes of democratization.'<sup>260</sup> Another diplomat told *Agence France-Presse* that 'perhaps, it was a lost opportunity.'<sup>261</sup> These sentiments, from those on the ground in Myanmar, have been echoed by scholars such as Kyaw Yin Hlaing, who argue that Myanmar's relinquishment of the ASEAN chair in 2006 did not speed reform inside Myanmar and indeed lessened whatever leverage ASEAN might have had over the state.<sup>262</sup> If Myanmar were chair of ASEAN in 2006–2007, it would have had to grant visas to American, European and other foreign journalists. Hlaing asks whether Myanmar's generals would have so brutally suppressed the Saffron Revolution in 2007 in full view of the world's foreign correspondents.<sup>263</sup>

What, then, can we make of ASEAN's decision in 2011 to support Myanmar's assumption of the chairmanship in 2014? It is important not to overdraw the significance of

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<sup>259</sup> Rudolfo C. Severino, *Southeast Asia In Search of an ASEAN Community* (2006) Singapore, Institute of Southeast Asian Studies Publishing, 44.

<sup>260</sup> 'Myanmar ASEAN Pullback Seen as Empty Victory for Europe, US' (27 July 2005) *Agence France-Presse*.

<sup>261</sup> *Ibid.*

<sup>262</sup> Kyaw Yin Hlaing, 'ASEAN's Pariah: Insecurity and Autocracy in Myanmar (Burma)' (2008) in Emmerson (ed), *Hard Choices: Security, Democracy and Regionalism in Southeast Asia* Stanford, CA, Walter H. Shorenstein Asia-Pacific Research Center Books, 151–190, 181.

<sup>263</sup> *Ibid.*

the chairmanship narrative. After years of benign constructive engagement, ASEAN is not perceived by the people of Myanmar to be a bastion of democracy.<sup>264</sup> Nonetheless, ASEAN's wholehearted support for Myanmar taking the chair in 2014, in light of its earlier unwillingness for this to occur, was a powerful signal of the regional association's confidence in Myanmar's reforms. In 2005, the regional leaders publicised their views that Myanmar was not ready to assume the chairmanship of ASEAN, because of the nation's domestic problems, such as lack of reconciliation with ethnic minorities and the imprisonment of democratic leaders. One of their concerns was that Myanmar's chairmanship would jeopardise ASEAN's relations with the US and the EU. By 2011, regional leaders had reversed their view about Myanmar's assumption of the chair, indicating a belief that reforms were genuine and irreversible, and that Myanmar's government was no longer an impediment to good relations between ASEAN and the West.<sup>265</sup>

The principle causal link between regional organisations and the consolidation of democracy, as described by Pevehouse, occurs when membership in a regional organisation is made conditional upon democratic institutions.<sup>266</sup> The Council of Europe provides the best example of the democratising effect of conditional membership.<sup>267</sup> Membership assists in consolidation in a number of ways. First, membership enables the regime to make credible commitments about democracy, because 'regimes would incur significant economic and political costs by joining regional international organisations and then violating the

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<sup>264</sup> Interview with Ma Thanegi, former secretary Aung San Suu Kyi, Yangon, 17 November 2011, copy on file with author.

<sup>265</sup> In Bali, at the 19th ASEAN summit, Ko Ko Hlaing, chief political adviser to the Myanmar president, stated that: 'We will do what we have to do as a democratic government and a democratic society. As a family, ASEAN nations have welcomed Myanmar to be a responsible chairman.' See: 'ASEAN agrees to let Myanmar lead bloc: Country given some long-sought recognition after it holds elections, frees opposition leader and eases media curbs.' (17 November 2011) *Al-Jazeera* available at: <http://www.aljazeera.com/news/asia-pacific/2011/11/2011111752457348715.html> [accessed 13 February 2012].

<sup>266</sup> Pevehouse, above n 17.

<sup>267</sup> Peter Schraeder, 'The State of the Art in International Democracy Promotion: Results of a Joint European-North American Research Network' (2003) 10(2) *Democratization* 21.

conditions of their membership, making reversals of democracy costly to winners.<sup>268</sup> Second, membership also provides ‘a public and highly visible external validation of the new regime that increases the probability that the masses will commit to the new democracy,’ which legitimises the new regime. Third, membership binds ‘distributional losers’ in the same way that it binds winners—by raising the cost of reneging on membership (which will result in loss of ‘trade, economic aid, military assistance, international status, military protection’). Fourth, regional organisations can ‘bribe’ losers into complying, through economic assistance.

Because democracy is not a condition for membership in ASEAN, these mechanisms do not directly apply to the consolidation of democracy in Myanmar. My argument, however, is that we can see a weaker version of these mechanisms at play in the issue of Myanmar’s chairmanship of ASEAN, and that the decision to allow Myanmar to assume the chair in 2014 had a non-trivial effect on stabilising politics during Myanmar’s uncertain post-transition period, and helping to lock in democratic reform.

Myanmar’s renunciation of the chair in 2005—whether voluntarily or as a result of pressure from her ASEAN neighbours—was an admission, to domestic and international audiences, of the nation’s political problems. In 2011, Myanmar’s apparent readiness to assume the chair, and the enthusiastic support for this plan by its ASEAN neighbours (and the lack of significant opposition from the US or the EU) was a strong signal of the new regime’s intentions about political, social and economic reform and peace-building. Any back-tracking on reforms—particularly, for example, the reintroduction of censorship or the re-arrest of pro-democracy activists—could mean that Myanmar would be forced to again surrender the chairmanship, and her leaders would pay a high political and diplomatic cost for doing so.

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<sup>268</sup> Pevehouse, above n 17, 37.

On Pevehouse's theory, this cost is enough to encourage those in power to press ahead with reforms, not only because they stand to benefit from the prestige of having secured the chair, and to discourage those who might stand in the way of reforms, but also because they would be blamed for the national humiliation of being deprived of the chair. The 'cost' issue so important to those in power is as relevant to the losers (the standpatters in the military) and is possibly enough to dissuade them from upsetting the path of reform. The net effect of Myanmar being awarded the 2014 chairmanship is to bolster the credibility of reform policies domestically, encouraging confidence in the new regime amongst the people, who see that an organisation that once shunned their nation, is now embracing it. This lends a degree of legitimacy to the regime at a crucial time in the process of consolidation. In sum, the decision on the 2014 chairmanship was a victory for Thein Sein's middle-way of reform, and reinforced a view (for those inside and outside Myanmar) that history was on the side of those operating under the 2008 Constitution. It is also, of course, relevant that ASEAN members (and others) have with alacrity rushed to support Myanmar's economic reforms and development plans, holding out substantial 'bribes', in the form of aid and investment, for Myanmar to continue along the path of democratisation.

There is one final way in which Myanmar's membership of ASEAN assists the government in overcoming problems about credible commitments. Because of historical parallels between Myanmar and Indonesia, the path of Indonesia's democratisation provides Myanmar's leaders with a plausible precedent for Myanmar's own democratisation. Myanmar's leaders are able to use the Indonesian example as evidence about Myanmar's potential to achieve successful reform, and to convince sceptics that the government's goals in relation to development and liberalisation are achievable.

Historians have drawn parallels between Indonesia and Myanmar since colonial times. In *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands*

India, J S Furnivall argued that Burma and Netherlands India (as Indonesia was then known), shared the character of a 'plural society', which means that:

In Burma, as in Java, probably the first thing that strikes the visitor is the medley of peoples—European, Chinese, Indian and native. It is in the strictest sense a medley, for they mix but do not combine. Each group holds by its own religion, its own culture and language, its own ideas and ways. As individuals they meet, but only in the market-place, in buying and selling. There is a plural society, with different sections of the community living side by side, but separately, within the same political unit. Even in the economic sphere there is a division of labour along racial lines.<sup>269</sup>

For Furnivall, the plural society was one of the by-products of colonialism, which had imposed *laissez-faire* capitalism upon traditional societies with devastating results. Furnivall argued that in both Burma and Netherlands India, capitalism increased the nation's wealth, but contributed to the people's poverty and powerlessness. In his view, the effects of colonialism were more devastating for Burma than for Netherlands India, because in Burma, the British retained (or gave to immigrant Indians) the bulk of commercial and administrative power, and imposed alien institutions upon an unwilling race. The Dutch, by contrast, 'tried to conserve and adapt to modern use the tropical principles of custom and authority [through indirect rule].'<sup>270</sup> For Furnivall, the prescription for the plural society was self-government and autonomy, geared to a nationalistic form of socialism that would reintegrate post-colonial societies.<sup>271</sup>

In different ways, both Burma and Netherlands India adhered to Furnivall's prescription. After the Second World War, both nations freed themselves from the shackles of colonialism and cleaved to extreme forms of nationalism. Both adopted variants of

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<sup>269</sup> J.S Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (1948) Cambridge, Cambridge University Press.

<sup>270</sup> *Ibid*, 10.

<sup>271</sup> Robert Taylor, 'Disaster or Release? JS Furnivall and the Bankruptcy of Burma' (1995) 29(1) *Modern Asian Studies* 45.

socialism at different stages of their development.<sup>272</sup> Furnivall did not, however, account for the historical consequences of the central role played by the army, in both nations, in the (difficult and bloody) liberations from colonialism, and the formation of the modern states of Burma and Indonesia. In both nations, the army became a key actor in the fields of politics, administration, and the economy. In both nations, early efforts to establish parliamentary democracy collapsed in the face of rebellion in outlying ethnic areas, and in both nations, martial law was introduced and re-introduced.<sup>273</sup> In both nations, opposition movements coalesced around the daughters of the heroes of the post-World War II independence movements: in Indonesia, Megawati Sukarnoputri, daughter of President Sukarno; in Myanmar, Aung San Su Kyi, daughter of General Aung San.

Indonesia's 1945 Constitution was drafted in just twenty days, following the surrender of Japan and Indonesia's declaration of independence.<sup>274</sup> Although it was intended to be merely an interim constitution, the 1945 Constitution nonetheless survived, substantially amended in 1999 in a series of post-Suharto reforms.<sup>275</sup> Until these reforms, Indonesia's 1945 Constitution guaranteed seats for the military in the parliamentary bodies and provided no limit on the number of terms a president could serve. Thus for thirty-two years under President Suharto, the military continued to exert significant authority within domestic politics. During this period, Indonesia also achieved rapid economic growth. It was not until

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<sup>272</sup> On socialism in post-colonial Indonesia, see: Justus M. Van der Kroef, 'An Indonesian Ideological Lexicon' (1962) *Asian Survey* 24. On socialism in Burma, see Robert Taylor, 'Politics Under the Socialist State' (1987) in Taylor, *The State in Burma* (1987), above n 23, 364-372.

<sup>273</sup> Harold Crouch, 'Patrimonialism and Military Rule in Indonesia' (1979) 31(4) *World Politics* 571; in relation to martial law in Burma/Myanmar, see section (ii) *infra*.

<sup>274</sup> Denny Indrayana, 'Indonesia: In Search for a Democratic Constitution (1945–2008)' (2008) in Clauspeter Hill and Jörg Menzel (eds), 2 *Constitutionalism in Southeast Asia*, 91–117, 91.

<sup>275</sup> Anthony L. Smith, 'Indonesia: Transforming the Leviathan' (2001) in John Funston (ed), *Government and Politics in Southeast Asia* (2001) London, Zed Books, 74–119, 83; Sebastian Benesch, 'The Indonesian Constitution: Historical Developments and an Evaluation of Recent Constitutional Amendments' (2007) in Bob S. Hadiwinata and Christoph Schuck (eds), *Democracy in Indonesia: the Challenge of Consolidation* (2007) Berlin, Nomos Publishers, 177–199.

1997 that Suharto's New Order finally crumbled, under the pressure of the 1997 Asian financial crisis. Suharto resigned in May 1998.

Throughout the 1990s, President Suharto's New Order provided a reassuring political reference point for Myanmar's SLORC.<sup>276</sup> The SLORC approved of the dual function ascribed to the military under President Suharto, as both defender of the state and as political actor.<sup>277</sup> The Indonesian national ideology of *Pancasila*, which provided a spiritual foundation for a strong and unified state, became a model (of sorts) for the SLORC's attempt to garner political legitimacy by welding its governance to the philosophy of Buddhism.<sup>278</sup> On many occasions, *The New Light of Myanmar* praised economic and political developments in Indonesia, and declared that Indonesia and Burma were 'two nations with common identity'<sup>279</sup> In the 1990s, the 1945 Constitution of Indonesia was published in Burmese, and Myanmar's generals asked delegates to the National Convention on the drafting of Myanmar's Constitution to learn from the Indonesian example.<sup>280</sup> Members of the SLORC visited Jakarta on many occasions for briefings about the Indonesian constitutional order. In September 1995, *The New Light of Myanmar* stated that:

In this new Constitution, the military wish to follow the Indonesian Constitutional model... While there has been little global, public outcry about Indonesia's system, no doubt Myanmar's current military government will continue to be bashed for their temerity in thinking that they too should continue to be involved in their country's government ...<sup>281</sup>

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<sup>276</sup> Jürgen Ruland, 'Burma Ten Years After the Uprising' (2001) in Robert Taylor (ed), *Burma: Political Economy Under Military Rule* (2001) London, C. Hurst & Co., 137–158, 141.

<sup>277</sup> Andreas Harsono, 'Love at First Sight: SLORC meets ABRI (1997) *Inside Indonesia*.

<sup>278</sup> David I. Steinberg, 'Legitimacy in Burma/Myanmar' (2007) in Ganesan and Hlaing (eds), *Myanmar: State, Society and Ethnicity*, above n 29, 109–142.

<sup>279</sup> 'Rangoon to Jakarta: A Tale of Two Juntas' (December 1998) 6(6) *The Irrawaddy*.

<sup>280</sup> Harsono, above n 277.

<sup>281</sup> *New Light of Myanmar*, (9 September 1995) IX (9).

*The New Light of Myanmar*, however, published almost nothing about the tumultuous overthrow of President Suharto in 1997, and his resignation in 1998.

In 1998, responding to popular pressure for reform, Indonesia began a successful transition to constitutional democracy. The parliament elected in 1999 proceeded to enact a series of constitutional amendments, bringing the Indonesian Constitution closer to that of a Western-style liberal constitutional democracy.<sup>282</sup> One of the centrepieces of Indonesia's reforms was the Constitutional Court. In 2000, a new chapter added an extensive Bill of Rights to the Constitution. In 2003, Indonesia's National Human Rights Commission was established by legislation. By 2010, commentators were hailing Indonesia's transition as 'a story that can provide inspiration and encouragement for constitutional projects elsewhere in Asia.'<sup>283</sup> But it is worth remembering that in the early years of Indonesia's transition, there were few optimists.<sup>284</sup> Indonesia's reformers faced problems of entrenched militarism, economic underdevelopment, endemic corruption, ethnic and religious tensions, and demands for secession in Aceh and Papua. For this reason, for Myanmar's new government, Indonesia is a useful illustration of how Southeast Asian states might evolve beyond their post-colonial authoritarian origins, to liberal democracy.

Are there any deeper reasons why Indonesia might be significant to the consolidation of Myanmar's democracy? Is it possible, for example, to sustain an argument that Myanmar has been 'socialised' into democratic norms by its 'elder brother' in ASEAN?<sup>285</sup> In Chapter 1, I drew attention to the phenomenon of socialisation, where decision makers align their

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<sup>282</sup> S.D. Harijanti and T. Lindsey, 'Indonesia: General elections test the amended constitution and the new constitutional court' (2006) 4(1) *International Journal of Constitutional Law* 138.

<sup>283</sup> A.H.Y. Chen, 'Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations' (2010) 8(4) *International Journal of Constitutional Law* 849, 867.

<sup>284</sup> M. Malley, 'Beyond democratic elections: Indonesia embarks on a protracted transition' (2000) 7(3) *Democratization* 153–80; D.Y. King, *Half-hearted Reform: Electoral Institutions and the Struggle for Democracy in Indonesia* (2003) Westport, CT, Praeger; R. Robison and V. Hadiz, *Reorganising Power in Indonesia: The Politics of Oligarchy in an Age of Markets* (2004) London, Routledge Curzon.

<sup>285</sup> According to *The Irrawaddy*, an Asian diplomat in Rangoon described Indonesia as like 'a big brother' in the eyes of the Burmese generals. 'SLORC's Big Brother in ASEAN' (January 1997) 5(1) *The Irrawaddy*.

country's policies with those of geographically, historically, politically and culturally proximate nations.<sup>286</sup> The idea is that identification with a reference group generates varying degrees of cognitive and social pressures to conform. Pressure is both internal and social. Internal pressures include social-psychological costs of nonconformity, such as anxiety, regret, and guilt, when a state's behaviour is inconsistent with the self-concept endorsed by the reference group. Social pressures include: (1) the imposition of social-psychological costs through shaming or shunning and; (2) the conferral of social-psychological benefits through 'back-patting' and other displays of public approval. One consequence is that actors seek reliable models of appropriate behaviour, and then 'mimic' the behaviour of these highly legitimated actors.<sup>287</sup> Goodman and Jinks describe these processes as 'acculturation'.<sup>288</sup>

Indonesia is, for Myanmar and within ASEAN, a highly legitimated actor. Socialisation theories predict that states will adopt institutional models that have authority and legitimacy within the states of their key reference group. We know that from 1993, Myanmar's Lieutenant-General Khin Nyunt, and high-ranking SLORC members, visited Indonesia frequently. SLORC Chairman, General Than Shwe, visited Jakarta in June 1995 and met President Suharto. Indonesian officials and high-profile businessmen, including Foreign Minister Ali Alatas and Defence Minister Edi Sudrajat, visited Yangon throughout 1994 and 1995.<sup>289</sup> Burma's embassy in Jakarta is the largest in Southeast Asia. If we were

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<sup>286</sup> Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621.

<sup>287</sup> This effect is documented in the sociology of organizations literature. See, e.g., W. Richard Scott, *Institutions and Organizations* (1995) 124–28 (discussing, in the context of collective responses to institutional environments, how states mimic behaviour). See: Richard E. Petty et al., 'Attitudes and Attitude Change' (1997), 48 *Annual Review of Psychology* 609, 612–20. These micro-processes are well represented in the international law literature—though they are typically embedded in a coercion model of social influence. See, e.g., Risse & Sikink, above n 11, at 11–35 (outlining a 'spiral model' of socialization incorporating elements of coercion, persuasion, and shaming). Also see Robert S. Baron et al., 'The Forgotten Variable in Conformity Research: Impact of Task Importance on Social Influence' (1996) 71 *Journal Personal and Social Psychology* 915, 924 (providing two case studies that found that 'heightening incentives for accuracy actually heightened participants' susceptibility to an inaccurate group consensus').

<sup>288</sup> Goodman and Jinks, above n 286..

<sup>289</sup> 'SLORC's Big Brother in ASEAN', above n 285.

seeking evidence of acculturation, we might point to these indicia of interaction, and then point to the way that Myanmar's leaders structured their new Constitution to allot certain seats to military officers (as did the Indonesian Constitution prior to the post-Suharto amendments), established a Constitutional Tribunal (similar to Indonesia's Constitutional Court) and a National Human Rights Institution, similar to that set up by Indonesia (and the other three 'most progressive' ASEAN states, the Philippines, Malaysia and Thailand). We might note the comments of the Indonesian ambassador to Myanmar in 1997, who claimed that 'the SLORC would like to imitate the New Order in three key areas: the Indonesian state ideology, Pancasila; the 1945 Constitution; and the dual function of the military',<sup>290</sup> and within Myanmar, the state-sponsored media releases highlighting political similarities between the two countries.<sup>291</sup> But without further evidence, such as the transcripts of the National Convention drafting meetings and interviews with constitutional draftsmen and politicians, it is difficult to make a strong case for acculturation.<sup>292</sup>

#### **4.5 Conclusion**

The focus in this Chapter has been squarely on democracy and the regional influence on Myanmar's democratisation. The underlying concern, of course, is with the human rights violations that have accompanied non-democratic rule in Myanmar: for example, the violent suppression of political protest; the holding of political prisoners; the curtailment of freedoms of speech and association. This chapter has demonstrated that one of the effects of low levels of democracy in Southeast Asia is to limit the regional body's power to influence democracy (and human rights) in a non-democratic member. In the decade following Myanmar's

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<sup>290</sup> Ibid.

<sup>291</sup> *New Light of Myanmar*, above n 281.

<sup>292</sup> Jose Alvarez, 'Do States Socialize' (2004) 54 *Duke Law Journal* 961.

admission to ASEAN, the regional body played no significant role in encouraging transition to democracy in Myanmar. How could it? ASEAN lacked (and lacks) the military or economic power to bribe, or the moral stature to persuade, recalcitrant members. What this chapter has sought to demonstrate, however, is that since 2010, Myanmar has been in a process of democratic consolidation. Because the dynamics of consolidation are different to the dynamics of transition, ASEAN's influence on Myanmar in relation to the *consolidation* of democracy is significant.

The primary explanation for this significance lies in the idea of 'credible commitments'. I have sought to argue that by effectively withholding the ASEAN chairmanship from Myanmar in 2006/2007, and then by later endorsing Myanmar's claim to the chairmanship for 2014, ASEAN sent a strong signal to internal and external audiences about confidence in Myanmar's process of democratisation. I have also suggested that the historical parallels between Indonesia and Myanmar, and Indonesia's successful transition to democracy, has increased the plausibility of claims by Myanmar's government that it is genuinely concerned with liberalisation. Both indicators of confidence are crucial to Myanmar's new government during the early stages of democratic consolidation, when the government is vulnerable to destabilisation from: (i) standpatters, who object to reform altogether; and (ii) from sections of the opposition, who doubt the credibility of government-led reform, or see reform as not going far enough.<sup>293</sup>

In terms of the theory put forward in this dissertation about the importance of *regional* effects in international human rights law, this chapter supports the arguments made in Chapter 2 about human rights, democracy, and the limitations of regional organisations that

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<sup>293</sup> Because this chapter is concerned with the inter-subjective perceptions of relevant actors, it has relied on information about attitudes garnered from state-owned media in Myanmar, external independent media sources, and on interviews conducted in Yangon in November 2011, with political activists, members of national and international NGOs, government representatives and members of the Myanmar Human Rights Commission.

are not comprised of a majority of democratic states. Yet it also points to the role played by newly-democratised and economically successful nations within a region, such as Indonesia within ASEAN, in setting an example for other democratising nations. This example is more effective, I would suggest, because it is provided by a nation within a geographically constrained zone of similar nations, who have shared experiences of colonialism, disunity, authoritarianism and underdevelopment. Myanmar turns to Indonesia as a democratic precedent not *just* because doing so adds credibility to its democratic commitments in the eyes of domestic and international audiences. Myanmar also, in the words of Foreign Minister Ohn Gyaw, believes that ASEAN's members see it as 'an equal.'<sup>294</sup> The approbation (or disapproval) of one's peers and equals is important, which is why so much significance was attached by Myanmar to the issue of ASEAN's chairmanship.

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<sup>294</sup> *Far Eastern Economic Review*, above n 195.

## **Chapter 5: The ASEAN Human Rights Declaration**

### **5.1 Introduction**

### **5.2 The Drafting of the ASEAN Human Rights Declaration**

### **5.3 The Content of the ASEAN Human Rights Declaration**

#### *5.3.1 The ASEAN Human Rights Declaration: Overview*

#### *5.3.2 Self-determination and Indigenous Rights*

#### *5.3.3 Preamble*

#### *5.3.4 Article 1: 'Free and Equal in Dignity and Rights'*

#### *5.3.5 Article 2: Non-discrimination*

#### *5.3.6 Article 6: Duties*

#### *5.3.7 Article 7: 'Universal, Indivisible, Interdependent and Interrelated'*

#### *5.3.8 Article 8: Limitations*

#### *5.3.9 Article 9: Particularisation*

#### *5.3.10 Solidarity Rights: Peace, the Environment and Development*

### **5.4 Conclusion**

### **5.1 Introduction**

My hypothesis is that regional arrangements for the promotion and protection of human rights possess a particular kind of legitimacy in the implementation of international human rights law. In Chapter 1, I put forward two separate propositions about why this might be the

case. The first concerns the nature of the relationship that exists between states within a particular geographic zone and the interdependencies between these states, which (I argue) under certain historical conditions, can lead to changes in the way governments behave. In Chapter 4, I examined this hypothesis in relation to ASEAN and the region's 'pariah' state, Myanmar. The conclusion was that although there is some evidence of regional-level influence on the consolidation of Myanmar's democracy, in general, the lack of representative democracy among ASEAN's members constrained regional level influences.

The second proposition outlined in Chapter 1 concerns the nature of regions as sites for deliberating about the meaning and importance of rights. My idea is that regions operate as a *via media* between the state level (where the realisation of rights can be constrained by politics and parochial prejudices) and the global level (which is too far removed from the particularistic concerns that govern social, cultural and political practice within different states). This chapter sets out to explore this second proposition. Does proximity enable more useful scrutiny of local issues? Does geography or contiguity breed a shared sense of the importance of certain issues? In this chapter, I consider these questions in relation to the drafting and final content of the ASEAN Human Rights Declaration ('the Declaration'), which was adopted by ASEAN Heads of State in Phnom Penh, Cambodia, on 18 November 2012. Whereas the discussion in Chapter 4 turned on the role of democracy (or its absence) in terms of macro-level relations between states, discussion in this chapter turns on the micro-level processes of communication that occur between actors *within* states. The focus is on the idea of deliberative democracy.

The first part of this chapter examines the drafting process for the Declaration, which took place between 2009, when AICHR was provided with a mandate to draft the Declaration in its TOR, and 18 November 2012, when the Declaration was adopted. The second part of this chapter considers the extent to which the Declaration be said, at this early stage of its life,

to reflect the cultural, social and economic commonalities of the region. Are the rights set out in the Declaration grounded in and cognisant of the actual regional context in which these rights will be operationalised? To what extent does the Declaration map the specific needs of ASEAN's diverse and developing nations, and provide scope for the future elaboration and specification of the precise content of rights within ASEAN states? To what extent does the Declaration meet the standards set out in the Universal Declaration of Human Rights (UDHR)? I evaluate the content of the Declaration, comparing it with the Universal Declaration of Human Rights, and with the instrument that has come to symbolise the high water mark of the 'Asian values' debate and cultural relativism—the 1993 Bangkok Declaration. Other relevant instruments are the 1993 Vienna Declaration and Program of Action (Vienna Declaration),<sup>1</sup> and the 1993 Kuala Lumpur Declaration on Human Rights.<sup>2</sup> The latter instrument was drafted by parliamentarians from Malaysia, Thailand, Indonesia, Singapore and the Philippines, directly after the Vienna World Conference on Human Rights.

In this chapter, I argue that the text of the Declaration, like AICHR itself, reflects the division between the more liberal and democratic ASEAN states, which have to different extents embraced the discourse of international human rights, and those states that are not liberal democracies, which have not. I point to evidence that shows how in the drafting of the Declaration, in relation to several key points, the views of the more liberal ASEAN states prevailed, and that overall, the Declaration evinces a clear intent to avoid the serious concessions to relativism which marred the Bangkok Declaration. However, this chapter also shows how the absence of deliberative democracy undermines the legitimacy of the instrument and limits its potential. This was demonstrated, in dramatic fashion, on the eve of the Declaration's signing, in November 2012. Indonesian civil society organisations publicly

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<sup>1</sup> UNGA, World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (25 June 1993).

<sup>2</sup> ASEAN Inter-Parliamentary Organisation, Kuala Lumpur Declaration on Human Rights, Kuala Lumpur (September 1993).

demanded that their government refuse to sign the AHRD,<sup>3</sup> and the High Commissioner for Human Rights, Navi Pillay, called for a delay of the signing, until broad public consultations could be carried out.<sup>4</sup>

## 5.2 The Drafting of the ASEAN Human Rights Declaration

In 2009, when ASEAN's newly appointed human rights commissioners announced their mandate to prepare an ASEAN Human Rights Declaration for the region,<sup>5</sup> few people were optimistic that the product would be a muscular statement of rights which met international standards. There were sound reasons for scepticism.

First, there was the political diversity of the region, described in Chapter 2, which led many to doubt that political agreement could be reached on the content of core human rights principles.<sup>6</sup> Many regional human rights systems, at their inception, have included politically diverse systems of government.<sup>7</sup> Nonetheless, the fear of many was that ASEAN's political diversity would make it impossible for states to agree on anything other than a vacuous Declaration, which described rights at a level of generality which permitted multiple and conflicting interpretations, or worse, that the Declaration would explicitly constrain the rights

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<sup>3</sup> 'Civil society rejects flawed ASEAN Human Rights Declaration' (15 November 2012) International Federation for Human Rights, available at: <<http://www.fidh.org/Civil-society-rejects-flawed-ASEAN-12429>> [accessed 13 December 2012].

<sup>4</sup> *ABC Australian Network News*, 'ASEAN declaration falls short on human rights: UN' (9 November 2012) *ABC* available at: <<http://www.abc.net.au/news/2012-11-09/an-un-hr-high-commissioner-warns-on-asean-declaration/4364384>> [accessed 13 December 2012].

<sup>5</sup> Association of Southeast Asian Nations (ASEAN), TOR of ASEAN Intergovernmental Commission on Human Rights, July 2009, available at: <<http://www.unhcr.org/refworld/docid/4a6d87f22.html>> [accessed 22 December 2012], Article 4.2: 'To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights'.

<sup>6</sup> Interview with Yuyun Wahyuningrum, Senior Advisor Human Rights Working Group, Jakarta, 12 December 2012, Canberra, copy on file with author.

<sup>7</sup> Burns Weston, Robin Lukes and Kelly Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law* 585.

of individuals and groups in favour of a broad discretion permitting states to limit freedoms on grounds such as public security, public health or public morality.<sup>8</sup> As we have seen, responsibility for drafting the Declaration lay in the hands of the Commissioners of AICHR who were accountable to their appointing states<sup>9</sup> and who must make decisions through consensus.<sup>10</sup>

Second, the low level of engagement of the ten ASEAN states with the international human rights treaty monitoring system suggests a lack of regional consensus about international human rights. Of the seven major international human rights treaties, only the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) had been signed by all ASEAN member states.<sup>11</sup> Even in relation to these treaties, several ASEAN states have entered substantial reservations.<sup>12</sup> Only the Philippines had signed the Optional Protocol to the ICCPR, allowing its citizens the right of individual petition to the Human Rights Committee.<sup>13</sup> The reluctance to engage in the international treaty system suggests, at the least, a region-wide ambivalence about subjecting government action to external scrutiny, and at the most, ongoing state-level resistance to the international human rights project altogether.

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<sup>8</sup> Ibid.

<sup>9</sup> Association of Southeast Asian Nations (ASEAN), TOR of ASEAN Intergovernmental Commission on Human Rights, July 2009, available at: <http://www.unhcr.org/refworld/docid/4a6d87f22.html> [accessed 22 December 2012], Article 5.2.

<sup>10</sup> Ibid, Article 6.1.

<sup>11</sup> Chapter 6 discusses the ratification of these Conventions by ASEAN states.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') (adopted 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981); Convention on the Rights of the Child (adopted 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990). Brunei and Malaysia have subjected obligations to Islamic and domestic law; Singapore had made all of its obligations subject to Singaporean law: Singapore's reservation to Convention on the Rights of the Child, 5 October 1995, available at: [http://untreaty.un.org/humanrightsconvs/Chapt\\_IV\\_11/reservations/singapore.pdf](http://untreaty.un.org/humanrightsconvs/Chapt_IV_11/reservations/singapore.pdf). Generally on reservations of ASEAN states see: Suzanne Linton, 'ASEAN states, their reservations to human rights treaties and the proposed ASEAN Commission on Women and Children' (2008) 30(2) *Human Rights Quarterly* 436.

<sup>13</sup> The Philippines also acceded to the Optional Protocol to the International Covenant on Civil and Political Rights on 22 August 1989.

Third, there were concerns that the Declaration would revive old debates about the philosophical foundation and political utility of ‘international human rights’ as an idea. During the 1993 Vienna World Conference on Human Rights, some Asian leaders, several of whom were from Southeast Asia, raised questions about the central premise of human rights: the principle of universality. These representatives asked how it could really be the case, as the UDHR asserted, that human rights were applicable to *all* people, at *all* times, regardless of a state’s economic development and social context. At the Vienna World Conference, Asian leaders made an observation which had also been made forty-five years earlier, by philosophers and scientists at the time of the drafting of the UDHR. This was that rights have a cultural and historical specificity: rights and duties cannot be absolute but are always relative to milieu.<sup>14</sup> Representatives of United Nations human rights bodies, and many civil society activists in Southeast Asia, were dismayed at the prospect of re-opening the question of universality. In their view, the rhetorical power of ‘the universal’ was an essential bulwark against slippage in state commitment to human rights protection.<sup>15</sup>

An antidote to all of these fears might have been a drafting process for the Declaration that was transparent, fair, broad, participatory, inclusive and wide-ranging, and in which the marginalised and vulnerable people of the region, who were after all the primary intended beneficiaries of the Declaration, participated. In such a scheme, drafts of the Declaration would have been translated into the languages of the region and disseminated widely, including in rural areas. The opinions of religious leaders and philosophers would have been sought, as well as the views of legal experts and politicians, and these figures would have engaged with one another—and with ordinary people—in public forums, about the scope and

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<sup>14</sup> At its simplest level, this argument took the form of observations such as this: how could a right to ‘rest and leisure, including reasonable limitation of working hours and periodic holidays with pay,’ which is guaranteed by Article 24 of the Universal Declaration on Human Rights, be a ‘universal’ right, held (for example) by pre-industrial agrarian communities, such as those that still exist in many parts of Southeast Asia?

<sup>15</sup> Interview with Yuyun Wahyuningrum, Senior Advisor, Human Rights Working Group, Jakarta, 12 December 2012, above n 6.

content of the Declaration. In short, the ideal of deliberative democracy, which is in modern times understood as a central element of the legitimacy of law created within the political confines of the state, would have been employed throughout the process of the creation of the ASEAN Human Rights Declaration.<sup>16</sup> When the United Nations High Commissioner for Human Rights, Navi Pillay, warned those responsible for drafting the ASEAN Human Rights Declaration that: ‘The process through which this crucial Declaration is adopted is almost as important as the content of the Declaration itself’ and asked AICHR to recognise the value of holding ‘meaningful consultations with people from all walks of life, in every country across the South-East Asia region,’<sup>17</sup> she was referring to precisely this sort of engagement. In May 2012, Pillay observed that: ‘No discussion of human rights can be complete or credible without significant input from civil society and national human rights institutions.’<sup>18</sup>

To civil society organisations (CSOs), and to UN actors such as Navi Pillay, it was self-evident that CSOs should play an important role in the drafting of the Declaration. Yet the central role accorded to civil society in international law-making is a relatively modern phenomenon. In 1949, for example, at the time of the drafting of the European Convention of Human Rights (ECHR), a very different ethic of public involvement prevailed. The ECHR was largely the work of a handful of bureaucrats; it was certainly not drafted with the considered input of civil society organisations; nor was there any expectation that it should be.<sup>19</sup> The different expectations about the necessity of CSO involvement is, largely, one of the by-products of globalisation. Discussion, debate, the resolution of conflicting positions, the drafting of submissions, the creation of consensus and the identification of positions of

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<sup>16</sup> John Dryzek, ‘Transnational Democracy’ (1999) 7(1) *Journal of Political Philosophy* 30.

<sup>17</sup> United Nations Office of the High Commissioner for Human Rights, Press Statement ‘Pillay Urges ASEAN to Set the Bar High with its Regional Human Rights Declaration’ (11 May 2012) available at: <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12142&LangID=E>> [accessed 14 May 2012].

<sup>18</sup> *Ibid.*

<sup>19</sup> A.W. B. Simpson, ‘Britain and the European Convention’ (2001) 34 *Cornell Int'l LJ* 523.

opposition, no longer require physical contact between interested parties. Advances in technology mean that communication between CSOs, governments, representatives of international organisations, and others in different parts of the world, is possible on a scale and at a level of intensity that was unimaginable at the time when Europe and the Americas were producing the first regional human rights agreements. It was extraordinary, therefore, in June 2012, when the Cambodian AICHR representative, Om Yintieng, stated that there would be no public circulation of the AHRD prior to its adoption by ASEAN Heads of State: ‘NGOs want to write it instead of us, but they don’t know their duties. The declaration is for all 800 million ASEAN people, so if those 800 million people want to help, in 800 million years we will not be able to finish it.’<sup>20</sup>

There were a number of specific reasons why CSOs in Southeast Asia considered it imperative that their submissions and views be taken into consideration in the drafting process of the AHRD. First, CSOs hoped that the Declaration would eventually evolve into a legally binding Convention, in the same way that the UDHR had eventually evolved into the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>21</sup> CSOs hoped to see the transformation of AICHR into a judicial body with powers of enforcement, as a parallel development. The Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights, pronounced in 2009 at the time of the announcement of the Commission’s TOR, provided that AICHR would be reviewed every five years after its entry into force ‘to strengthen the mandate and functions of AICHR in order to further develop mechanisms on both the protection and promotion of human

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<sup>20</sup> Chhay Channyda, ‘NGOs Don’t Need to See Rights Doc Draft: official’ (14 June 2012) *The Phnom Penh Post* available at: <<http://www.phnompenhpost.com/index.php/2012061456802/National-news/ngos-dont-need-to-see-rights-doc-draft-official.html>> [accessed 20 July 2012].

<sup>21</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 3 November 1976); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, 993 UNTS 3, entered into force 3 January 1976).

rights.’<sup>22</sup> The Commission’s Five-year Workplan, which was never publicly released, also provided that AICHR would ‘Work towards the ASEAN Convention on Human Rights upon the adoption of the ASEAN Human Rights Declaration.’<sup>23</sup> Optimists hoped that by the time of AICHR’s first five-year review, in 2014, there might be sufficient momentum amongst ASEAN states to support the transformation of the Declaration into a formal convention. CSOs feared that a weak declaration, which failed to meet international standards for human rights protection, would be a precursor to a weak convention.

Second, it was hoped that the Declaration would provide AICHR with a clearer mandate. Under the TOR of AICHR, one of the purposes of the Commission is to ‘uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.’<sup>24</sup> The TOR also states that AICHR is to be guided by the principle of ‘upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States.’<sup>25</sup> Because of the references to ‘human rights instruments *to which ASEAN Member States are parties*’ and ‘international law.... *subscribed to by ASEAN Member States*’ (emphasis added) it was unclear whether or not the Commission’s mandate was limited to upholding only those human rights to which all ASEAN states had formally

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<sup>22</sup> Article 7, Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights 2009, Fifteenth ASEAN Summit, Cha-am Hua Hin, Thailand (23 October 2009).

<sup>23</sup> Copy on file with author. This document was leaked to the public mid-2011. At 4.2, the Workplan discusses the drafting of the ASEAN Declaration, and lists as items to be completed: ‘1. Set up an ad hoc task force on drafting an ASEAN Human Rights Declaration (AHRD) with the TOR to be prepared by AICHR. 2. Take stock of and assess status of existing human rights mechanisms and instruments in ASEAN. 3. Work towards the ASEAN Convention on Human Rights upon the adoption of the ASEAN Human Rights Declaration. 4. Support the development of other ASEAN legal instruments on human rights undertaken by other ASEAN sectorial bodies. Support and strengthen the framework of legal cooperation on ASEAN Human Rights.’

<sup>24</sup> Association of Southeast Asian Nations (ASEAN), TOR of ASEAN Intergovernmental Commission on Human Rights, July 2009, available at: <<http://www.unhcr.org/refworld/docid/4a6d87f22.html>> [accessed 22 December 2012] Article 1.6.

<sup>25</sup> Ibid, Article 2.1(f).

subscribed, either in international conventions, or regional instruments. It confounded CSOs, for example, that AICHR had made no statements of condemnation on human rights issues that arose throughout the region during its first term in office, in relation to violations of rights of: freedom of speech (Thailand);<sup>26</sup> freedom of association (Malaysia);<sup>27</sup> freedom of expression and association (Singapore);<sup>28</sup> the right to life (the Philippines);<sup>29</sup> freedom of expression (Vietnam and Laos);<sup>30</sup> the right to life, freedom of expression and freedom of association (Cambodia);<sup>31</sup> freedom of expression, freedom of association, right to political

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<sup>26</sup> For example, on 25 July 2011, Somyot Pruksakasemsuk, journalist and editor of the *Voice of Thaksin* magazine, was charged for publishing and distributing the magazines containing articles that violated Thailand's *lese majeste* law. At the time of writing, Somyot is still imprisoned.

<sup>27</sup> For example, on 17 September 2012, 136 Malaysian non-governmental Organisations (NGOs) wrote an open letter protesting against the actions of the Malaysian government in relation to one of the country's leading NGOs, Suara Rakyat Malaysia (SUARAM). The NGOs claimed that the government had carried out ongoing harassment of SUARAM through investigations, public vilification and threats to charge the NGO for alleged financial irregularities, non-registration as a society, and receipt of foreign funds. See: 'Malaysian and International Human Rights Groups Urge Malaysian Government to End Harassment against SUARAM' (17 September, 2012) *Forum-Asia* available at: <http://www.forum-asia.org/?p=1538> [accessed 21 September 2012].

<sup>28</sup> See: Parameswaran Ponnudurai, 'ASEAN Wavers On Rights: An Analysis' (10 January 2012) available at: <http://www.rfa.org/english/east-asia-beat/rights-01102012201819.html> [accessed 20 December 2012].

<sup>29</sup> For example, on 23 November 2009, what appeared to be a politically-motivated massacre occurred, in the Philippine town of Ampatuan, in Maguindanao. Among the 58 dead were journalists, lawyers and political aides. Relatives of the dead bought a complaint to AICHR, urging the Commission to call on the Philippine government to ensure that the perpetrators of the massacre were brought to justice and adequate reparations were made to the heirs of the victims under international law. AICHR passed the complaint to the ASEAN Secretariat, after the Arroyo government declared it was a 'domestic issue'. Allen V. Estabillo, 'Ampatuan Massacre, Other Cases 'Gathering Dust' at ASEAN Rights Commission' (31 March 2012) *Minda News* available at: <http://www.mindanews.com/top-stories/2012/03/31/ampatuan-massacre-other-cases-gathering-dust-at-asean-rights-commission/> [accessed 23 November 2012].

<sup>30</sup> James C. McKinley jr., 'Vietnam Sentences 2 Musicians to Prison Terms on Propaganda Charges' (30 October 2012) *The New York Times (Arts Beat)* available at: <http://artsbeat.blogs.nytimes.com/2012/10/30/vietnam-sentences-2-musicians-to-prison-terms-on-propaganda-charges/> [accessed 23 November 2012]. In this case, a court in Vietnam sentenced two musicians to prison for writing and distributing protest songs. The musicians, Vo Minh Tri and Tran Vu Anh Binh, were convicted of spreading propaganda against the state after a half-day trial in Ho Chi Minh City. Mr Tri received four years in prison; Mr Binh, six years. In neighbouring Laos, student leaders who were arrested in 1999 remain in gaol: see Universal Periodic Review, 'List of recommendations contained in Section II of the Report of the Working Group to Lao PDR' A/HRC/15/5 available at: [http://www.upr-info.org/IMG/pdf/recommendations\\_to\\_laos\\_2010.pdf](http://www.upr-info.org/IMG/pdf/recommendations_to_laos_2010.pdf) [accessed 20 December 2012].

<sup>31</sup> On 26 April 2012 Mr Chhut Wuthy, the President of Environmental and Natural Resource Protection Organization, was shot dead when he entered into a prohibited logging area. On 16 May 2012, a 14-year-old girl, Heng Chantha, was shot by Cambodia's armed forces in Kampong Damrei commune, Chhlong district, Kratie province, during a displacement mission by the authorities, which provoked a protest from the local community. On 24 May 2012, the Phnom Penh municipal court issued arrest warrants to detain 15

participation, right to life, (Myanmar);<sup>32</sup> freedom from torture (Indonesia).<sup>33</sup> CSOs believed that the Declaration needed to provide a clear statement of the rights that AICHR was mandated to take action upon (even if action only amounted to oral condemnation).

Third, the Declaration was seen as a gauge of the extent to which the institutional limitations of AICHR would prevent it from operating to protect and promote human rights within the region. Observers were keen to assess the Declaration, which was the Commission's first task, given that: the Commission was only required to meet twice a year; decisions were required to be made by consensus;<sup>34</sup> Commissioners were appointed by their government and were 'accountable to the government.'<sup>35</sup> There remained the hope amongst some CSOs that despite these limitations, independent-minded and courageous commissioners might yet be able to speak out on human rights violations within the region, and so by a combination of awareness-raising and 'shaming', change the way governments in the region dealt with questions of human rights. The Declaration came to be seen as the crucible for this hope. As one coalition of NGOs put it: '[t]he drafting of the AHRD is a litmus test of AICHR's willingness to constitute a credible, respected, and effective regional human rights body.'<sup>36</sup>

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representatives of Boeng Kak Lake community, who were protesting the recent seizure of their land plots by Shukaku Inc Co, Ltd. For a report on the Chhut Wuthy case, see: Fran Lambrick, 'Who is Responsible for the Death of Cambodia's Foremost Forest Activist?' (1 May 2012) *The Guardian* available at: <http://www.guardian.co.uk/environment/blog/2012/may/01/death-cambodian-forest-activist-chut-wuty> [accessed 12 December 2012].

<sup>32</sup> See Chapter 4.

<sup>33</sup> In October 2010, video footage of West Papuan villagers being tortured by members of the Indonesian Security Forces was seen around the world. The incident was believed to have been filmed on the mobile phone of one of the soldiers as a 'trophy'. See: *Survival*, 'Shocking Video of Papuan Torture Prompts Calls for Inquiry' (20 October 2010) available at: <http://www.survivalinternational.org/news/6598> [accessed 20 December 2012].

<sup>34</sup> TOR, above n 9.

<sup>35</sup> *Ibid.*

<sup>36</sup> Joint Statement NGOs, 'NGOs Call for the Drafting of the ASEAN Human Rights Declaration to be Transparent and Subject to Meaningful Consultations with Civil Society' (2 May 2012) available at: <http://www.fidh.org/The-ASEAN-Human-Rights-Declaration> [accessed 20 June 2012].

## Chapter 5: The ASEAN Human Rights Declaration

For these reasons, CSOs attached significant importance to the Declaration, and were determined to ensure that its fate would be different to the hundreds of hortatory declarations, statements and ‘visions’ that each year emanated from ASEAN, few of which ever come to fruition, or altered the way states behaved, or penetrated the consciousness of the people of the region. CSOs recognised that the Declaration would be more effective as a tool for lobbying if it was perceived as legitimate, and they also recognised that the legitimacy of the Declaration would be enhanced by the involvement of civil society in its creation, and to the greatest degree possible, by the involvement of the broader public as well.

The means for broad public engagement were certainly available. In Southeast Asia, of the many thousands of civil society organisations, many possess sophisticated, transparent, and highly democratic processes for engaging with one another, and with governments and international organisations. Many CSOs had been active in lobbying for the creation of a regional human rights mechanism back at the time when the ASEAN Charter was drafted, and possessed well-organised national and regional networks. Using the Internet to promote discussion, debate, and to include the many grass-roots NGOs whose views would otherwise have been overlooked, CSOs were well-prepared to play an active and constructive part in the drafting of the Declaration. Several joint CSO recommendations were prepared through participative processes at the national level, engaging diverse groups of national and regional NGOs.<sup>37</sup> The two most prominent *networks* of CSOs, which functioned as umbrella organisations, bringing together small and grass-roots NGOs, were the Solidarity for Asian

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<sup>37</sup> For example, in September 2012, Indonesian NGOs submitted a joint proposal which included seven ‘priority issues’ which AICHR must consider in the Declaration, such as the issue of limitation of rights (including whether ‘public morality’ should be included as a permissible limitation), principles of self-determination, indigenous peoples rights, the right to an impartial and independent judiciary, and sexual and reproductive health and rights. See: LBH Apik, Arus Pelangi, SAPA Indonesia, Demos, Human Rights Resource Center, I for Humans, Solidaritas Perempuan, Imparsial, Human Rights Working Group (HRWG), LBH Jakarta (Jakarta Legal Aid Institute), Kalyanamitra, Indigenous Peoples Alliance of the Archipelago (AMAN), ‘AHRD is Hijacked by Narrow-minded National Interests’ (13 September 2012) available at: <http://www.burmapartnership.org/2012/09/ahrd-is-hijacked-by-narrow-minded-national-interests> [accessed 2 December 2012].

## *Chapter 5: The ASEAN Human Rights Declaration*

People's Advocacy (SAPA), which represents around 80 civil society organisations from across Southeast Asia; and the Working Group for an ASEAN Human Rights Mechanism (HRWG). As well as holding workshops on the Declaration and disseminating information about it, these networks drafted several joint submissions on the content of the Declaration to AICHR and later, to the ASEAN Foreign Ministers. Several CSOs dedicated to specific issues, such as the Southeast Asia Women's Caucus on ASEAN (Women's Caucus) and Earthrights International, also made submissions on the ASEAN Human Rights Declaration.

Despite repeated calls from these groups for consultation and dialogue about the Declaration,<sup>38</sup> and the exhortations of the High Commissioner for Human Rights, AICHR held only two, day-long regional consultations with civil society. Both of these occurred in the latter half of 2012, when the Declaration was already largely completed. The first regional consultation took place on 22 June 2012, at the Ritz Carlton Hotel in Kuala Lumpur, one day before AICHR held its final meeting on the draft Declaration.<sup>39</sup> The second meeting took place on 12 September 2012, in Manila, at a time when the Declaration had already been submitted to the ASEAN Foreign Ministers for review. Only four CSOs from each country were permitted to attend each of these consultations. How these four were selected was the subject of controversy. Each Commissioner selected the representatives from his or her country, and in the case of Laos and Vietnam, the CSOs selected were affiliated with the government.<sup>40</sup> For these reasons alone, from the perspective of civil society organisations, the consultations were manifestly inadequate.

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<sup>38</sup> In April 2011, prior to the 4th meeting of AICHR, 136 civil society organizations released a joint statement calling for the immediate release of the draft Declaration and for AICHR to engage in full and meaningful consultations with civil society. These calls continued throughout 2011 until finally, AICHR announced that it will hold the 22 June consultation with civil society on the ASEAN Human Rights Declaration. The region's national human rights institutions were not invited to participate in the consultation.

<sup>39</sup> The Declaration was due to be submitted to ASEAN's Foreign Ministers on July 9, 2012.

<sup>40</sup> The modalities for the second regional consultation were discussed during the 6<sup>th</sup> AICHR Meeting on the Declaration, held in Yangon, Myanmar on 3-6 June 2012. It was during that meeting that it was decided that

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The June consultation in Kuala Lumpur involved little dialogue and debate between CSOs and Commissioners. CSO representatives read out prepared statements; the Commissioners listened without responding. After the first consultation, CSOs released a joint statement saying that they ‘were appalled that AICHR hopes to finalize such an important regional document, that is supposed to enshrine the rights of the peoples in the region, by holding merely one consultation with civil society at this late hour.’<sup>41</sup> They described the 22 June consultation as a symbolic ‘box-ticking’ exercise so that AICHR could claim to have consulted civil society, rather than a meaningful engagement with civil society.<sup>42</sup> The Malaysian Bar Association labelled the drafting process ‘secretive and opaque’ and demanded that the submission of the draft Declaration to the ASEAN Foreign Ministers should be delayed in order for comprehensive consultations to be carried out: ‘Since the intention is for the AHRD to be a foundational document that captures the hopes and aspirations of the peoples of ASEAN, then their voices must be heard.’<sup>43</sup> On the other hand, AICHR’s press release described the 22 June consultation as ‘engaging, constructive and productive as it brought many fresh ideas and different perspectives for AICHR’s consideration for the further enrichment of the draft AHRD.’<sup>44</sup>

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each Representative could select which 4 NGOs were to be invited. Each NGO was permitted to bring two persons to the consultation. AICHR also discussed regional and international NGOs that could be invited.

<sup>41</sup> Amnesty International, the International Commission of Jurists, Human Rights Watch, the International Federation for Human Rights (FIDH), Dignity International, and ARTICLE 19, ‘Less than Adequate: AICHR Consultation on ASEAN Human Rights Declaration’ (21 June 2012) available at: <http://www.article19.org/resources.php/resource/3338/en/less-than-adequate:-aichr-consultation-on-asean-human-rights-declaration> [accessed 22 December 2012]; ‘ASEAN Human Rights Declaration: ASEAN Intergovernmental Commission on Human Rights Urged to Hold Meaningful Consultations with CSOs’ (2012) 9 *Asia Pacific Update* 8.

<sup>42</sup> Amnesty International, the International Commission of Jurists, Human Rights Watch, the International Federation for Human Rights (FIDH), Dignity International, and ARTICLE 19, *Ibid.*

<sup>43</sup> Lim Chee Wee, President, Malaysian Bar Council, ‘ASEAN Human Rights Declaration: Hear the Voices of the Peoples of ASEAN’ (12 April 2012) available at: [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_asean\\_human\\_rights\\_declaration\\_hear\\_the\\_voices\\_of\\_the\\_peoples\\_of\\_asean.html](http://www.malaysianbar.org.my/press_statements/press_release_asean_human_rights_declaration_hear_the_voices_of_the_peoples_of_asean.html) [accessed 12 July 2012].

<sup>44</sup> ASEAN Press Release, ‘The Seventh Meeting of the ASEAN Intergovernmental Commission on Human Rights (AICHR) on an ASEAN Human Rights Declaration (AHRD) and the Second Regional Consultation of

The second consultation was, in the words of Indonesian CSO delegate Yuyun Wahyuningrum, ‘a step forward for ASEAN in engaging with the civil society.’<sup>45</sup> CSOs had learnt from the July experience, and were determined that the September consultation ‘should be more interactive. No more listening mode, but rather to answer our questions.’<sup>46</sup> Indonesian NGOs collaborated to prepare a joint approach on eight ‘priority issues’ for the AHRD, which had apparently still not been agreed upon by AICHR Commissioners: limitation of rights (including public morality); principles of self-determination; non-derogable rights; indigenous peoples rights; right to an impartial and independent judiciary; migrant workers; sexual and reproductive rights.<sup>47</sup>

In Manila, CSOs used their allocated presentation time—which was 15 minutes for each country—to present specific proposals on areas where there was still debate and contention. CSOs demanded responses from AICHR commissioners on specific submissions, and in some instances, illuminating exchanges occurred. For example, in response to the submission from representatives of the Women’s Caucus, that ‘public morality’ should be removed as a limitation on rights, the Malaysian Commissioner told NGOs that Malaysia, as well as Singapore and Brunei, possessed legal systems which included ideas of public morality as a limitation on the exercise of freedoms, and that because of this, public morality must remain as a limitation in the Declaration.<sup>48</sup> On the question of including indigenous

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AICHR on the AHRD, Kuala Lumpur’ (25 June 2012) available at: <<http://www.asean.org/27044.php>> [accessed 21 November 2012]. In this release, AICHR reaffirmed that the draft AHRD would be submitted to the ASEAN Foreign Ministers’ Meeting (AMM) in July 2012 and adopted by the ASEAN Leaders in November 2012 in Cambodia.

<sup>45</sup> Human Rights Working Group, ‘CSOs Indonesia Highlight 8 Priority Issues on Improving AHRD’ (9 September 2012) available at: <<http://www.hrwg.org/en/hrwg/press-release/item/3917-csos-indonesia-highlight-8-priority-issues-on-improving-ahrd>> [accessed 21 November 2012].

<sup>46</sup> Email distribution briefing letter from Yuyun Wahyuningrum, senior advisor to the HRWG, 7 September 2012. Copy on file with author.

<sup>47</sup> These recommendations were prepared at the national level by Indonesian CSOs and finalized by the Human Rights Working Group (HRWG), Indigenous Peoples Alliance of the Archipelago (AMAN), Jakarta Legal Aid (LBH Jakarta), and Kalyanamitra.

<sup>48</sup> See ‘AHRD is Hijacked by Narrow-Minded Interests’, above n 37.

rights in the Declaration, the Lao PDR representative was reported as saying that ‘the concept was not appropriate for countries that have no indigenous peoples, including Lao PDR.’<sup>49</sup> On the question of whether rights to sexual orientation and gender identity should be included, AICHR Representative from Malaysia stated that LGBTIQ rights were incompatible with the legal systems of those ASEAN countries that applied Shari’a law.<sup>50</sup>

At the national level, in some countries, (Thailand, Indonesia, the Philippines, Singapore and Malaysia), individual Commissioners held a number of meetings with CSOs on the Declaration.<sup>51</sup> CSO submissions to commissioners generally exhorted the same basic principle: that the Declaration should enshrine the human rights principles found in the Universal Declaration of Human Rights, the ICCPR, the International Covenant on Economic, Social and Cultural Rights and the other major human rights treaties.<sup>52</sup> In Brunei, Vietnam, Cambodia, Laos and Myanmar, there was virtually no engagement between AICHR and CSOs on the Declaration. Indeed, in these countries, the identity of AICHR country

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> On 26 May 2012, in Bangkok, prior to the 22 June meeting, AICHR representatives from Thailand and Malaysia held an Informal Consultation on the Declaration. In the course of that meeting, the Thai and Malaysian Commissioners reported that the draft they were working on was ‘progressive’, and consisted of: a) Preamble, b) General Principles, c) Catalogue of Rights, and d) Rights and Responsibilities. The Commissioners claimed that the draft followed and adopted all articles in the Universal Declaration of Human Rights and also contained the ‘added value’ of the right to development and the right to peace. The Commissioners reported that they were still deliberating on the inclusion of issues relating to: an independent judiciary; self-determination; right to protection of personal data; rights of migrant workers; rights concerned with sexual orientation and gender identity; statelessness; corporate social responsibility; the protection of human rights defenders; non-refoulement for refugees; enforced disappearances; right to peace. The Commissioners also suggested that perhaps civil society should consider drafting its own *ASEAN Peoples’ Human Rights Declaration*, to provide a counter-point to the ASEAN Human Rights Declaration, if the text of the latter document proved to be deficient in the eyes of CSOs. Working Group for an ASEAN Human Rights Mechanism, ‘News and Updates’ (undated) available at: <<http://www.aseanhrmech.org/news/phil-aichr-rep-dialogues-with-cso-of-aseanhrd.htm>> [accessed 21 November 2012].

<sup>52</sup> The SAPA Task Force On ASEAN And Human Rights, ‘Civil Society’s Position Paper on ASEAN Human Rights Declaration’ (21 June 2011) available at: <[http://forum-asia.org/documents/SAPA\\_TFAHR\\_Position\\_Paper\\_AHRD\\_final.pdf](http://forum-asia.org/documents/SAPA_TFAHR_Position_Paper_AHRD_final.pdf)> [accessed 21 November 2012]. In May 2012, the American Bar Association Rule of Law Initiative produced a seventy page ‘Experts Note on the ASEAN Human Rights Declaration (AHRD)’. Written by a group of international legal experts, the note was published as part of an effort ‘to share expertise and promote dialogue regarding the purpose and content of the AHRD.’

representative was not widely known. Few CSOs within these countries contributed submissions on the Declaration. As the Malaysian Bar Association noted: ‘Discussion of the draft AHRD between AICHR representative and civil society of each ASEAN country has not been consistent or widespread, depending very much on individual initiatives, and varying from country to country.’<sup>53</sup>

When meetings between Commissioners and CSOs did occur, it is difficult to say what effect they had. For example, after the first CSO-AICHR consultation, the Philippines’ Commissioner announced that she had become convinced that the public morality limitation should be removed from the draft; the Malaysian Representative undertook to include the rights and concerns of Indigenous Peoples’ in the draft; some Commissioners undertook to adopt in the Declaration the formulation of the right to self-determination as it is included in Article 1 of the ICCPR (with the proviso that the right to self-determination would not be applicable to the territorial jurisdiction of the state); many AICHR representatives agreed that the limitation of rights provision in the Declaration should follow international standards.<sup>54</sup> Yet none of these undertakings were realised in the final Declaration. One reason for this is that after January 2012, AICHR was no longer in control of the drafting process. After a draft of the Declaration was leaked to the public in January 2012, the task of drafting the Declaration was taken out of the hands of AICHR and given to the ASEAN Secretariat. This means that during consultations that occurred after this point, those who were responsible for actually drafting the Declaration were not the ones engaging in the debate, argumentation and justification about how the Declaration should be framed and what rights it should include, or what limitations it should exclude.

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<sup>53</sup> Lim Chee Wee, ‘Press Release ASEAN Human Rights Declaration: Hear the Voices of the Peoples of ASEAN’ 12 April 2012, above n 43.

<sup>54</sup> The Human Rights Working Group produced a detailed account of what transpired at the First Consultation: Human Rights Working Group, *The 2nd Regional Consultation on ASEAN Human Rights Declaration (AHRD)*, Ritz-Carlton Hotel, Kuala Lumpur, Malaysia (22 June 2012). Copy on file with author.

## *Chapter 5: The ASEAN Human Rights Declaration*

The draft leaked in January 2012 contains some instructive insights into the different priorities and concerns of ASEAN states. The draft was the creation of a drafting group, comprised of one representative from each ASEAN Member State, which had been established to assist AICHR in creating the Declaration.<sup>55</sup> The draft was sufficient to confirm the fears of civil society activists that the Declaration would reflect a ‘lowest common denominator’ approach to articulating rights in Southeast Asia. It contained 100 clauses, most of which were bracketed, indicating that agreement had yet to be reached on the final form of that clause.<sup>56</sup> Contentious clauses were footnoted, with the notes indicating which country was proposing the clause or had reservations about its form or inclusion. It is notable that Thailand, Indonesia and the Philippines (referred to as ‘ThaiIndoPhils’ in the draft) presented a united position on almost all clauses, and this position was, by and large, a progressive and liberal one. Little can be learnt from the draft on the stance of Singapore, Myanmar, Brunei and Malaysia, although we know that Malaysia and Brunei objected to expanding the prohibition on discrimination to include ‘sexual identity’. Vietnam and Laos, however, provided some illuminating contributions. In the section on civil and political rights, Vietnam objected to the inclusion of the word ‘freely’ in the clause, ‘Every citizen has the right to participate freely in the government of his or her country.’<sup>57</sup> Laos also proposed a limitation clause, which stated:

The exclusive insistence on rights can result in conflict, division, and endless dispute and can lead to lawlessness and chaos. Nothing in this Declaration may therefore be

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<sup>55</sup> AICHR did not release to the public the TOR that it had supplied to the drafting team. According to a press release issued by AICHR, the Drafting Group was instructed to prepare a draft of the ASEAN Human Rights Declaration, and ‘in particular take into account the values and principles in the ASEAN Charter, the TOR of AICHR as well as international human rights instruments including the Universal Declaration of Human Rights.’ See: <http://aichr.org/press-release/press-release-of-the-fifth-asean-intergovernmental-commission-on-human-rights-asean-secretariat/> [accessed 21 November 2012].

<sup>56</sup> The draft makes reference to non-discrimination and recognition before the law, most of the major civil and political rights found in the ICCPR, and the full range of economic and social rights set out in ICESCR. The draft also contained a section on the ‘right to development’ and a section on the duties and responsibilities of corporations.

<sup>57</sup> Article 56, draft of the ASEAN Human Rights Declaration, 9 January 2012. Copy on file with author.

interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.<sup>58</sup>

The significance of the draft should not be overstated, given that it was prepared solely by the drafting group and at the time it was leaked, it had not yet been reviewed by AICHR or by the ASEAN Senior Officials Meeting (SOM). Nonetheless, from the leaked draft, it appeared to CSOs that concessions to regional exceptionalism may have been winning out over the imperative towards universalism. From January 2012, therefore, most of the submissions put forward by CSOs cautioned against a failure to meet ‘international standards’ in the ASEAN Human Rights Declaration. A submission by the International Commission of Jurists, for example, stated that the ICJ ‘shared the apprehension expressed by numerous human rights stakeholders that the outcome of this drafting process may be a document with provisions falling below international human rights standards and even unduly limiting rights that have been set out in international human rights instruments to which ASEAN members are parties.’<sup>59</sup> The ICJ reminded AICHR that it must uphold the principle of universality of human rights embodied in those instruments.<sup>60</sup> But in the end, the result was disappointment. ‘We see our expectation on AHRD becoming smaller and smaller in the due course of drafting process,’ said Febionesta, the Director of Jakarta Legal Aid. ‘We

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<sup>58</sup> Laos also recommended a clause relating to freedom of religion, which included the following provision: ‘No one shall use religion as the pretext to violate the law and order of the State. Advocacy or dissemination of religions or beliefs shall be in compliance with national law of each ASEAN Member State.’ Several of the potential limitations clauses contained in the Draft permitted derogations from rights on the grounds such as national security and respect for the reputations of others, as well as (the commonly accepted grounds) of public order, public health, public morality, and the general welfare of the peoples in a democratic society. In light of this, Amnesty International, the International Commission of Jurists, and a joint submission by the Mekong Lawyers Network, Earthrights International and the Sydney Centre for International Law, all recommended that reference be made to the international law principle of non-derogability of fundamental human rights. They hoped that, if adopted, this reference would be sufficient to displace the usual presumption that the rules of international law did not apply to ‘soft law’ such as Declarations.

<sup>59</sup> International Commission of Jurists, ‘The ICJ Urges Broad-based Civil Society Consultations and Respect for the Principle of Universality in Elaboration of the ASEAN Human Rights Declaration’ (13 March 2012) available at: <<http://www.enable.org.tw/iss/pdf/20120821-3.pdf>> [accessed 23 October 2012].

<sup>60</sup> Ibid.

doubt that AHRD will be at par with the international human rights standard as AICHR's earlier promises. For Indonesia, there is no point of return. The country should stand firm with its civil society to only accept AHRD at par with the international standard. Period.'<sup>61</sup>

### **5.3 The Content of the ASEAN Human Rights Declaration**

On several occasions, AICHR Commissioners informed audiences that their aim was to draft a human rights declaration 'that met international standards for the protection of human rights' and that also contained an 'added value' for Southeast Asia.<sup>62</sup> This section measures the ASEAN Human Rights Declaration against these goals. Section 1 provides an overview of the contents of the Declaration, noting the major similarities and divergences between the ASEAN Human Rights Declaration and the 'parent' of all human rights instruments, the Universal Declaration on Human Rights. Section 2 considers two rights *not* included in the ASEAN Declaration: the right to self-determination and the rights of indigenous peoples. Section 3 discusses the Preamble to the Declaration. Section 4 considers the dimensions and significance of Article 1 of the Declaration, which leads to an excursus about universalism and its significance in the Southeast Asian context. Section 5 discusses Article 2, the non-discrimination provision, and the decision not to include gender identity and sexual orientation as a prohibited ground of discrimination. Section 6 discusses Article 6, the 'duties' provision. Section 7 analyses Article 7, and the claims that human rights are 'indivisible, interdependent and interrelated.' Section 8 considers Article 8, the limitations provision, and specifically, the implications of the 'public morality' limitation in the context

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<sup>61</sup> 'AHRD is Hijacked by Narrow-Minded National Interests, above n 37.

<sup>62</sup> Tassia Sipahutar and Yohanna Ririhena, 'ASEAN Declaration Should be 'Equally Powerful' to UN's' (28 June 2012) *The Jakarta Post* available at: <http://www.thejakartapost.com/news/2012/06/28asean-declaration-should-be-equally-powerful-un-s.html> [accessed 21 July 2012].

of same-sex rights in Malaysia. Section 9 discusses Article 9, which concerns the avoidance of ‘double standards and politicisation.’ Section 10 provides an overview of the ‘solidarity rights’ contained in the Declaration: rights to peace, the environment and development.

### **5.3.1 *The ASEAN Human Rights Declaration: Overview***

The ASEAN Human Rights Declaration states that ASEAN Member States affirm all the civil and political rights, and all of the economic, social and cultural rights, in the Universal Declaration of Human Rights, as well as the specific rights listed in the ASEAN Human Rights Declaration.<sup>63</sup> From this, we can assume that the Declaration was intended to meet the standard of the UDHR in relation to the protection of all rights listed there, and that any divergences between the two texts were not intended to have significance.<sup>64</sup> Articles 3 and 5 of the Declaration, concerning the right to recognition before the law<sup>65</sup> and the right to an enforceable remedy,<sup>66</sup> mirror Articles 6 and 8 of the UDHR. In an Article, which has no counterpart in the UDHR, Article 4 of the Declaration draws special attention to the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups, as ‘inalienable, integral and indivisible part of human rights and fundamental freedoms.’

Nonetheless, despite the Declaration’s stated intention to include all of the rights in the UDHR, there are some potentially significant differences between the Declaration and the

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<sup>63</sup> AHRD, Article 10; AHRD, Article 26.

<sup>64</sup> It is notable that the Declaration does not contain amongst the specific rights listed, Article 24 in the UDHR, which provides a right to ‘rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’

<sup>65</sup> Article 3 of the Declaration states: ‘Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.’

<sup>66</sup> Article 5 of the Declaration states that: ‘Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.’ The equivalent provision in the UDHR, Article 8, states that: ‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’

UDHR, both in relation to civil and political rights, and in relation to economic, social and cultural rights.

In relation to civil and political rights, many of the rights contained in the Declaration are copied directly from the UDHR; the prohibition on torture, for example, is a direct replica of the provision in the UDHR.<sup>67</sup> In relation to certain other rights, the Declaration actually expands and clarifies rights. In relation to the prohibition on slavery and servitude, for example, along with the general prohibition on these things, the Declaration includes references to ‘smuggling or trafficking in persons, including for the purpose of trafficking in human organs.’<sup>68</sup> In other cases, the Declaration adopts a slightly different expression to the one used in the UDHR, but the difference is inconsequential. For example, the provisions on freedom of movement in the Declaration and the UDHR are identical, save that the Declaration is more gender inclusive, adding ‘or her’ to the UDHR’s ‘his’.<sup>69</sup> In relation to some articles, however, the Declaration provisions are different to the UDHR provisions in small but not necessarily trivial ways. In relation to several articles, the Declaration modifies the UDHR by adding the phrase ‘in accordance with state law.’

In relation to the right to seek and to enjoy in other countries asylum from persecution, for example (UDHR Article 14), the Declaration also includes this right, but adds a phrase at the end: ‘in accordance with the laws of such State and applicable international agreements.’<sup>70</sup> In relation to the right to a nationality (UDHR, article 15), the Declaration adds the phrase: ‘as prescribed by law’ (Declaration, Article 18). The

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<sup>67</sup> Article 14 of the Declaration states that: ‘No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’ Article 5 of the UDHR states that: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ There is no significance to the deletion of the ‘ed’ in ‘subjected’ in the Declaration formulation of this Article.

<sup>68</sup> AHRD, Article 13. The UDHR, Article 4, merely refers to slavery and servitude and the prohibition of the slave trade.

<sup>69</sup> AHRD, Article 15; UDHR, Article 13.

<sup>70</sup> AHRD, Article 16.

Declaration's right to freedom of thought, conscience and religion, which includes a strong statement that 'All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated,'<sup>71</sup> does not contain the UDHR's expansive right to change religion, and to manifest religion in teaching, practice, worship and observance.<sup>72</sup> The UDHR provisions would have troubled some followers of Islam in countries such as Malaysia, Brunei and in parts of Indonesia. Islam does not permit Muslims to change religion; the manifestation of religions other than Islam is controversial in Islamic society.<sup>73</sup> In a final example, the UDHR contains the right to peaceful assembly and association.<sup>74</sup> The Declaration also contains a right to freedom of assembly, but not, oddly—or perhaps ominously—a right to freedom of association.<sup>75</sup>

In relation to economic, social and cultural rights, the right to found a family, guaranteed in the UDHR to men and women of full age without limitation due to race, nationality or religion,<sup>76</sup> is circumscribed in the Declaration by the addition of the phrase 'as prescribed by law' and does not contain the UDHR's prohibition about discrimination.<sup>77</sup> The right to work in the UDHR is more expansive than in the Declaration. The UDHR provides for the right to equal pay for equal work, without discrimination; it also provides that everyone who works has the right to remuneration which will give he and his family an existence worthy of human dignity, and that it will be supplemented, if necessary, by other means of social protection.<sup>78</sup> The Declaration merely states that every person has the right to

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<sup>71</sup> AHRD, Article 22.

<sup>72</sup> UDHR, Article 18.

<sup>73</sup> Tad Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' (1999) *Bingham Young University Law Review* 251.

<sup>74</sup> UDHR, Article 20.

<sup>75</sup> AHRD, Article 24. According to Yuyun Wahyuningrum, senior legal advisor to the Working Group for an ASEAN Human Rights Mechanism, reference to freedom of association was removed at the insistence of Vietnam. Interview with Yuyun Wahyuningrum, 12 December 2012, above n 6.

<sup>76</sup> UDHR, Article 16.

<sup>77</sup> AHRD, Article 19.

<sup>78</sup> UDHR, Article 23.

work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed.<sup>79</sup> On the other hand, the Declaration includes a clause *not* found in the UDHR, and one that relates specifically to the problem of child labour, prevalent in Southeast Asia:

No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law.<sup>80</sup>

Other rights included referred to in the Declaration but not in the UDHR, are the rights of those suffering from communicable diseases, including HIV/AIDS,<sup>81</sup> and the right to reproductive health, within the broad ‘right to health.’<sup>82</sup> The right to development, discussed below, is also present in the Declaration.<sup>83</sup>

### 5.3.2 *Self-Determination and Indigenous Rights?*

Two rights which are notably *not* present in the Declaration are the right to self-determination and the rights of indigenous peoples. These rights are not contained in the UDHR or in the regional human rights instruments of Europe or the Americas<sup>84</sup> However, the right to self-determination is found in Article 1 of both the ICCPR and ICESCR, and in the United

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<sup>79</sup> AHRD, Article 27. Both the AHRD and the UDHR provide that everyone has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests; but the AHRD adds the phrase ‘in accordance with national laws and regulations.’ AHRD, Article 27(2); UDHR, Article 23(4).

<sup>80</sup> AHRD, Article 26(3).

<sup>81</sup> AHRD, Article 29(2).

<sup>82</sup> AHRD, Article 29(1).

<sup>83</sup> AHRD, Articles 35-37.

<sup>84</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms: European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, 213 UNTS 2, entered into force 3 September 1953), as amended by Protocol 11 (1998) and Protocol 14 (2010); American Convention on Human Rights (adopted 22 November 1969, 1144 UNTS 143, entered into force 18 July 1978). Article 20 of the African Charter on Human and Peoples’ Rights (Banjul Charter) (adopted 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986) contains a right to self-determination of peoples.

Nations Charter, Articles 1(2) and 55.<sup>85</sup> In relation to the rights of indigenous peoples, it is notable that all ASEAN states voted in favour of the adoption by the United Nations of the Declaration on the Rights of Indigenous Peoples,<sup>86</sup> as a right by virtue of which ‘a peoples’ may ‘freely determine their political status and freely pursue their economic, social and cultural development.’<sup>87</sup>

The traditional understanding of the principle of self-determination is a right of states to determine, without external interference, their own political status.<sup>88</sup> The principle is most commonly invoked in the context of decolonisation. At first blush, therefore, we might assume that self-determination would be a principle that appealed to ASEAN states, with their diverse political systems and histories of colonialism (Chapters 2 and 3). Why were governments within Southeast Asia averse to including these rights in the Declaration?

It is possible that some ASEAN governments perceived self-determination as suggesting a right to secession, and hence as a threat to unity, stability, and order.<sup>89</sup> Within many Southeast Asian states, there are groups who deny, on historical, cultural, sociological, anthropological, economic or political grounds, that they belong to the state where they reside. Many of these groups have sought recognition and/or independence for decades, often through violent conflict.

One notable example is Myanmar. Chapter 4 of this dissertation draws attention to the ethnic conflict within Myanmar and to the efforts—in some cases, the violent struggles—of

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<sup>85</sup> Charter of the United Nations (adopted 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945).

<sup>86</sup> UNGA Res. 61/295, Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (13 September 2007).

<sup>87</sup> Declaration on the Rights of Indigenous Peoples, *ibid.*, Article 3.

<sup>88</sup> 1970 Friendly Relations Declaration, U.N.G.A.Res.2625 (XXV) 24 Oct. 1970. Martti Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ 43 *International and Comparative Law Quarterly* 241, 245.

<sup>89</sup> Klabbers, however, argues that recent decisions of the International Court of Justice support the reconception of the right of self-determination as a *procedural* guarantee, rather than a substantive right to secession. This, he argues, is as it should be, because self-determination is a political matter, and the natural arena for political debates is the body politic, rather than a court of law; Jans Klabbers, ‘The Right to be Taken Seriously: Self-Determination in International Law’ (2006) 28(1) *Human Rights Quarterly* 186.

several ethnic groups for self-government. The 1948 Constitution of Burma provided for a right of secession for the Shan and Kayah peoples.<sup>90</sup> The 2008 Constitution, however, specifically provides that: ‘No part of the territory constituted in the Union such as Regions, States, Union Territories and Self-Administered Areas shall ever secede from the Union.’<sup>91</sup> Under the 2008 Constitution, ethnic groups are arranged into states, which possess some powers of self-government.<sup>92</sup> But it is, at the time of writing, unclear precisely how self-government will work; how autonomous the states and self-administered zones will be; and whether the different ethnic groups will be satisfied with the degree of independence which they have been given. Myanmar’s government, which has long struggled to forge unity and cooperation among the various ethnic groups in the country, and which still fears the balkanisation of the Union, would be hardly likely to endorse a regionally mandated concept as potentially unsettling as ‘the right to self-determination.’

Such a right is equally unappealing to the government of the Philippines. In October 2012, the Philippines announced a peace agreement between the Republic and the Muslim Moro peoples of Mindanao, in the country’s south. The decades-old conflict between the government of the Philippines and Moro peoples has its origins in the nation’s colonial history. In 1946, when the United States granted independence to the Philippines, it incorporated into the new Republic two previously independent Muslim sultanates. These Sultanates specifically stated, in the 1935 Dansalan Declaration, that they desired to be excluded from the proposed Republic.<sup>93</sup> The Dansalan Declaration predicted that if

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<sup>90</sup> Josef Silverstein, ‘Politics in the Shan State: The Question of Secession from the Union of Burma’ (1958) 18(1) *The Journal of Asian Studies* 43.

<sup>91</sup> Constitution of the Union of the Republic of Myanmar (2008), Article 10. The Constitution sets out as basic principles of the Union: (i) non-disintegration of the Union; (ii) non-disintegration of National solidarity; (iii) perpetuation of sovereignty, at Articles 6 (a), (b) and (c).

<sup>92</sup> The Shan peoples have an added degree of autonomy, in a ‘self-administered zone’. Constitution of the Union of the Republic of Myanmar, Article 56.

<sup>93</sup> *Philippine Muslim News*, Manila, 2(2) (July 1968) 7–12: ‘...we do not want to be included in the Philippines for once an independent Philippines is launched, there would be trouble between us and the Filipinos because

incorporation proceeded, the result would be unrest, suffering and misery.<sup>94</sup> And so it proved to be.

The Mindanao conflict has taken various forms since 1946: agitation within parliament for self-government; calls for secession; armed struggle by the Muslim Independence Movement and later the Muslim National Liberation Front; and calls for a jihad (holy war) to defend the Moro homeland. In 1972, there was full-scale civil war in the southern Philippines. The Bangsamoro's long-standing demand has been for full political autonomy from the Philippines, or a separate Islamic State. The 2012 agreement paves the way for the establishment of a new autonomous region, the 'Bangsamoro new autonomous political entity,' by 2016. But again, as in the case of Myanmar, it is unclear at the time of writing whether or not this will answer the people's demands for autonomy, and if it does not, whether peace will last.

The situation is different for the indigenous inhabitants of the Cordillera region of the Philippines, the Igorot peoples. The Igorot have long called for the right to maintain control over their land and resources, practice and develop their own cultures, and determine their own path of development. But there has been deep disagreement amongst the Igorot people themselves about precisely what political form self-determination should take. The militant Cordillera Peoples Liberation Army has called for the establishment of an independent 'Cordillera Nation'. The Cordillera People's Alliance has called for the establishment of a 'Cordillera Autonomous Region' within the Republic of the Philippines. At the core of both sets of demands is the right to recognition of indigenous control over ancestral lands and a degree of territorial sovereignty, together with self-rule, which would enable collective control, management and development of indigenous territories and resources. The

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from time immemorial these two peoples have not lived harmoniously together. Our public land must not be given to people other than the Moros.'

<sup>94</sup> Ibid.

government of the Philippines proposed two Organic Acts to recognise the right of self-determination of the Cordillera indigenous peoples, but both were defeated in plebiscites held in 1990 and 1997, for a number of reasons: mistrust in the national government; fear of discrimination by non-indigenous residents; the view that the Organic Acts did not truly recognise indigenous rights, largely because both Acts contained a clause limiting the actual exercise of regional autonomy where it is in the interests of the Republic's 'national interest, security and development.'<sup>95</sup>

At the time of writing, the Congress of the Philippines is deliberating on House Bill No. 5595 and Senate Bill No. 3115, which seek a third Organic Act to create the Cordillera Autonomous Region. The measures will allow the regional government to control its resources and oblige the national government to augment yearly revenues. But one commentator has noted that '[An autonomous government] is inherently a power of the central government, given to [the region], which means at any time, that power can be taken back by the state ... Don't expect to be liberated from the central government. That will never happen.'<sup>96</sup> Whether the people of the Cordilleras will be satisfied with these most recent measures is unclear.

Finally, there is the case of Indonesia. Since gaining independence from the Dutch after the Second World War, Indonesia has engaged in several armed conflicts with ethnic groups, who have all claimed a right to independence from the Republic of Indonesia. These include: the Aceh/Sumatra National Liberation Front; the movement of the Republic of South Moluccas; the Independence Movement of West Papua; and the Fretelin of East Timor. East Timor gained independence from Indonesia in 1999, following a United Nations-sponsored

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<sup>95</sup> Joan Carling, 'The Cordillera Peoples and the Movement for Regional Autonomy' in Victoria Tauli-Corpuz and Joji Carino (eds) *Reclaiming Balance* (2004) Indigenous People's International Centre for Policy Research and Information Tebtebba Foundation, 183–196.

<sup>96</sup> Vincent Cabreza, 'Cordillerans ponder on autonomy' (17 July 2012) *Philippine Daily Inquirer* available at: <http://newsinfo.inquirer.net/230458/cordillerans-ponder-on-autonomy> [accessed 20 December 2012].

referendum. The Free Aceh Movement signed a peace accord with Indonesia in 2005, in the wake of the Asian Tsunami.<sup>97</sup> The largely Christian inhabitants of the Moluccas, which were part of the Netherlands East Indies, but only formed part of Indonesia after decolonisation, continue to agitate for independence from Indonesia.<sup>98</sup> West Papua also continues to call for independence, and for the reversal of the 1969 United Nations Resolution concerning the handover of then-West New Guinea—now Papua and West Papua—from the Netherlands to Indonesia.<sup>99</sup>

In relation to the rights of indigenous peoples, AICHR representative from Laos stated that the right was ‘not appropriate for countries that have no indigenous populations, such as Laos.’<sup>100</sup> This statement is not a reflection of reality. Laos and Vietnam classify indigenous populations as ‘minorities’. Laos, together with Vietnam, Indonesia and most other countries in Southeast Asia, still possess autochthonous populations.<sup>101</sup> These populations exist in relative poverty and are politically underrepresented at local, regional and national levels. Because they are often geographically located in remote and regional areas, they are vulnerable to the effects of development projects and natural resource exploitation (logging, damming and mining), which impact heavily (and largely negatively) upon them.<sup>102</sup>

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<sup>97</sup> Aceh was never part of Indonesia. In 1949, when the United Nations brokered an agreement to transfer all the former colonial territory of the Dutch East Indies to the sovereign state of the Federal Republic of Indonesia, Aceh was included in the new Republic.

<sup>98</sup> On 25 April 1950, the South Moluccas declared independence from Indonesia, a move violently ended by Indonesian troops, four months later.

<sup>99</sup> UNGA Res. 2504 (XXIV), Agreement concerning West New Guinea (West Irian), A/RES/2504 (19 December 1969) (Indonesia and the Netherlands).

<sup>100</sup> See: ‘AHRD is hijacked by Narrow-minded National Interests’, above n 37.

<sup>101</sup> Singapore is perhaps the exception.

<sup>102</sup> Gerard Clarke, ‘From ethnocide to ethnodevelopment? Ethnic minorities and indigenous peoples in Southeast Asia’ (2001) 22(3) *Third World Quarterly* 413.

### 5.3.3 Preamble

In early drafts of the Declaration, the Preamble contained broad statements about the nature and value of rights.<sup>103</sup> In the final Declaration, these sorts of clauses are found in the body of the Declaration proper, in the first ‘General Principles’ section of the Declaration. In the final draft, the Preamble simply reaffirms adherence to:

the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance

And:

a commitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties

It is perhaps significant that the ‘object’ clause in the preamble of the Declaration changed significantly throughout the course of the drafting. The original preamble, in the January 2012 draft Declaration, included a broad and ambitious ‘purpose’ clause, which envisaged the Declaration as:

a foundational instrument to manifest common values, commitments and aspirations in the field of human rights promotion and protection for the peoples of ASEAN, and as a shared vision of ASEAN for the fulfilment of the goals and objectives set forth herein, including establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights.<sup>104</sup>

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<sup>103</sup> For example, in the January 2012 draft, the preamble stated:

viii. STRESSING the indivisibility of human rights and that civil and political rights, economic, social and cultural rights and right to development should be treated on equal footing with a view to creating conducive environment to achieve the betterment of human rights in the region, and ASEAN’s commitment to progressively narrow the development gap among ASEAN Member States through relevant mechanisms;

and:

ix. EMPHASIZING the interrelatedness of rights, duties and responsibilities of the human person and the ASEAN common values in the spirit of unity in diversity in the promotion and protection of human rights, while ensuring the balance between such rights, duties and responsibilities, and the primary responsibility to promote and protect human rights and fundamental freedoms, which rests with each Member State.

<sup>104</sup> Working draft of the ASEAN Human Rights Declaration, 8 January 2012, clause vii.

The final draft of the Declaration is much less ambitious:

CONVINCED that this Declaration will help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process<sup>105</sup>

Unlike the UDHR, which begins with only one general article, a philosophical statement about the universal nature of rights, the ASEAN Human Rights Declaration contains many more broad ‘general principles.’<sup>106</sup> The following section considers the significance of these.

#### 5.3.4 Article 1: ‘Free and Equal in Dignity and Rights ...’

Article 1 of the ASEAN Human Rights Declaration provides that:

all persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.

Article 1 of the Declaration mirrors Article 1 of the UDHR.<sup>107</sup> The drafters of the UDHR drew their text from the 1948 Pan-American Declaration of Human Rights and Duties (the Bogota Declaration),<sup>108</sup> which was itself drawn from the French 1789 Déclaration des Droits de l'Homme et du Citoyen.<sup>109</sup> The 1993 Vienna Declaration of Human Rights and Program of Action reaffirms Article 1 of the UDHR in its own Article 1: ‘Human Rights and fundamental freedoms are the birth-right of all human beings; their protection and promotion is the first responsibility of Government.’ The Preamble to the 1993 Kuala Lumpur Declaration, drafted by the five ASEAN member states after the Vienna World Conference, states that: ‘all human beings are created by the Almighty, and possess fundamental rights

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<sup>105</sup> AHRD, Preamble.

<sup>106</sup> AHRD, Articles 1-9 are ‘General Principles.’

<sup>107</sup> In the AHRD, ‘humanity’ replaces the word ‘brotherhood’, which is contained in the Universal Declaration of Human Rights.

<sup>108</sup> Mary Ann Glendon, ‘The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea’ (2003) 16 *Harv. Hum. Rts. J.* 27.

<sup>109</sup> S.P. Sinha, ‘The Axiology of the International Bill of Human Rights’ (1989) 1 *Pace YB Int'l L.* 21, 53.

which are universal, indivisible and inalienable’ and that ‘the peoples of ASEAN are born free and equal with full dignity and rights and are endowed with reasoning and conscience enabling them to act responsibly and humanely towards one another in a spirit of brotherhood.’<sup>110</sup>

Neither ASEAN’s human rights commissioners, nor the drafting working group, debated or discussed Article 1 to any significant extent, and Article 1 was one of the few which civil society did not query or quibble with, accepting its inclusion in the form proposed in the various drafts of the Declaration. Article 1 was subject to only one amendment throughout the drafting process of the Declaration. In the January 2012 draft, Article 1 begins with the word ‘Everyone’. Representatives from Thailand, the Philippines and Indonesia, jointly suggested changing the word ‘Everyone’ to ‘All persons’. This amendment does not appear to have been the subject of debate or controversy: in the June 23 draft, the September draft and in the final version, Article 1 begins with ‘All persons.’<sup>111</sup>

This is not, perhaps, as minor a change as one might think. The American Declaration on the Rights and Duties of Man begins its statement about ‘the freedom and equality of all’ with the phrase ‘all men’. In the drafting of the American Convention, the words ‘all men’ were changed to ‘All persons.’ Clearly, ‘All persons’ is the more inclusive in gender terms, but there is perhaps a more significant difference between ‘all men’ and ‘all persons.’ ‘All men’ denotes ‘all mankind’, or ‘all human beings’: it is a general reference to humanity. The concept of ‘person’ is a legal concept—a person is someone who is recognised under law and who is accorded a particular bundle of rights. From this perspective, the shift from ‘all men’ to ‘all persons’ in the American instruments can be viewed as a consequence of the shift from a non-binding declaration to an enforceable convention. On the other hand, Article 1 of the

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<sup>110</sup> The Kuala Lumpur Declaration on Human Rights (1993), above n 2.

<sup>111</sup> The Kuala Lumpur Declaration on Human Rights (1993) refers to ‘everyone’. *Ibid.*

UDHR begins with the words ‘All human beings’.<sup>112</sup> When the UDHR was finally transformed into the two Conventions, the broader references to ‘human beings’ and to ‘everyone’ was preserved.<sup>113</sup>

Martha Nussbaum has pointed out that the notion of ‘person’ has been historically used to provide a restricted normative conception of what ethical obligations are owed to specific social groups, and that the concept of ‘person’ has often been applied and withheld capriciously.<sup>114</sup> Nussbaum contrasts the legal concept of the ‘person’, to whom specific rights might attach, with the broader and more inclusive concept of the human being. Nussbaum argues that the notion of ‘human being’ leaves less room for denying the moral obligation to provide others with what they need in order to survive and flourish. In contrast, ‘persons’ might belong to a legally classified class or group who might legitimately, in the view of a majority in a political society, be denied some rights (the stateless person; the refugee; the ethnic minority).

In relation to the ASEAN Human Rights Declaration, the suggestion that ‘all persons’ be substituted for ‘everyone’ was proposed by representatives of Thailand, the Philippines and Indonesia, and supported by some civil society organisations.<sup>115</sup> From this, one might assume that ‘all persons’ was not substituted because it was (potentially) a more legally restrictive phrase than ‘everyone’, but instead, because ‘all persons’ conveys a stronger aura of legality, which might imply more enforceable protection of rights than the less specific ‘everyone.’ The change from ‘everyone’ to ‘all persons’ was not the subject of discussion in

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<sup>112</sup> UDHR, Article 1.

<sup>113</sup> Article 6 of the ICCPR, referring to the right to life, begins with a reference to ‘every human being.’ Article 6 of ICESCR refers to ‘everyone’: e.g. ‘the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’

<sup>114</sup> Martha Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (1992) 20(2) *Political Theory* 202. Nussbaum cites U.S. jurisprudence in the 1900s and early 20<sup>th</sup> century, which defined ‘person’ in a way that excluded women. In one case, for example, the Supreme Court ruled that it was up to that state ‘to determine whether the word ‘person’ is confined to males.’ Nussbaum, 227.

<sup>115</sup> For example, the Working Group for an ASEAN Human Rights Mechanism.

either of the two regional consultations, or amongst civil society groups who prepared submissions on the Declaration.

I turn now to the claim made in Article 1 of the ASEAN Human Rights Declaration about the nature of human beings as (i) rational (ii) of equal moral worth, and (iii) born equal in dignity and rights. This article affirms the principle of universality: all human beings have rights simply by virtue of being born human. What does this acknowledgment mean, given the region's longstanding resistance to a Western dominated discourse of rights, the contention which accompanied debate about universality during the 1993 Vienna World Conference on Human Rights, and the profound diversity of religious beliefs within Southeast Asia?

At the time of the drafting of the UDHR, Jacques Maritain noted the importance of a shared 'philosophy of life' to provide a common platform for a statement about human rights.<sup>116</sup> There is a question about whether or not there is congruence between the belief about the nature of human beings, which is articulated in Article 1 of the ASEAN Human Rights Declaration, and the various other philosophical beliefs that exist in Southeast Asia. To illustrate: is there congruence between Article 1, and the Confucian idea that individuals do *not* exist as free, autonomous, independent selves, with rights which attach to them simply because they are born human, but instead exist in a context of social relationships, and it is these relationships which define the rights and obligations owed?<sup>117</sup> Or between Article 1 and the Buddhist idea that *no one* is born equal (because of past *karma*) and that one's duty is to

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<sup>116</sup> Jacques Maritain, United Nations Educational, Social and Cultural Organization (UNESCO) (ed), *Human Rights Comments and Interpretations: A Symposium* (1949) New York, Columbia University Press, 17.

<sup>117</sup> The Confucian view of the human person is one where moral duties and rights arise solely from social relationships (father – son, husband – wife, elder brother – younger brother, ruler – ruled, friend – friend). See Joseph Chan, 'A Confucian Perspective on Human Rights' in Joanne E. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights* (1999) Cambridge, Cambridge University Press, 213–237, 217. Peerenboom writes that because human rights are rights to which humans are entitled *from birth* human beings must be thought of as beings 'qua members of a biological species' and not 'qua social beings', which is a view deeply incompatible with the Confucian one. R. P. Peerenboom, 'What is Wrong with Chinese Rights? Towards a Theory of Rights with Chinese Characteristics' (1993) 6 *Harvard Human Rights Journal* 40.

strive towards a more equal existence in the next life?<sup>118</sup> Or between Article 1 and the caste system within the Hindu tradition, which denies the equal worth of all human beings?<sup>119</sup> Or between Article 1 and the differentiated legal rights allotted to women under Islamic *Shari'a*?<sup>120</sup> All of these religious beliefs exist within Southeast Asia, and profoundly shape the lives and value patterns of many Southeast Asians. If the philosophy articulated in Article 1 of the ASEAN Human Rights Declaration does not reflect the deeply held convictions of those subject to the Declaration, then what does this mean for the legitimacy of the regional human rights regime?

The drafters of the ASEAN Human Rights Declaration viewed questions about the metaphysical basis of human rights as being of limited importance and value.<sup>121</sup> This is not an indefensible position. After all, when the Universal Declaration of Human Rights was drafted, the conclusion to long and acrimonious disputes about the philosophical basis of human rights was simply to adopt what Jacques Maritain described as a 'practical viewpoint and concern ourselves no longer with seeking the basis and philosophic significance of human rights but only their statement and enumeration.'<sup>122</sup> Maritain's lead has been followed by several contemporary philosophers. Charles Beitz, for example, argues that what matters is how human rights operate as a discursive and political practice, and not as a philosophical doctrine.<sup>123</sup> Richard Rorty suggests that the metaphysical basis of human rights is less

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<sup>118</sup> Saneh Chamarik, *Buddhism and Human Rights* (1982) Bangkok, Thai Khadi Research Institute; Damien V. Keown, Charles S. Prebish and Wayne R. Husted (eds), *Buddhism and Human Rights* (1997) Surrey, Curzon Press; Henry Rosemont, Jr., 'Why Take Rights Seriously? A Confucian Critique' (1988) in Leroy Rounner (ed) *Human Rights and the World's Religions* Notre Dame, University of Notre Dame Press.

<sup>119</sup> Andreas Follesdal, 'Human Rights and Relativism' (2005) *Real World Justice* 265, 270.

<sup>120</sup> Abdullahi A. An-Na'im *Towards an Islamic Reformation: Civil liberties, human rights and international law* (1990) Syracuse, NY, Syracuse University Press, 171.

<sup>121</sup> Correspondence with Yuyun Wahyuningrum, Senior Advisor, Human Rights Working Group, Jakarta, 19 December 2013, copy on file with author.

<sup>122</sup> *Human Rights Comments and Interpretations: A Symposium*, above n 117, 13.

<sup>123</sup> Charles R. Beitz, *The Idea of Human Rights* (2009) Oxford, Oxford University Press.

important than its rhetorical role in stirring sympathy for those who might be suffering.<sup>124</sup>

Thomas Nagel suggests that the violation of basic human rights is devoid of philosophical interest:

The maintenance of power by the torture and execution of political dissidents or religious minorities, denial of civil rights to women, total censorship, and so forth demand denunciation and practical opposition, not theoretical discussion. One could be pardoned for thinking that the philosophical interest of an issue is inversely proportional to its real-life significance.<sup>125</sup>

Nonetheless, many other philosophers have considered it important to demonstrate that at the core of Asian philosophies and religions are values compatible with the modern doctrine of human rights. Within the Confucian tradition, for example, scholars have pointed to the fact that although ‘human rights’ do not exist as a concept in Confucian thought (or as words in the Chinese language),<sup>126</sup> one can find in the works of Confucius and Mencius a focus on humanity and human dignity that is entirely compatible with the philosophy of contemporary international human rights.<sup>127</sup> In Thailand, scholars such as Sivaraksa have drawn on the central Buddhist notions of individual responsibility for Enlightenment, to formulate a new application of the doctrine of non-violence that calls for respect for the autonomy of each person, and a minimal use of coercion in human affairs.<sup>128</sup> Even the Hindu caste system has been described by one scholar as a ‘traditional, multidimensional view[s] of human rights.’<sup>129</sup> Panikkar argues that the Indian view of social order captured in Hinduism

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<sup>124</sup> Richard Rorty, ‘Human Rights, Rationality and Sentimentality’ (1993) in S. Shute & S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* New York, Basic Books, 1994.

<sup>125</sup> Thomas Nagel, ‘Personal Rights and Public Space’ in Harold Hongju Koh and Ronald C. Slye (eds), *Deliberative Democracy and Human Rights* (1999) New Haven and London, Yale University Press, 33-48, 34.

<sup>126</sup> Julia Ching, ‘Human Rights: A Valid Chinese Concept?’ in WM Theodore de Bary and Tu Weiming (eds), *Confucianism and Human Rights* (1998) New York, Columbia University Press, 70-71; Irene Bloom, ‘Fundamental Intuitions and Consensus Statements: Mencian Confucianism and Human Rights’, *ibid.*

<sup>127</sup> Joseph Chan, ‘An Alternative View’ (1997) 8(2) *Journal of Democracy* 35. See also: J. Cohen, ‘Minimalism About Human Rights: The Most We Can Hope For?’ (2004) 12(2) *Journal of Political Philosophy* 190, 203.

<sup>128</sup> Sulak Sivaraksa, *Seeds of Peace: A Buddhist Vision for Renewing Society* (1992) Berkeley and Bangkok, Parallax Press, Ch. 9.

<sup>129</sup> R. Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 30(120) *Diogenes* 75.

provides an account of human dignity that conforms with human rights standards. He argues that the individual exists and has meaning within a social order, and this order defines the individual's entitlements and duties in relation to others within the order.<sup>130</sup>

Simon Jones describes these approaches as 'continuous' strategies—they attempt to establish continuity between the theory of human rights and the various doctrines to which people are committed.<sup>131</sup> Onuma Yasuaki calls them a 'theory of universal origin', a way for intellectuals and human right advocates in diverse societies to argue: 'look, human rights are not alien. They are already in *our* religion (culture, customs, etc).'<sup>132</sup> The argument is, in essence, that if *all* societies, in *all* ages, have seen the human person as holding a certain value and deserving respect, then we can take this as justification for a doctrine of human rights. The Western bias of human rights, and its basis in natural law, is removed. Some scholars, however, such as Alison Dundes Renteln, question the integrity of any hunt to find common values in all cultures. Renteln argues that it is not possible to pluck values from a complex culture and still have those values retain their original meaning. In Renteln's view, what matters within any particular culture is how values relate to one another and rank beside each other.<sup>133</sup>

It is also difficult to identify with precision what these things are that all cultures respect and value. The answer is more easily given in the negative, in terms of things that all cultures abhor. Charles Taylor identifies genocide, murder, torture and slavery as things that all cultures condemn.<sup>134</sup> In a similar vein, Donnelly suggests that there are certain things

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<sup>130</sup> Ibid.

<sup>131</sup> Simon Jones, 'Human Rights in Diverse Cultures' in Simon Caney and Peter Jones (eds), *Human Rights and Global Diversity* (2001) Illford, Essex and Portland, Oregon, Frank Cass Publishers, 34.

<sup>132</sup> Onuma Yasuaki, 'Towards an Intercivilizational Approach to Human Rights' in *The East Asian Challenge for Human Rights*, above n 117, 103-124, 109.

<sup>133</sup> Alison Dundes Renteln, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights' (1985) 7(4) *Human Rights Quarterly* 514.

<sup>134</sup> Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' in *The East Asian Challenge for Human Rights*, above n 127, 124-146, 126.

which simply cannot legitimately be done to human beings (such as chattel slavery and the caste system), and some things which seem to be accepted as binding by virtually all cultures (such as prohibition of torture and requirements of procedural due process in imposing and executing legal punishments).<sup>135</sup> These are the same types of things that Bernard Williams recognises as ‘abuses of power that almost everyone everywhere has been in a position to recognise.’<sup>136</sup>

Thomas Nagel believes that such things constitute a ‘core of inviolability’ to which no cost-benefit analysis applies, and which are wrong regardless of culture or circumstance, and which demand ‘denunciation and practical opposition, not theoretical discussion.’<sup>137</sup> These inviolable rights seem, for most who have written in this vein, to be the non-derogable rights listed in the International Convention on Civil and Political Rights: the right to life; freedom from torture, slavery, arbitrary arrest and imprisonment; recognition before the law; and freedom of thought, conscience and religion. But from an empirical perspective, it is difficult to argue that even these basic rights are universal: that is, that they have been accepted, at all times, by all cultures.<sup>138</sup>

Values assumed to be cross-culturally valid because they are found in every culture are often either very vague or very meagre. Some scholars, for example, have found in the concept of ‘dignity’ the necessary element of commonality to ground a common universal

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<sup>135</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (2003) Cornell, Cornell University Press.

<sup>136</sup> Bernard Williams, ‘In the Beginning was the Deed’ in Koh and Slye (eds), *Deliberative Democracy and Human Rights* (1999), above n 125, 57.

<sup>137</sup> Nagel identifies as some of these things: ‘the maintenance of power by the torture and execution of public dissidents or religious minorities, denial of civil rights to women, total censorship.’ Thomas Nagel, ‘Personal Rights and Public Space’ in *ibid*, 34.

<sup>138</sup> Examples commonly given of the contested scope of core rights are abortion and infanticide, in the context of the right to life. Abortion is at present legal in most Western countries: Centre for Reproductive Rights ‘The World’s Abortion Laws’ available at: <<http://worldabortionlaws.com/map/>> [accessed 20 December 2013]. In ancient Greece, Plato and Aristotle supported infanticide in cases of weak or deformed infants who might be a burden on the state: B.R. Sharma, ‘Historical and Medico-legal Aspects of Infanticide: an Overview’ (2006) 46(2) *Medicine, Science and the Law* 152.

system of value.<sup>139</sup> But attempts to give meaning to the word diminish its practical utility. In Pannikar's conception of the caste system, for example, dignity might derive from one's role in a social order, and one's rights might be the rights that attach to a person as ruler, wife, mother, or street-sweeper. In such an order, there is manifest dignity in a wife's fulfilment of *sati* after the death of her husband. But Western observers would find it difficult to see how in these circumstances the wife could be said to possess freedom and equality in the same way that her husband does.

In essence, the question is not really whether different cultures are capable of supporting a doctrine of human rights. Clearly they are, if human rights are broadly understood and cultures are sympathetically interpreted. The question is; why should they? Why should a moral community be built around an understanding of human beings as rational, and free and equal? It might be the case that norms of freedom and equality do in fact best protect those things that some societies hold most dear. Strong arguments have been made about the instrumental value of individual freedoms in terms of the large contribution to the common good made by protection and promotion of these rights.<sup>140</sup> But this cannot just be assumed.

What follows from this is that the values and principles that undergird international human rights require justification. In modern times, in democratic societies, it is understood that justification occurs through processes of public deliberation.<sup>141</sup> Part of my hypothesis is that regions are particularly useful and fruitful sites within which these kinds of conversations might occur, and that the transcripts of regional conversations—which take the form, sometimes, of texts such as the ASEAN Human Rights Declaration—carry a particular legitimacy because of this. My hypothesis rests on the idea that the processes for deliberating

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<sup>139</sup> Jeremy Waldron, 'Dignity, Rights, and Responsibilities' (2011) 43 *Arizona State Law Journal* 1107.

<sup>140</sup> Nagel, 'Personal Rights and Public Space' in Koh and Slye (eds), *Deliberative Democracy and Human Rights* (1999), above n 125.

<sup>141</sup> Michael Ignatieff, 'The Attack on Human Rights' (2001) 80(6) *Foreign Affairs* 102.

on the value and meaning of rights might occur effectively at a regional level because of the proximity, and awareness of differences, understandings and shared histories that link states and peoples within a region. What this chapter shows, however, in the case of the drafting of the ASEAN Human Rights Declaration, is a conversation that was truncated and partial. This was the result of political impediments to free and unencumbered discourse in a majority of ASEAN states.

### **5.3.5 Article 2: Non-Discrimination**

Article 2 of the ASEAN Human Rights Declaration again replicates the UDHR. It contains the essential principle of non-discrimination, entitling everyone to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability, or other status.

In the 8 January 2012 draft Declaration, the prohibited grounds of discrimination included ‘sexual identity’, which in the text was enclosed in brackets, signifying that at that stage there was lack of agreement among the drafters on the inclusion of this ground. The June 2012 draft Declaration makes no reference to rights of sexual orientation or gender identity, indicating that by June 2012, the question had been resolved. Article 2, and the issue of whether sexual orientation and gender identity should be included as a prohibited ground of discrimination, represented one of the few occasions on which the Declaration became the subject of broad debate in the public arena.

In the debate about the inclusion of ‘sexual orientation and gender identity’ (SOGI) rights in the Declaration, non-governmental organisations (NGOs) whose work focused on SOGI played a leading role. These NGOs participated in the ASEAN Civil Society Conference, held in April 2012, and agitated there among other CSOs for recognition of

SOGI rights in the Declaration. After the April 2012 conference, one of the key regional civil society organisations, the ASEAN People's Forum, agreed to press for the inclusion in the Declaration of equality rights relating to sexual orientation and gender identity.<sup>142</sup> AICHR representatives of Thailand, the Philippines and Indonesia, supported the inclusion of SOGI in Article 2. However, AICHR representatives from Malaysia and Brunei, states with majority Islamic populations and which apply Shari'a law, and some prominent social and religious actors within these countries, strongly objected to the inclusion of rights of sexual orientation and gender identity. Singapore's AICHR representative did not support the inclusion of SOGI rights.

It is useful to consider the exchange of viewpoints on this issue in some detail, as it illustrates the sort of regional dialogue about rights, which (I argue) has the potential to lead to new understandings about the scope and value of rights. The International Gay and Lesbian Human Rights Commission began the public debate by publishing online some of the reasons that in their view justified inclusion of SOGI rights in the Declaration:

In Brunei, Burma, Malaysia and Singapore colonial laws that criminalize SOGI are used to harass, extort money and demand sexual favours, arrest, detain and persecute LGBTIQ persons. In the Philippines and Indonesia, anti-trafficking or pornographic laws are used to conduct illegal raids at gay establishments and detain LGBTIQ people. The anti-kidnapping law in the Philippines is used to forcibly break apart lesbian couples in legitimate and consensual relationships. In Cambodia, a lesbian was imprisoned following a homophobic complaint by the family of her partner because of their relationship. In Thailand, the negligence of the state is clearly manifested in the refusal to investigate the killings of fifteen lesbians and gender-variant women. The existence of the pornographic law in Indonesia, which haphazardly included SOGI as pornography, is used by several internet providers to block websites of legitimate LGBTIQ organization such as the International Gay Lesbian Human Rights Commission (IGLHRC) and the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) websites. In Malaysia, Seksualiti Merdeka, an annual sexuality festival was disrupted and banned by the police as the festival was deemed a 'threat to national security'. Basic human rights, such as right to healthcare, housing and education, are denied on the basis our SOGI. This has contributed to the steep rise in HIV infection amongst most at risk

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<sup>142</sup> International Gay and Lesbian Human Rights Commission, Report From The Peoples Forum In Phnom Penh Cambodia (30 April 2012) available at: <<http://iglhrc.wordpress.com/2012/04/30/lgbt-report-from-the-peoples-forum-in-phnom-pehn-cambodia/>> [accessed 21 November 2012].

populations: men who have sex with men and transgendered people. Archaic laws that criminalize SOGI make it even more difficult in implementing life-saving interventions to at-risk groups.<sup>143</sup>

This statement was picked up by the media in several states across the region, and formed the subject of much online discussion. The Vice-President of the Muslim Lawyers Association of Malaysia, Azril Mohd Amin, responded to the suggestion that SOGI rights should be included in the ASEAN Human Rights Declaration in the following way:

Were ASEAN to endorse such rights in the final declaration, Malaysia as a Muslim-majority country would have to reiterate her strong objections; as such a policy clearly contradicts the principles enshrined in the religion of Islam ... The 12 September 2012 Regional Consultation is expected to submit a revised draft of an ASEAN Human Rights Declaration for Leaders' signing at the 21st ASEAN Summit to be held in November 2012. In it, you will see the disregard for medical opinion, the politicisation of all gender issues, and demands for recognition for public behaviour that has never been publically endorsed in most previous cultures, and certainly not in any major religion. You will see the immense pressure on ASEAN governments, particularly on the Malaysian government, to subscribe and submit to the 'Yogyakarta Principles' of 2006, in fear of the upcoming 2013 United Nations' Universal Periodic Review (UPR) of Malaysia's Human Rights situation, which will inevitably be a review of Malaysia's LGBT policy and rights. If Malaysians and their friends do not take a firm stand against deviation from the teachings of all major and revealed religions, they may well suffer the punishment of others who have disregarded the Quranic principles at some point on the stage of human organisation ... What is to be done? Muslim scholars and leaders, Islamic NGO activists and government representatives to the forthcoming Regional Consultation must make it clear that Malaysia has already expressed an unalterable position on LGBTs. Malaysia, together with OIC member states objected to the 17/19 UN Resolution on LGBTs, as well as objecting directly to the Human Rights Council Chair in Geneva ... It will be difficult, but the test of our faith is that we must nevertheless defend the veracity of Divine Laws among us. We must witness this veracity to the entire human race. Therefore, the upcoming UPR of Human Rights in Geneva may be the one of the real tests for Muslims living in this so-called 'modern world'. May Allah help us all, and witness our intention to defend His Presence and the presence of His Laws, among us, AMIN.<sup>144</sup>

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<sup>143</sup> International Gay and Lesbian Human Rights Commission, 'Inclusion of SOGI issues and Rights in the ACSC/APF and in the ASEAN Human Rights Declaration' (29 March 2012) available at: <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1510.html> [accessed 21 November 2012].

<sup>144</sup> Azril Mohd Amin, 'LGBTIQ Rights Should Be Excluded' (10 September 2012) available at: <http://www.malaysiakini.com/letters/208463> [accessed 21 November 2012].

The juxtaposition of these two alternate views served an important public purpose in identifying the parameters of the debate on whether or not discrimination on the basis of SOGI should be recognised in the ASEAN Human Rights Declaration. The difficulty was that ASEAN's human rights commissioners, who were 'accountable to their appointing governments', did not act, in meetings and consultations about the AHRD, as independent agents whose interests were in furthering debate and testing ideas through reasoned discourse. This was made clear during the second regional consultation on the AHRD, in Manila in June 2012, when the issue of including reference to sexual orientation and gender identity was again raised. NGOs who attended the conference reported that Malaysia's Commissioner, Muhammad Shafee Abdullah, said: 'I cannot use my personal decision since together with Brunei and Singapore, we have strict instructions from the government to oppose LGBT rights inclusion in the declaration.'<sup>145</sup>

The second difficulty was that too little time was given to exploring what are complex questions of religion, sexuality and morality. During the Manila consultation, for example, there was a heated exchange between the member of a Malaysian Muslim Youth Group, who had been invited to the consultation by the Malaysian government, and Ging Cristobal, an LGBT activist from the Philippines. The Muslim Youth Group member declared his opposition to recognition of sexual orientation and gender identity recognition, stating: 'Even if we agree that LGBT persons should not be discriminated against, they are abnormals and should not be in the declaration and should be deleted ...' Cristobal responded that 'this is clearly what inequality and discrimination looks like—maligning LGBT persons by claiming we are 'abnormals' and by denying our rightful space in the declaration.'<sup>146</sup>

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<sup>145</sup> Alex Au, 'Singapore choosing to be anti-human rights' (14 September 2012) available at: <http://yawningbread.wordpress.com/2012/09/14/at-asean-singapore-choosing-to-be-anti-human-rights/#more-8006> [accessed 16 September 2012].

<sup>146</sup> Ibid.

## Chapter 5: The ASEAN Human Rights Declaration

In an example of the mistrust that existed between civil society and the governments of the region in the processes of drafting the Declaration, Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights at the Human Rights Working Groups (HRWG), suggests that AICHR Commissioners (or their governments) deliberately invited to the consultation civil society representatives whose views were in violent opposition to one another, so that they would be able to point to the lack of consensus that exists among civil society itself, and civil society's disorderliness, as evidence that their views should be discounted.<sup>147</sup>

The truncated conversation that occurred in relation to recognition of SOGI rights, to which this chapter returns in the discussion below on the 'public morality' limitation, shows that not all debate leads to consensus. In his critique of Rorty's ironic liberalism, Peerenboom writes of a point where reconciliation between different positions is simply impossible, and where liberal stories could be told 'until the cows come home, and the edifying conversation could go on forever' and yet there would still be disagreement, because '[a]t the end of the day, we do not all share the same values, we do not all have the same vision of the good life. Nor need we.'<sup>148</sup> Peerenboom questions Rorty's assumption that 'everyone would be better off with bourgeois freedoms and our culture of rights.'<sup>149</sup> Yet in the end Peerenboom agrees that 'as a practical matter, there seems little alternative to reasoned discussion.'<sup>150</sup> Discussion brings then, if not agreement, the kind of understanding of the other's views, which eventually, one hopes, leads to respect and to tolerance. For example, civil society leader Wahyuningrum, who supported the inclusion of SOGI rights in the Declaration, does not view it as a defeat that they were not ultimately included. Wahyuningrum considers it

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<sup>147</sup> Interview with Yuyun Wahyuningrum, above n 15.

<sup>148</sup> Randall Peerenboom, 'The Limits of Irony: Rorty and the China Challenge' (2000) 50(1) *Philosophy East and West* 56, 72.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

progress that in the course of the drafting of the Declaration, states such as Malaysia, Brunei and Singapore, were forced to acknowledge the position of proponents for SOGI rights and to listen to their arguments.

We return again to the importance of free inquiry and debate, and to the civil liberties that are necessary in order for these things to occur. My argument is not that free inquiry and debate will necessarily lead to consensus on questions about the relative importance of values such as individual autonomy, liberty and social cohesion. On the issue of sexual autonomy, liberals might follow Nagel's simple proposition: 'it is essential that we learn to live together without trying to stifle one another's deepest feelings.'<sup>151</sup> For others, the answer may be more complex, and the scales may be tilted in favour of social cohesion over individual self-expression. What I argue is that these sorts of conversations are a necessary step towards clarifying the positions of people who fundamentally disagree on important issues, and helping the respective parties to understand where the differences lie. The debate itself works towards ensuring that the common public life reflects the views of all its members, so that all members stand a chance of achieving self-realisation as part of a community. One of the central difficulties of the Article 2 exchange was that SOGI activists attempted to put forward rational arguments for recognition of their rights, but these were met with arguments from religion, which proponents did not think required justification. The difficulty with a discourse of justification where one of the parties to the conversation is arguing on the basis of religion is discussed below, in the context of the 'public morality' clause in the ASEAN Human Rights Declaration.

### **5.3.6 Article 6: Duties**

Article 6 states that:

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<sup>151</sup> Nagel, above n 125, 42.

The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.

The 9 January 2012 ‘working draft’ of the Declaration contains ten alternative formulations of a ‘duties’ provision, suggesting that this Article was one which caused significant difficulties for the working group originally tasked with creating the Declaration.

Several of these draft provisions were along the following lines:

Everyone must respect the human rights and fundamental freedoms of others as it contributes to the State, society and their own development. Duties and responsibilities are implicit in the understanding of good citizens and responsible members of the ASEAN Community.<sup>152</sup>

The Preamble to the January draft of the Declaration also contains a reference to duties, emphasising:

the interrelatedness of rights, duties and responsibilities of the human person and the ASEAN common values in the spirit of unity in diversity in the promotion and protection of human rights, while ensuring the balance between such rights, duties and responsibilities, and the primary responsibility to promote and protect human rights and fundamental freedoms, which rests with each Member State.<sup>153</sup>

The June 2012 draft contained what was to become the final formulation of the duties provision, and remained unchanged.

Civil society organisations objected very strongly to any reference to ‘balancing’ rights with duties. The HRWG, for example, argued that: ‘the notion of ‘balancing’ duties against human rights is alien to the concept of ‘inalienable’ human rights.’<sup>154</sup> In her statement to the Bali Democracy Forum on 7 November 2012, the High Commissioner for Human Rights, as well as (again) criticising civil society’s exclusion from the drafting process for the

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<sup>152</sup> Draft ASEAN Human Rights Declaration, 9 January 2012, article 12.

<sup>153</sup> *Ibid*, article ix.

<sup>154</sup> Human Rights Working Group, ‘Submission on the ASEAN Human Rights Declaration’ (12 September 2012).

ASEAN Human Rights Declaration, specifically stated that: ‘the balancing of human rights with individual duties was not a part of international human rights law, misrepresents the positive dynamic between rights and duties and should not be included in a human rights instrument.’<sup>155</sup>

The idea of ‘duties’ has a pedigree in international human rights instruments.<sup>156</sup> In the lead-up to the drafting of the UDHR, for example, the importance of including duties was emphasised by participants from China, Latin America, the Soviet Union, and France.<sup>157</sup> The result was the provision in Article 29(1) of the Universal Declaration of Human Rights, stating that: ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’<sup>158</sup> Regional human rights instruments such as the American Declaration of the Rights and Duties of Man,<sup>159</sup> the American Convention on Human Rights,<sup>160</sup> the African Charter on Human and Peoples’ Rights<sup>161</sup> also contain references to duties. Indeed nearly all of the human rights instruments created since World

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<sup>155</sup> High Commissioner for Human Rights, Statement at the Bali Democracy Forum (7 November 2012) available at: <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12752&LangID=E>> [accessed 21 November 2012].

<sup>156</sup> Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1997) 73 *Notre Dame L. Rev.* 1153, 1162.

<sup>157</sup> *Ibid.*

<sup>158</sup> UDHR, article 29.

<sup>159</sup> Ninth International Conference of American States, American Declaration on the Rights and Duties of Man, Bogota, Colombia (2 May 1948). Preamble. There is also a special section in the American Declaration which emphasises specific duties: to society; towards children and parents; to vote; to acquire an elementary education; to obey the law; to cooperate with the state and the community with respect to social security and welfare; to pay taxes; to work: Ch. 2, arts, XXIX-XXXVIII.

<sup>160</sup> American Convention on Human Rights (adopted 22 November 1969, 1144 UNTS 143, entered into force 18 July 1978). Art 32(1). The Preamble to the International Covenant on Civil and Political Rights also recognises duties:

the individual ... is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant ... Such private duties and responsibilities cannot be fulfilled if an individual violates the rights of other individuals or groups, and the preamble to the Covenant clearly states that, with respect to human rights, individuals have ‘duties to other individuals’.

International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 3 November 1976).

<sup>161</sup> African Charter on Human and Peoples’ Rights (Banjul Charter) (adopted 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986). The Preamble recognizes ‘that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone,’ and Articles 27–29 of the Charter contain specific duties of individuals.

War II have provided express or implied recognition of duties. Writing in the *Harvard Human Rights Journal* twenty years ago, Jordan J Paust advised a shift from theoretical inquiries about whether duties existed in international human rights law, to questions about what sorts of duty correspond to what sorts of rights in what contexts, how competing rights should be accommodated, and how these ultimately affect public responsibility.<sup>162</sup>

The idea of duties as an important and natural part of a theory of rights seems entirely unremarkable to modern philosophers of rights.<sup>163</sup> For example, Hohfeld's conception of rights distinguishes between claims, liberties, authorities and immunities. Each type of right possesses a correlative legal consequence for others.<sup>164</sup> Joseph Raz employs the notion of duties to identify whether or not something is a right at all. Raz argues that a person has a right if some aspect of her wellbeing (some 'interest') is sufficiently important to justify holding another person or persons to be under a duty to respect and fulfil that right. A's right to free speech, for example, is sufficiently important from a moral point of view to justify holding other people (particularly the government) to have duties not to place A under restrictions or penalties in this regard.<sup>165</sup> Amartya Sen has explored the scope of duties in international human rights law, without questioning that the idea of duty belongs in the theory of human rights that he proposes. For Sen, all of us have a basic general obligation (a duty) to engage in an act of deliberative reasoning in order to work out what should be done, given the parameters of a particular case, to prevent the human rights of others from being violated or to aid their enjoyment of rights.<sup>166</sup> Thomas Pogge has offered a more specific and demanding idea of duty, arguing that every person has a duty not to cooperate in imposing an unjust institutional scheme upon others, one that might violate their rights in indirect ways,

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<sup>162</sup> J.J. Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harv. Hum. Rts. J* 51, 62.

<sup>163</sup> Michael Freeman, 'Human rights, Democracy and 'Asian values' (1996) 9(3) *The Pacific Review* 352.

<sup>164</sup> Wesley Newcombe Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

<sup>165</sup> Joseph Raz, *The Morality of Freedom* (1986) Oxford, Clarendon, 166.

<sup>166</sup> Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs* 315.

and that continued participation in an unjust institutional scheme, triggers obligations to promote feasible reforms of this scheme.<sup>167</sup> In his (very brief) contribution to the UNESCO Committee on the Drafting of the UDHR, Mahatma Gandhi suggested that instead of a list of rights, it might be better for the Committee to ‘define the duties of every Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.’<sup>168</sup>

Some scholars, however, have drawn attention to the dangers of advancing a notion of duties within a framework of human rights. Saul, for example, in his critique of the 1997 Draft Declaration of Human Responsibilities, created by the Inter-Action Council, argues persuasively that: (1) duties cannot be defined with sufficient clarity and precision to make them useful legal concepts; (2) duties involve subtle and particularistic matters of custom and lore, better suited to local systems of morality rather than codification at the international level; (3) historically, the concept of human duties has proven open to abuse and manipulation.<sup>169</sup> This last argument is particularly telling in the context of Southeast Asia, where a very particular conception of duty has prevailed among governments in the region. This idea of duty was most clearly set out in the 1991 Singapore government’s White Paper, ‘Shared Values,’ discussed in Chapter 3.<sup>170</sup> The White Paper, presented as a pan-Singaporean national ideology, identifies five key values of Singaporean society.<sup>171</sup> The first value is ‘nation before community and society before self.’ This is projected as the foundational value

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<sup>167</sup> Thomas Pogge, ‘Cosmopolitanism and Sovereignty’ (1992) 103(1) *Ethics* 48.

<sup>168</sup> UNESCO, above n 116, 18. The Kuala Lumpur Declaration includes a provision on duties, providing that: ‘the peoples of ASEAN recognize that human rights have two mutually balancing aspects: those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and state; all human beings, individually and collectively, have a responsibility to participate in their total development, taking in account the need for full respect of their human rights as well as their duties to the community. Freedom, progress and national stability are promoted by balance between the rights of the individual and those of the community.’

<sup>169</sup> Ben Saul, ‘In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities’ (2000) 32 *Columbia Human Rights Law Review* 565.

<sup>170</sup> Singapore Government, *Shared Values* Singapore, Singapore National Printers, 3. See N. Balakrishnan, ‘Esprit de Core: Values Offer Shares in Confucian Society’ (1991) 7 *Far Eastern Economic Review* 27.

<sup>171</sup> *Shared Values*, *ibid.*

upon which the other four values (family as the basic unit of society; community support and respect for the individual; consensus, not conflict; racial and religious harmony) are built. ‘Nation before community’ means that no ethnic or religious group should place its own interests above those of other groups; all subgroups should support the national interest above all. ‘Society before self’ means that individuals should pursue the common good and not selfishly prioritise their own interests and benefits. The White Paper states: ‘If Singaporeans had insisted on their individual rights and prerogatives, and refused to compromise these for the greater interests of the nation, they would have restricted the options available for solving these problems.’<sup>172</sup>

The White Paper endorses a uniquely East/Southeast Asian version of communitarianism, one that preferences collectivism over individualism, especially the individual’s freedom.<sup>173</sup> The community is exalted in the formation and shaping of the individual’s values, behaviour, and identity. For example, in the White Paper, Singaporeans are exhorted to compromise their selfish individual interests, benefits, and rights for the common good and to perform their duties as members of their family and community. Personal rights and civil and political liberties are less important than fulfilling duties and responsibilities toward family and community. The Singapore White Paper does not base a commitment to upholding rights on the needs and interests of each individual, but on a calculus that relates the importance of that interest to the importance of every other interest, such as social stability or national security. In Malaysia, Mahathir pronounced similar

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<sup>172</sup> Ibid.

<sup>173</sup> See Charlene Tan, ‘Creating ‘Good Citizens’ and Maintaining Religious Harmony in Singapore’ (2008) 30(2) *British Journal of Religious Education* 133; Charlene Tan and Yew Leong Wong, ‘Moral Education for Young People in Singapore: Philosophy, Policy and Prospects’ (2010) 13(2) *Journal of Youth Studies* 89; Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (1995) London, Routledge; Beng-Huat Chua, ‘The Cost of Membership in Ascribed Community’ in Will Kymlicka and Baogang He (eds), *Multiculturalism in Asia* (2005) Oxford, Oxford University Press; Wing On Lee, David L. Grossman, Kerry J. Kennedy and Gregory Fairbrother (eds), *Citizenship Education in Asia and the Pacific: Concepts and Issues* (2004) Hong Kong, Comparative Education Research Centre, University of Hong Kong; and Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (2006) Princeton, New Jersey, Princeton University Press.

philosophies to the ones set out in the White Paper, about the duty of citizens to put the interests of the state before their individual desires. Consider the following speech:

For Asians, the community, the majority comes first. The individual and minority must have their rights but not at the unreasonable expense of the majority. The individuals and the majority must conform to the mores of society. A little deviation may be allowed but unrestrained exhibition of personal freedom which disturbs the peace or threatens to undermine society is not what Asians expect from democracy.<sup>174</sup>

As Yash Ghai notes, in the hands of some governments, the concept of duty becomes a justification for, as well as an instrument of, authoritarianism.<sup>175</sup> Ghai points out that in societies where ideas of duty predominate is that ‘the system becomes reminiscent of feudalism with persons at the top of the hierarchy having rights and those at the lower reaches, duties.’<sup>176</sup> He notes that the fulfilment of duties frequently betokens social, economic, or political subordination, tends towards conservatism and the perpetuation of inequalities. The emphasis on duties which permeated the policies and rhetoric of leaders such as Lee Kuan Yew, Mahathir and Suharto, essentialised citizens as people who are obedient and devoted to the community; and civic and national virtue as demanding an orientation away from ‘individualistic’ demands such as a free press or habeas corpus.<sup>177</sup> The political logic following from an emphasis on duty was a constraint of civil and political rights in the name of order, harmony and control.

There is a clear strand of utilitarian thinking in this kind of philosophy about duties: an idea that individual rights might justifiably be ‘traded-off’ against a greater good. This is the very notion that the idea of rights was supposed to resist, in Ronald Dworkin’s idea of

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<sup>174</sup> Mohamad Mahathir, ‘Speech to World Youth Foundation’ (1999) in *Human Rights: Views of Dr. Mahathir Mohamad* Kuala Lumpur, Melaka: World Youth Foundation.

<sup>175</sup> Yash Ghai, ‘Human Rights and Governance: the Asia Debate’ (2000) 1 *Asia-Pacific Journal of Human Rights and the Law* 9, 33.

<sup>176</sup> *Ibid.*

<sup>177</sup> Neil Englehart, ‘Rights and Culture in the Asian Values Argument: the Rise and Fall of Confucian Ethics in Singapore’ (2000) 22(2) *Human Rights Quarterly* 548.

rights as ‘trump cards’, which protect the basics of our individual freedom and liberty against other imperatives.<sup>178</sup> Jeremy Waldron argues that rights are supposed to impose limits on the sacrifices that can be demanded from individuals as contributions to the general good: ‘designed to pick out those interests of ours that are not to be traded off against the interests of others in this way.’<sup>179</sup>

In relation to ASEAN’s communist members, Vietnam and Laos, the idea of balancing duties with rights is inherently problematic. In communist societies, the possession of rights is contingent on the performance of duties. Because of this element of contingency, many argue that in communist societies, rights are not the equal and inalienable entitlements that the UDHR envisions.<sup>180</sup> The argument is that if the state can bestow or remove rights based on its assessments of citizen’s contributions to the state, then entitlements are not held as *rights*. In Chapter 3, I discussed Jack Donnelly and Rhoda Howard’s argument that the duty to build society according to a particular communist vision will inevitably lead to the denial of civil and political rights, because the exercise of personal autonomy and civil liberties is almost certain to undermine that vision.<sup>181</sup> Article 51 of the Constitution of the Socialist Republic of Vietnam, modelled on Article 59 of the 1977 Soviet Constitution, states: ‘The citizen’s rights are inseparable from his duties. The State guarantees the rights of the citizen; the citizen must fulfil his duties to the State and society.’<sup>182</sup>

CSOs involved in advocacy around the ASEAN Human Rights Declaration were not opposed to a reference to duties. The draft declaration prepared by the ASEAN Working

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<sup>178</sup> Ronald Dworkin, *Taking Rights Seriously* (1977) London, xi.

<sup>179</sup> Jeremy Waldron, ‘Rights in Conflict’ (1989) 99(3) *Ethics* 503.

<sup>180</sup> Rhoda Howard and Jack Donnelly, ‘Human Dignity, Human Rights, and Political Regimes’ (1986) 80(3) *American Political Science Review* 801.

<sup>181</sup> *Ibid.*

<sup>182</sup> Constitution of the Socialist Republic of Vietnam.

Group for a Human Rights Mechanism, for example, itself includes an article on duties.<sup>183</sup> It was the idea of ‘balancing’ rights and duties that many found to be problematic.<sup>184</sup> CSOs feared that the conception of balance favoured by Southeast Asian governments would be a balance between individual liberty, and the duty of citizens to preserve the existing social order. CSOs feared that an individual’s duty to ensure the cohesion and security of the state would prevail over individual liberty. In circumstances where the existing social order subjugates the rights of women, or ethnic minorities, or indigenous peoples, this was viewed as unacceptable.

In her discussion on the drafting of the Universal Declaration of Human Rights, Glendon comments in relation to Article 29, the ‘duties’ article, that the duties are meant to apply in ‘a certain kind of community, where the free and full development of his personality is possible.’<sup>185</sup> The UDHR does actually not say this. The UDHR states that it is ‘the community alone in which the free and full development of his personality is possible’ and this is why the individual owes the community duties. But Glendon is trying to make the point that we cannot owe duties to communities in which we are not free and equal members, in which our views about balancing rights, and the relationship between rights and duties, are ignored or subjugated. Put simply, civil society actors in Southeast Asia did not trust that the governments of the region would carry out any balancing act in an even-handed way.

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<sup>183</sup> Human Rights Working Group, ‘Submission on the ASEAN Human Rights Declaration’ (September 2012) Article 29: ‘Every person shall have duties towards his/her family, community, State and the international community.’

<sup>184</sup> CSOs viewed as particularly problematic Malaysia’s statement in the draft ASEAN Declaration of 9 January 2012, which proposed an article stating: ‘The parameters of the enjoyment and exercise of human rights and fundamental freedoms is dependent on the fulfilment of duties and responsibilities towards other individuals, societies, future generations and the State.’ Vietnam put forward a proposal that stated: ‘The rights of persons are inseparable from their duties. The State protects these rights and the persons fulfil their duties towards the State and society.’ Draft Declaration, 9 January 2012, Article 27.

<sup>185</sup> Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1997), above n 156.

**5.3.7 Article 7: ‘Indivisible, Interdependent and Interrelated’**

Article 7 provides that:

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

This article also closely follows the formulation of Article 5 of the Vienna Declaration:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>186</sup>

The phrase ‘indivisible and interdependent and interrelated’ is ritually invoked in the statements, speeches and reports of United Nations human rights actors and institutions. Only recently have scholars attempted to unpack the meaning and potential of the phrase.<sup>187</sup> Initially, the idea was born from the desire of developing nations to emphasise economic and social rights, in contradistinction to the perceived emphasis placed on civil and political rights, and to make the point that social and economic rights are as essential to a life with dignity as rights connected to individual liberties. The 1968 Proclamation of Teheran states: ‘Since human rights and fundamental freedoms are indivisible, the full realization of civil and

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<sup>186</sup> Vienna Declaration, above n 1, Article 5.

<sup>187</sup> James W Nickel, ‘Rethinking Indivisibility: Towards A Theory of Supporting Relations Between Human Rights’ (2008) 30(4) Human Rights Quarterly 984; L.J. Laplante ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Develop’ (2007) 10 Yale Human Rights and Development Law Journal 141.

political rights without the enjoyment of economic, social and cultural rights is impossible.<sup>188</sup>

It is surely the case that economic and social rights, and civil and political rights, are interrelated. The work of Amartya Sen links rights of political participation to the fulfilment of economic and social rights: in democracies, the exercise of one's civil and political liberties (for example, to protest against the government's economic and social policies) assists political communities in avoiding the severest forms of economic deprivation (famines).<sup>189</sup> Sen argues that egregious social injustices are less likely to prevail in societies that practice liberal democracy.<sup>190</sup> Viewed from the alternative perspective, jurisprudence from the Inter-American Commission on Human Rights has established that there is a link between economic and social conditions and the ability to exercise rights of political participation: poor, less educated and marginalised people are less able to access systems of power and more likely to be excluded from decision-making processes.<sup>191</sup> In this way, rights are clearly interdependent and interrelated, both amongst civil and political rights (for example, in the way the right to freedom of expression supports the right to political participation), amongst social, economic and cultural rights (for example, in the way the right to food supports the right to work, and vice versa), and between civil and political rights and economic, social and cultural rights (in the way, for example, that equality rights support the right to education).

All rights are clearly interdependent and interrelated, but are they all indivisible? And if they are not, then are indivisible rights, without which other rights cannot exist, more

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<sup>188</sup> International Conference on Human Rights, Final Act of the International Conference on Human Rights: Proclamation of Teheran, A/CONF. 32/41 (22 April-13 May 1968).

<sup>189</sup> Amartya Sen, *The Idea of Justice* (2009) Cambridge, Mass., Harvard University Press.

<sup>190</sup> Ibid.

<sup>191</sup> Heraldo Muñoz, 'The Right to Democracy in the Americas' (1998) 40(1) *Journal of Inter-American Studies and World Affairs* 1.

important than other rights? And if some are more important, how much weight can we give to the statement that ‘all rights must be treated on the same footing and with the same emphasis’? These questions bring us to the vexed issue of whether or not there is a hierarchy of human rights. Is the right to life, protected in Article 11 of the ASEAN Human Rights Declaration, equally as important as the right to ‘freely take part in cultural life, to enjoy the arts and the benefits of scientific progress,’ protected in Article 33 of the Declaration? It is certainly arguable that cultural life is extremely important, that it is essential to self-identity and fulfilment, and even that it is necessary in order for an individual to fulfil his or her potential to lead a fully ‘human’ life. But is it as important as being alive, or not being a slave? Death or enslavement precludes the possibility of enjoying *any other rights* at all. Is it helpful to the realisation of *all* rights to argue that these rights are thus of a different and more important order than other rights, and that their realisation should be prioritised in government policy?

In relation to questions such as these, James Nickel has argued that indivisibility should be viewed differently to interdependence and interrelatedness. His argument is that indivisibility is a very strong form of interdependence, where one right cannot exist in the absence of another. Interdependence and interrelatedness mean merely that one right supports the other, without being essential to its survival. He uses the analogy of human biology. The heart and the liver are indivisible: one cannot function without the other. A person’s two hands, in contrast, are merely mutually supportive, not indivisible.<sup>192</sup>

In most countries in Southeast Asia, governments have very limited resources and the prioritisation of some pressing social needs over others is inevitable. There may indeed be utility in counting some core rights as indivisible, and prioritising their realisation over other rights, which are merely interdependent and interrelated. International customary law

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<sup>192</sup> James Nickel, above n 187.

recognises certain rights as peremptory norms of international law, from which no derogation is possible. International human rights treaties—and indeed the ASEAN Human Rights Declaration itself—implicitly acknowledge that there is a hierarchy of rights, in the sense that they demand immediate protection for some rights (‘negative’ civil and political rights) and provide that other (‘positive’ social and economic rights) may be realised progressively.<sup>193</sup>

The second sentence of the ASEAN Human Rights Declaration, about the realisation of rights ‘in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’ generated significant protests from civil society organisations. Civil society organisations identified this sentence as one of the Declaration’s key shortcomings, which would ‘allow ASEAN member states to not respect human rights’ and, in the words of Human Rights Watch Thailand, render the ASEAN Human Rights Declaration ‘a tragedy’ for the 600 million people of Southeast Asia.<sup>194</sup>

Yet by itself, the article is unobjectionable. Nothing of any consequence flows from the difference between Article 7 in the ASEAN Human Rights Declaration and Article 5 in the Vienna Declaration. True, Article 5 of the Vienna Declaration provides that *regardless* of historical, cultural backgrounds (which can be born in mind) it is the state’s duty to promote and protect all human rights and fundamental freedoms, while the ASEAN Human Rights Declaration does not make this clear, and instead merely draws attention to the fact that different political, economic, legal, social, cultural, historical and religious backgrounds should be born in mind. But the ASEAN Human Rights Declaration contains an expansive

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<sup>193</sup> Even social and economic rights have minimum core elements which are immediately enforceable: Philip Alston and Gerard Quinn ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9(2) *Human Rights Quarterly* 156.

<sup>194</sup> Sunai Phasuk, Human Rights Watch Thailand quoted in Sok Khemara, ‘Mixed Reviews of ASEAN Human Rights Declaration’ (19 December 2012), *VOA Khmer* available at: <http://www.voacambodia.com/content/mixed-reviews-of-asean-rights-declaration/1567319.html> [accessed 20 December 2012].

provision about state responsibility in Article 6, when it states, ‘It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.’ Why then did Article 7 cause so much ire?

The response of civil society can only be explained in the context of the Asian Values debate and the secretive drafting process of the ASEAN Human Rights Declaration. The 8 January 2012 version of the Declaration includes a preambular clause, which states: ‘Reaffirming that the Declaration adheres to the purposes and principles of the ASEAN Charter, and international human rights standards, taking into account national and regional particularities.’ The phrase ‘taking into account national and regional particularities,’ echoes Article 8 of the 1993 Bangkok Declaration:

while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.<sup>195</sup>

The word in the Bangkok Declaration that greatly troubled human rights activists and Western leaders at the time of the Vienna World Conference was: ‘*while*’: ‘

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

After tortuous negotiation, in the Vienna Declaration, the qualifying ‘while’ was placed in relation to the claim for *particularism*, rather than the claim for universalism, translating into an uneasy compromise between universalism and relativism.

The 1993 Kuala Lumpur Declaration on Human Rights, which was prepared by ASEAN member states (which at the time were Indonesia, Malaysia, Thailand, the

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<sup>195</sup> The 1993 Kuala Lumpur Declaration contains a slightly different phrase, referring in its preamble to ‘changing economic, social, political and cultural realities.’

Philippines and Singapore) *after* the Vienna World Conference on Human Rights, evades the universalist/relativist controversy, merely stating that: ‘the peoples of ASEAN accept that human rights exist in a dynamic and evolving context and that each country has inherent historical experiences, and changing economic, social, political, and cultural realities and value systems which should be taken into account.’<sup>196</sup>

Given this background, we can see more clearly the reasons behind the strong objection of CSOs to the inclusion of the phrase ‘national and regional particularities’ in the January 2012 draft of the Declaration. CSOs viewed it as an attempt to revive the ‘Asian Values’ debate and an opening to future concessions to relativism. The views of CSOs prevailed, in terms of removing the phrase ‘national and regional particularities’ from the Preamble.

The contention surrounding Article 7 of the ASEAN Human Rights Declaration is again one that is born of civil society’s distrust of the governments of the region, and the particular histories of authoritarianism and oppression that have shaped post-colonial Southeast Asia. For on one reading, the statement that human rights must be realised ‘in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’ is entirely unremarkable. As long as one accepts that human rights are universal, indicating that there is at some level a common global standard in the way a right is understood, defined and interpreted, then there is little problem in acknowledging that rights will be realised in different regional and national contexts, where different political, economic, legal, social, cultural, historical and religious backgrounds exist. Indeed, the effective realisation of rights *demands* that the different political, economic, legal, social, cultural, historical and religious backgrounds of different societies must be considered. The action required to ensure that a woman living in a rural

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<sup>196</sup> Kuala Lumpur Declaration (1993) Preamble.

areas of the Philippines can attain ‘the highest attainable standard of reproductive health’<sup>197</sup> is different to what is required to ensure this same right to a woman living in Singapore. The fear of civil society was that permitting the consideration of particular historical, political and cultural elements in different societies, would allow states to *defer* to culture, religion and political background, in the interpretation and implementation of rights, in ways that denied that there was any common global standard in the way a right was understood, defined and interpreted.

### 5.3.8 Article 8 Limitations: ‘Public Morality’

Article 8 contains a limitations clause, which provides that:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the rights and duties of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others and to meet the just requirements of national security, public order, public health and public morality and the general welfare of the peoples in a democratic society.<sup>198</sup>

The limitations clause in the UDHR, Article 29(2), permits limitations on the basis of morality, public order and the general welfare in a democratic society. It is not, in any substantive way, different to the limitations clause contained in the ASEAN Human Rights Declaration.<sup>199</sup> Nonetheless, some civil society organisations objected to the limitations clause, on the grounds that it was placed in the ‘General Principles’ section of the text, meaning (in the view of these organisations) that limitations could potentially apply to *all*

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<sup>197</sup> AHRD, Article 29(1).

<sup>198</sup> AHRD, Article 8.

<sup>199</sup> I do not consider the addition of ‘public health’ and ‘public security’ to be substantive additions, given that the ICCPR permits limitations on grounds of public security and public health (as well as public order and morals), in relation to certain rights (one of which is *not* freedom of thought, conscience and religion). If we consider the kinds of repressive laws that might be justified by states on the grounds of national security and public health, for example anti-terrorism laws and restrictions on movement during pandemics, these are laws that could be – and have been, in Western democracies, justified on the grounds of public order and the general welfare in a democratic society.

rights, including rights that are non-derogable under international law. For this reason, some NGOs, some Western governments, and the UN High Commissioner for Human Rights, were very critical of the limitations provision within the Declaration.

Some were also highly critical of the inclusion of ‘public morality’ as a limitation on the exercise of rights and freedoms. This criticism requires some explication, as most international human rights instruments include a provision that permits states to limit certain rights and freedoms on the basis of public morality. The UDHR contains a provision very similar to that of the ASEAN Human Rights Declaration;<sup>200</sup> the European Convention on Human Rights permits limitations on certain rights (privacy, freedom of thought, conscience and religion, expression and assembly) on grounds of public morality;<sup>201</sup> the American Convention on Human Rights largely follows the European model;<sup>202</sup> the African Charter permits certain rights to be limited or circumscribed by reference to national law;<sup>203</sup> the Arab Charter permits limitations on rights to political participation and information on the basis of morality.<sup>204</sup> The constitutions of most ASEAN states, in one form or another, provide for the limitation of rights based on public morality.<sup>205</sup>

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<sup>200</sup> UDHR, Article 29(2): ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

<sup>201</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, 213 UNTS 2, entered into force 3 September 1953), as amended by Protocol 11 (1998) and Protocol 14 (2010).

<sup>202</sup> American Convention on Human Rights, above n 160.

<sup>203</sup> African Charter on Human and Peoples’ Rights (Banjul Charter) (adopted 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986).

<sup>204</sup> Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008), Articles 24 and 31.

<sup>205</sup> For example, Article 41 of the 1993 Constitution of Cambodia provides in relation to Freedom of Expression, that: (1) Khmer citizens have freedom of expression, press, publication, and assembly. No one may exercise this right to infringe upon the rights of others, to affect the good traditions of the society, or to violate public law and order and national security; Article 28J of the 2002 Constitution of the Republic of Indonesia permits the limitation of some rights on the basis of: ‘morality, religious values, security and public order in a democratic society’; Article 44 of the Amended Constitution of the Lao’s Peoples Democratic Republic provides that Lao citizens have the right and freedom of speech, press and assembly; and have the right to set up associations and

Nonetheless, several civil society organisations—particularly those representing women’s organisations—argued against the inclusion of this limitation. The fear of civil society organisations was that states would use the public morality limitation to justify domestic laws and practices that subjugate women and sexual minorities. The Southeast Asia Women’s Caucus on ASEAN released a submission which argued that in Southeast Asia, the ‘public morality’ justification permitted the survival of cultural practices that were harmful to women, such as: female genital mutilation as a sign of chastity in Indonesia; discrimination against married woman who commit adultery in the Philippines; traditional birth practices in Cambodia and Laos; prohibition against same-sex relationships in Malaysia. The Caucus argued that the interpretation of ‘public morality’ was based on the perspective of the dominant patriarchal and religious hierarchies, and that the experiences of women and girls were excluded from these popular understandings of public morality, by the realities of patriarchy, family responsibilities, education, religion, land acquisition and trading systems, militarisation, labour and migration.

For these reasons, the Caucus argued that ‘public morality’ should not be permitted to limit rights and freedoms: to do so would further exclude and subjugate women and sexual minorities.<sup>206</sup> The Asia Pacific Forum on Women, Law and Development agreed that: ‘morality clauses have the potential to undermine women’s rights and should not be used in the AHRD.’<sup>207</sup> The Forum argued that ‘morality’ reflected the dominant culture that tended to favour some, who were mostly men in power, and marginalise others, mostly women. They argued that in Southeast Asia, political and religious hierarchies made women the subject of

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to stage demonstrations, which are not contrary to the laws. The Constitution of Malaysia (1957), Article 10(2), permits restrictions on the rights of expression, assembly and association, on the grounds of morality (amongst other things).

<sup>206</sup> The Southeast Asia Women’s Caucus on ASEAN, ‘Submission on the ASEAN Human Rights Declaration’ (21 October 2011) available at: <<http://womenscaucusonasean.wordpress.com/2011/10/25/full-text-womens-caucus-submission-on-ahrd-on-aichr/>> [accessed 21 December 2012].

<sup>207</sup> Asia Pacific Forum on Women’s Law and Development, ‘Adding Value: Removing Morality from the ASEAN Human Rights Declaration’ (2011).

patriarchal and hetero-normative standards, and excluded the narratives and perspectives of minorities, denying them access to the processes of deliberation and decision-making within societies. They pointed, again, to the non-inclusive, non-transparent way in which the Declaration had been drafted.<sup>208</sup>

Where there is no common position on a particular moral issue within a state or region, the practice of the European Court of Human Rights is to defer to the state's views on the necessity of a public morality limitation.<sup>209</sup> On matters of public morality, states are seen, '[B]y reason of their direct and continuous contact with the vital forces of their countries as being 'in principle in a better position than the international judge to give an opinion on the exact content of these requirements.'<sup>210</sup> The difficulty perceived by Southeast Asian critics of a public morality limitation in the Declaration, was that the diversity of opinion on issues of public morality within the region would provide states with a wide latitude to determine themselves whether or not freedoms should be restricted in the interests of preserving the prevailing morality.

Within Southeast Asia, there is no common position on morality issues such as adultery, solicitation, obscenity, abortion, same-sex relations, censorship and pornography. For example, in Indonesia, homosexuality is not illegal except under regional ordinances in South Sumatra and Palembang.<sup>211</sup> In Laos, adultery is punishable by imprisonment or 're-

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<sup>208</sup> Asia Pacific Forum on Women's Law and Development, *ibid.* In their submission, the Asia Pacific Forum on Women's Law and Development (APFWLD) drew attention to the comments of the Human Rights Committee, which had stated that 'the concept of morals derives from many social, philosophical, and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.' UN Human Rights Committee, General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (30 July 1993) available at: <<http://www.refworld.org/docid/453883fb22.html>> [accessed 7 February 2014].

<sup>209</sup> *Handyside v United Kingdom*, Application No. 5493/72 (7 December 1976)..

<sup>210</sup> *Ibid.*

<sup>211</sup> Julia Suryakusuma, 'Gays are us: LGBT rights are human rights' (31 October 2012) *The Jakarta Post* available at: <<http://www.thejakartapost.com/news/2012/10/31/viewpoint-gays-are-us-lgbt-rights-are-human-rights.html>> [accessed 31 October 2012].

education’;<sup>212</sup> for monks or novices who commit sexual acts, the punishment is imprisonment and a fine;<sup>213</sup> the dissemination of pornography and objects that are ‘contrary to fine tradition’ carries a penalty of imprisonment and/or a fine.<sup>214</sup> Yet in Laos, same-sex relations are not prohibited. In Cambodia, the Law on Marriage and the Family prohibits marriage between persons of the same gender, and prohibits men who are impotent to marry.<sup>215</sup> Indonesia does not criminalise homosexuality, but the federal government has allowed certain municipal governments to adopt Shari’a law, which forbids homosexual relations and adultery. In the Philippines, homosexuality is not illegal, but attempts to legislate for protection from discrimination for sexual minorities have been resisted by the Catholic Church and thus far have been unsuccessful.<sup>216</sup>

Under Vietnam’s Constitution, the family is ‘the cell of society’ and marriage is required to conform to ‘the principles of free consent, progressive union, monogamy and equality between husband and wife.’<sup>217</sup> In 2012, Vietnam’s Justice Minister proposed amending Vietnam’s marriage laws to include same-sex couples. Singapore’s penal code no longer prohibits consensual anal and oral sex, but it retains a provision that criminalises

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<sup>212</sup> Lao People’s Democratic Republic Penal Law (1990) available at: <http://www.asianlii.org/la/legis/laws/pl199076.pdf> [accessed 21 December 2012] Article 117 and Article 119.

<sup>213</sup> Ibid, section 121: Any monk or novice who commits a sexual act with a female or male person shall be punished by 6 months to 3 years imprisonment and shall be fined 500,000 – 3,000,000 kip.

<sup>214</sup> Ibid, section 127: Dissemination of Pornographic objects and objects contrary to fine tradition: any person engaging in the widespread production, distribution or dissemination of pornographic items, magazines or pictures, video cassettes, or other materials contrary to fine traditions, shall be punishable by 3 months to one year imprisonment and 300,000 to 5,000,000 kip.

<sup>215</sup> Section 6.

<sup>216</sup> Nonetheless, in 2010, the Supreme Court of the Philippines reversed a decision of the electoral commission, which refused to accredit an LGBT organisation called Ang Ladlad as a political party on the grounds of its ‘immoral doctrines.’ *Ladlad LGBT Party v. Commission on Elections* (8 April 2010) (Republic of the Philippines Supreme Court), 4-5. The commission had based its decision on moral grounds. According to the commission, Ang Ladlad advocated ‘immoral doctrines’ and if the commission accredited it as a political party, it would be failing in its constitutional duty ‘to protect our youth from moral and spiritual degradation.’ The Supreme Court reversed the decision on equal protection and freedom of expression grounds.

<sup>217</sup> Article 64 of the 1992 Constitution of the Socialist Republic of Vietnam.

‘outrages of decency’ between male homosexuals.<sup>218</sup> Brunei’s Penal Code criminalises obscene acts and songs,<sup>219</sup> uttering words with deliberate intent to wound religious feelings<sup>220</sup> and also ‘unnatural acts.’<sup>221</sup> There is no anti-discrimination protection in Brunei. In Myanmar, same-sex relations are criminalised under the nation’s colonial penal code, and although it is not strictly enforced, activists say the law is still used by authorities to discriminate and extort.<sup>222</sup>

In Malaysia, the Constitution declares Islam to be the religion of the Federation.<sup>223</sup> The Malaysian government uses Islam as a justification for the criminalisation of anal and oral sex, for which the Penal Code provides a maximum penalty of 20 years in prison, with fines and lashes.<sup>224</sup> In addition, states within Malaysia have enacted Islamic Shari’a laws, promulgated by local fatwas, which apply to all Muslims. These laws also criminalise certain sexual acts (such as sodomy) and punish them by imprisonment and whipping. The Shari’a Penal law in the Malaysian state of Syriah, for example, prescribes penalties for sodomy (*Liwat*) and lesbian relations (*Musahaqat*) with fines of RM5,000.00, three years imprisonment and six lashes of the whip.<sup>225</sup>

Malaysia’s role in preserving the ‘public morality’ limitation within the Declaration merits special attention. Reports from the Second Public Consultation on the ASEAN Human Rights Declaration were that the Malaysian representative to AICHR, Datuk Seri Muhammad

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<sup>218</sup> Section 377A of the Penal Code of Singapore.

<sup>219</sup> Ibid, Section 294.

<sup>220</sup> Ibid, Section 298.

<sup>221</sup> Ibid, Section 377.

<sup>222</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association, ‘LGBT Groups Call for Burma’s Penal Code to Be Amended’ 8 December 2013, available at: <<http://ilga.org/ilga/en/article/opoqnVe1uh>> [accessed 12 December 2013].

<sup>223</sup> Article 3 of the Malaysian Constitution also provides that other religions may be practised in peace and harmony.

<sup>224</sup> Penal Code of Malaysia, Section 377A. This section provides that: ‘Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.’

<sup>225</sup> Sylvia Tan, ‘Gay sex acts should not be criminalised: Malaysian Bar Council Human Rights Committee’ (13 August 2009) *Fridae* available at: <<http://www.fridae.asia/newsfeatures/2009/08/13/8773.gay-sex-acts-should-not-be-criminalised-malaysian-bar-council-human-rights-committee?n=sec>> [accessed 21 November 2012].

Shafee Abdullah, strongly defended the public morality limitation in the Declaration on the basis that Malaysia's own constitution permitted limitations on the grounds of public morality. He argued that it would therefore be inconsistent if the regional instrument did not permit similar limitations. In a public statement issued on 19 November 2012, the Southeast Asian Women's Caucus on ASEAN claimed that while representatives of some of other ASEAN nations seemed prepared to abandon a 'public morality' limitation, Malaysia insisted on preserving it.<sup>226</sup>

In Malaysia, the government's view is that the character of Malaysian society as Islamic precludes tolerance of homosexuality. This is because of the view that homosexuality is profoundly at odds with Islam, to the extent that tolerance of homosexuality threatens the shared morality upon which the survival of Islamic society depends. Homosexuality is forbidden in Islam: it is seen as a crime worse than murder.<sup>227</sup> Because Islam is viewed as a 'complete system of life and perceives life as an integrated whole ... sexuality, reproduction and [the] family system are also parts of the whole Islamic system of life, not outside it.'<sup>228</sup> The Human Rights Committee of the Malaysian Bar Council has reported, 'The LGBTIQ community is frequently perceived as breaching social codes, fomenting dissent and advocating "deviancy" and in particular the perception that they are not "normal".'<sup>229</sup>

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<sup>226</sup> The Southeast Asian Women's Caucus on ASEAN, 'ASEAN Human Rights Declaration Limited by 'morality' Say Women's Organisations' Chiang Mai, Thailand (19 November 2012).

<sup>227</sup> In 2000, *Time* magazine published an interview with Abdul Kadir Che Kob, a government official in Malaysia's Islamic Affairs Department. Kadir was quoted as saying: 'Homosexuals are shameless people.' The interviewer asked Abdul Kadir if people should not have the right to choose who they want to be with. He replied: 'what right are you talking about? This is sin, end of story. How can men have sex with men? God did not make them this way. This is all Western influence.' 'Homosexuality is a Crime Worse Than Murder' (26 September 2000) *Time* available at: <<http://www.time.com/time/world/article/0,8599,2040451,00.html>> [accessed 2 December 2012].

<sup>228</sup> Zeenath Kausar, 'Feminist Sexual Politics and Family Deconstruction: An Islamic Perspective' (2001) Kuala Lumpur, International Islamic University.

<sup>229</sup> Sylvia Tan, above n 225, 'Gay Sex Acts Should Not Be Criminalised.' Tan reports that there have been 7 charges under section 377 of the Penal Code since 1938. Of the seven, four were connected to Anwar Ibrahim. Anwar Ibrahim, former deputy prime minister, was convicted for sodomy and corruption in 1998. The sodomy conviction was overturned in 2004.

On July 2012, Malaysia's Prime Minister, Datuk Seri Najib Razak, gave a public address in which he stated that 'LGBTs, pluralism, liberalism—all these "isms"—were against Islam and it is compulsory for us to fight these.'<sup>230</sup> He said that the government supported human rights, but that 'it must do so within the boundaries set by Islam' and he told Muslims to avoid discord which could threaten those who safeguard Islamic principles.<sup>231</sup> That same day, Malaysian opposition leader Anwar Ibrahim, who was convicted in 1998 under Malaysia's sodomy laws and spent six years in prison, released a statement which averred that: 'vice activities' such as homosexuality, free sex and gambling, were prohibited in the Quran and Hadith; Islamic law did not distinguish whether these activities were carried out in the public domain or in private places; and the government had a responsibility to enforce these types of laws where they were committed by individuals in the public domain.<sup>232</sup> Both Razak and Ibrahim, in their views on homosexuality, follow in the footsteps of former Prime Minister Mohammad Mahathir, who throughout the course of his 22 year rule, placed sexual freedom at the core of what Malaysia stood against in terms of the West:

Our minds, our culture, our religion, and other things will become the target. In the cultural and social fields they want to see unlimited freedom for the individual ... they accept the practice of free sex, including sodomy, as a right ... the cultures and values which they will force us to accept will be hedonism, unlimited quest for pleasure, the satisfaction of basic desires, particularly sexual desires.<sup>233</sup>

Where religious beliefs form the foundation of the state's idea about what public morality consists of, it is particularly difficult for proponents of new ideas to open up areas

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<sup>230</sup> Hafidz Baharom Najib, 'LGBTs, liberalism, pluralism are enemies of Islam' (19 July 2012) *The Malaysian Insider* available at: <<http://www.themalaysianinsider.com/malaysia/article/najib-lgbts-liberalism-pluralism-are-enemies-of-islam>> [accessed 2 December 2012].

<sup>231</sup> Ibid.

<sup>232</sup> 'Malaysia's Anwar Ibrahim Denies Supporting Homosexuality' (19 July 2012) *Hindustan Times* available at: <<http://www.hindustantimes.com/world-news/RestOfAsia/Malaysia-s-Anwar-Ibrahim-denies-supporting-homosexuality/Article1-891801.aspx>> [accessed 20 December 2012].

<sup>233</sup> Samar Habib (ed), *Islam and Homosexuality* (2010) Santa Barbara, Cal., Praeger, 11.

for debate and discourse. Specifically, religious arguments present difficulties for those who would try to champion individual liberties in the face of what appears to be a moral consensus, because an appeal to a deity *is* a principled moral reason for holding a particular moral viewpoint, and it is often offered by religious authorities against whose teachings criticism is discouraged, if not forbidden.<sup>234</sup>

The question of what threatens the survival of society was addressed in what has become a famous exchange between Professor H.L.A. Hart and Lords Devlin on the subject of public morality and the criminalisation of homosexuality, prostitution, and pornography. Lord Devlin, objecting to the Wolfenden Report, which recommended the decriminalisation of homosexuality in Britain, argued that a degree of moral conformity was essential to society, and that every society has a right to preserve its own existence by insisting on some such conformity. Lord Devlin acknowledged that individual freedom was important, and that a society must be cautious about concluding that a practice is profoundly immoral to the extent that it forbids it. Nonetheless, he maintained that when public feeling in relation to an issue rises to the level of ‘intolerance, indignation and disgust,’ and if the broad popular feeling was genuinely that a particular practice is an abominable vice, then society's right to eradicate that practice could not be denied.<sup>235</sup>

Professor Hart’s response was that society was not as fragile as Lord Devlin imagined it to be, and that Lord Devlin offered no evidence to support his claim that the tolerance of individuals practices which ran against the moral grain of society jeopardised society’s survival. Hart suggested that Lord Devlin was adopting a definition of society that was highly artificial—as a particular complex of moral ideas and attitudes, which its members happen to

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<sup>234</sup> Abdullahi A. An-Na’im *Towards an Islamic Reformation: Civil liberties, Human Rights and International Law* (1990) Syracuse, NY., Syracuse University Press.

<sup>235</sup> Patrick Devlin, *The Enforcement of Morals* (1959) Oxford, Oxford University Press, 17.

hold at a particular moment in time. Why (argued Professor Hart) should such a moral status quo have the right to preserve its precarious existence by force?<sup>236</sup>

For my purpose here, the critical issue is how we determine when the danger presented to society by a particular practice is sufficiently clear and present to justify prohibition. Some of the difficulties surrounding this question have been addressed by Ronald Dworkin.<sup>237</sup> Dworkin considers Devlin's point about public condemnation, and whether in and of itself, it justified making an act a crime, and whether if public condemnation was *not* sufficient, what more might be needed. Dworkin wonders whether there must be some demonstration of present harm to particular persons directly affected by the practice in question, or whether it might be sufficient to show some effect on social customs and institutions which alters the social environment, and thus affects all members of society indirectly. Applying these questions to Lord Devlin's argument that society's abhorrence of homosexuality justified its prohibition, Dworkin notes that Lord Devlin offered no evidence that homosexuality presents any danger at all to society's existence, beyond the naked claim that all 'deviations from a society's shared morality ... are capable in their nature of threatening the existence of society.'<sup>238</sup> Dworkin concludes that Lord Devlin simply *believed* that the ordinary man in the street thought that homosexuality was an abominable vice and that society was therefore justified in outlawing it, leaving homosexuals to choose, in Dworkin's words, 'between the miseries of frustration and persecution.'<sup>239</sup>

Dworkin argues strongly that public condemnation by itself ought not to be enough to justify restricting the liberties of individuals. This is because public feeling might not be based on good reasons, but might instead be based on prejudices, personal aversions and

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<sup>236</sup> H. L. A. Hart, *Law, Liberty and Morality* (1963) Oxford, Oxford University Press.

<sup>237</sup> Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75(6) *Yale Law Journal* 986.

<sup>238</sup> Patrick Devlin, above n 235, 13.

<sup>239</sup> Dworkin, above n 237, 992.

rationalisations, which do not in themselves justify restricting important individual freedoms. In Dworkin's view, legislators have a responsibility to test claims about the existence of a moral consensus, by studying the community's reactions to practices, participating in and encouraging public debate, and studying the views contained in editorial columns, the speeches of colleagues, the testimony of interested groups, and the view of constituents. These arguments and positions must be sifted in order to determine which are prejudices or rationalisations, and which represent a genuine reasoned moral consensus.<sup>240</sup>

What might this process look like? In relation to homosexuality and Islam in Southeast Asia, consider the following exchange. In 2008, the *Jakarta Post* reported on the discussions held during a public forum on Islam and homosexuality. The forum, organised by nongovernmental organisation Arus Pelangi, was attended by activists, Islamic scholars and teachers, and members of the media. The article in the *Jakarta Post*, titled 'Islam recognizes homosexuality',<sup>241</sup> reported the views of moderate Muslim scholars, who put forward the view that 'there were no reasons to reject homosexuals under Islam, and that the condemnation of homosexuals and homosexuality by mainstream ulema and many other Muslims was based on narrow-minded interpretations of Islamic teachings.'<sup>242</sup> The newspaper also reported the views of scholars such as Siti Musdah Mulia, who argued that homosexuals and homosexuality was created by God, and was natural, and thus permissible within Islam, and that the Koran's *al-Hujurat* (49:3) should be interpreted as meaning that all men and women are equal, regardless of ethnicity, wealth, social positions or sexual orientation. The paper reported Mulia's view that '[i]n the eyes of God, people are valued based on their piety,' which is 'God's prerogative to judge' and that '[t]he essence of the religion (Islam) is to humanise humans, respect and dignify them.' The paper also reported

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<sup>240</sup> Ibid, 1004.

<sup>241</sup> Abdul Khalik, 'Islam recognizes homosexuality' (28 March 2008) *The Jakarta Post*.

<sup>242</sup> Ibid.

the views of participants who emphasised *ijtihad* (the process of making a legal decision by independent interpretation of the Koran and the Sunnah) as a path to avoiding ‘old paradigms without developing open-minded interpretations’ and the views of others who pointed to parts of Indonesia where homosexuality within Islam had been acknowledged, such as Ponorogo (East Java). However, the views of conservative Muslim groups such as the Indonesian Ulema Council (MUI) and Hizbut Thahir Indonesia (HTI) were also reported. Deputy Chairman of MUI, Amir Syarifuddin, was reported as saying, ‘It’s a sin. We will not consider homosexuals an enemy, but we will make them aware that what they are doing is wrong.’ Rokhmat, of the HTI, several times asked homosexual participants in attendance to repent and force themselves to gradually return to the right path.<sup>243</sup>

Here we can see conflict between a religious view which is supported by the state and which lays claim to representing a ‘public morality’, and individual claims about the right to liberty in matters of sexuality. We see this conflict in almost all societies within the region. In the Philippines, for example, over 81 per cent of the population claims to belong to the Roman Catholic faith.<sup>244</sup> During the period of the drafting of the ASEAN Human Rights Declaration, there was intense public debate in the Philippines around the passage of House Bill 5043, the ‘Reproductive Health and Population Development’ Bill. The Bill aimed to improve reproductive health choices through compulsory school sex education, and by enabling access to contraception, reproductive health services, and ‘post-abortive’ health-care for women. Proponents of the bill argued that these measures were necessary in order to realise women’s autonomy and liberty. They also argued that the measures would serve the interests of the state in curbing population growth, particularly among the poor.

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<sup>243</sup> Ibid.

<sup>244</sup> Over 81 percent of citizens claim membership in the Roman Catholic Church, according to the official 2000 census data on religious preference. US Department of State: <http://www.state.gov/j/drl/rls/irf/2004/35425.htm> [accessed 20 December 2012].

The position of the Catholic Church in the Philippines is that legislation should be consistent with traditional church teachings on sexual morality and family planning. The Catholic Bishops Conference of the Philippines has consistently rejected the Bill, *not* on the basis that it contradicts specifically Catholic religious teachings, but on the basis that it contradicts ‘the fundamental ideals and aspirations of the Filipino people.’ In this regard, the Bishops cite Article 12 of the Constitution of the Republic of the Philippines:

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception.<sup>245</sup>

In their 2010 encyclical, the Bishops declared, ‘it would be morally corrupt to disregard the moral implications of the RH bill,’ which ‘is a major attack on authentic human values and on Filipino cultural values regarding human life that all of us have cherished since time immemorial.’ They argued that the Bill:

does not respect moral sense that is central to Filipino cultures. It is the product of the spirit of this world, a secularist, materialistic spirit that considers morality as a set of teachings from which one can choose, according to the spirit of the age. Some it accepts, others it does not accept. Unfortunately, we see the subtle spread of this post-modern spirit in our own Filipino society.<sup>246</sup>

In relation to the claim of the Bill’s proponents that the Bill would empower women, the Bishops stated that:

Advocates also assert that the RH Bill empowers women with ownership of their own bodies. This is in line with the post-modern spirit declaring that women have power over their own bodies without the dictation of any religion. How misguided this so-called ‘new truth’ is! For, indeed, as created by God our bodies are given to us to keep and nourish. We are stewards of our own bodies and we must follow God’s will on this matter according to an informed and right conscience. Such a conscience must certainly be enlightened and guided by religious and moral teachings provided by

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<sup>245</sup> Article 12 Constitution of the Republic of the Philippines (1987).

<sup>246</sup> Excommunication for Philippines president ‘a possibility,’ bishop states’ (6 October 2010) *Catholic News Agency* available at: <<http://www.catholicnewsagency.com/news/excommunication-for-philippines-president-a-possibility-in-contraception-dispute-bishop-states/>> [accessed 20 January 2014].

various religious and cultural traditions regarding the fundamental dignity and worth of human life.<sup>247</sup>

The idea that access to technologies of reproductive choice contravenes not merely Catholic morality, but the morality of the nation, is a powerful ideological argument, one that is difficult for religious people, or patriots, to refute. Nonetheless, there were dissident voices within the Catholic Church.<sup>248</sup> In 2007, during a symposium on population and development, three Jesuit priests, Fathers Gernilo, Carroll and Echica, argued that there was space within the Catholic Church to accommodate use of artificial contraception, and that, in the context of a conjugal relationship, sexuality need not be subordinate to the procreative value of sex. These priests acknowledged the realities of the lives of working Filipinos, many of whom live in poverty, in circumstances where feeding and raising many children is a terrible struggle, and where many men work as contractual labourers, making only periodic returns to the family home, and thus making natural family planning impossible. These views emanated from what one researcher called ‘a more acute consideration of the circumstances in which married couples must decide on their reproductive well-being in light of their financial and other non-doctrinal considerations.’<sup>249</sup>

These sorts of conversations are a necessary step towards clarifying the positions of people who fundamentally disagree on important issues, and helping the respective parties to understand where the differences lie. The debate itself works towards ensuring that the common public life reflects the views of all its members, so that all members stand a chance of achieving self-realisation as part of a community. In this sense, we see that at the heart of civil society’s concerns about permitting states in Southeast Asia to limit freedoms on the grounds of public morality, lies a concern about the regional absence of democracy, in its

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<sup>247</sup> Julius Bautista, ‘Church and State in the Philippines: Tackling Life Issues in a ‘Culture of Death’ (2010) 25(1) *SOJOURN: Journal of Social Issues in Southeast Asia* 29.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

broad deliberative sense—about the lack of real freedom within societies in Southeast Asia for people to voice their concerns about liberties and restraints—to participate in dialogue and debate about what their society is and what they would like it to be.

It is impossible to understand issues such as the acceptance of homosexuality, or contraception, and its effect on a community, without considering the details of precisely *how* liberalising sexual relations might harm a particular society. It is at this point that regional attitudes to particular moral issues become important. As Saul notes, regional instruments are a potential means by which local differences can be particularised, and regional particularity acknowledged and protected from erosion by the ‘excessive, arguably imperialistic, effects of the expanding global consumer economy.’<sup>250</sup> If the work of the state is to balance people’s wish to pursue their own ends, with the goal of social solidarity and the formation of a common good, then the experience of one’s neighbouring states in striking this balance should be highly relevant, particularly if these neighbours share similar histories, emphasise religious values in similar ways, or have similar cultures. In this sense, *regional* human rights arrangements provide ‘a certain distance’ necessary to make objective judgements about the balance between liberty and social stability, in a context of cognisance of local conditions. A state may have, for example, neighbours who have found it possible for a government to support solidarity and a richer public life, without unduly restricting an individual’s opportunities for self-creation. These regional instances stand as points of resistance to the inherent conservatism of states, their propensity to maintain the status quo, their interest in the preservation of power and their eye to the appetites of the majority, all of which inhibit a government’s willingness to open a particular contentious issue to broad dialogue and debate. Engaging regional views permits the inflection of the dialogue—particularly where some members of the region are democracies that encourage free and fair debate between diverse

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<sup>250</sup> Saul, above n 169, 595.

participants. As we saw in the first part of this chapter, the kind of comparative dialogue that I am describing did not take place in relation to the drafting of the Declaration. It might be concluded that the countries of Southeast Asia possesses insufficient commonality (of religion, culture, political tradition) to ground a regional discourse on the meaning and value of rights. In this regard, as the discussion in Chapter 2 foreshadowed, the absence of a common understanding of democracy is perhaps the most obvious limitation on the evolution of a regional human rights community. Democracy's absence is relevant in at least two ways. In the first place, without democratic conditions permitting free discourse, there is a diminished ability for actors to forge shared understandings around human rights concerns. Second, as we saw in Chapters 2 and 3, the conception we hold of democracy shapes our conception of the meaning and value of human rights. Without a common understanding of democracy, therefore, the prospect of reaching common understanding about the meaning and value of rights is greatly diminished.

### **5.3.9 Article 9: Particularisation**

Article 9 of the Declaration provides that:

In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability.

The principles listed in the first part of Article 9 are the same as those listed in Articles 3 and 7 of the 1993 Bangkok Declaration.<sup>251</sup> They reflect the view held by some

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<sup>251</sup> Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Report of the Regional Meeting for Asia of the World Conference on Human Rights A/Conf.1 57/ASRM/8-A/Conf.157/PC/59 (7 April 1993) (Bangkok Declaration) Article 3: 'Stress the urgent need to democratize the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced

Asian governments, at the time of the 1993 Vienna World Conference, that Western states were guilty of hypocrisy in their exhortations to other states about human rights. Asian governments argued that it was not so very long ago that the West were plundering colonial possessions, practicing slavery, and denying the vote to women and people of colour. It seemed outrageous to Asian governments that the West should now try to call Asian governments to account, under the authority of this new secular religion of ‘human rights’.

The final form of this article in the ASEAN Human Rights Declaration was the result of two important and very late changes. First, when the article was originally drafted, and right up until September 2012, the word ‘paramount’ was included before the word ‘principles’. That is, Article 9 provided that: ‘the *paramount* principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld’ (italics added). During the Manila consultations, civil society organisations objected to the inclusion of the word ‘paramount’, on the grounds that it implied that these considerations were capable of overriding other principles (such as the universality of all human rights). The word ‘paramount’ was removed.<sup>252</sup>

Second, the final sentence of this article was not originally included in the drafting, and was only added after the Manila consultation. The sentence, emphasising participation, inclusivity and accountability, speaks to precisely the concerns about participatory democracy with which this chapter has been concerned.

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and non-confrontational approach in addressing and realizing all aspects of human rights’; Article 7: ‘Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified’.

<sup>252</sup> These consultations took place on 10–11 September 2012.

### 5.3.10 Solidarity Rights: Peace, the Environment and Development

The ASEAN Human Rights Declaration contains three ‘solidarity’ rights: the right to a safe, clean and sustainable environment,<sup>253</sup> the right to development,<sup>254</sup> and the right to peace.<sup>255</sup>

The wording of these rights in the Declaration largely tracks their formulation in international human rights treaties and declarations. Civil society organisations and the governments of Southeast Asian nations were largely in agreement about the inclusion of these ‘solidarity rights.’ This is unsurprising. The environment, peace and development, represent genuinely cross-border ‘regional’ issues, where the actions of individual states impact on regional neighbours, and where the effects in terms of human rights of environmental degradation, war and poverty, are obvious to citizens and governments alike. For example, the haze arising from forest fires in Indonesia in 1997 affected the health of people as far afield as Thailand, Malaysia, Singapore, the Philippines and Irian Jaya.

Deforestation, overfishing, and the pollution of urban air and waterways, threaten not just the communities in states where these activities occur, but also in neighbouring states. Large-scale development projects such as dams, in places like the Lower Mekong, affect communities along the river, in Laos, Cambodia, Vietnam, and Myanmar. Conflict in nations such as Myanmar, spills across the border to Thailand.

Furthermore, peace, development and environmental concerns have been prominently articulated in Southeast Asian regional instruments. The 1967 Bangkok Declaration, announcing the establishment of ASEAN, put peace as the *raison d’être* of the association’s existence.<sup>256</sup> The first Article of the 2008 ASEAN Charter confirms that the purpose of

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<sup>253</sup> AHRD Article 28(f).

<sup>254</sup> AHRD Article 35.

<sup>255</sup> AHRD Article 38.

<sup>256</sup> Association of Southeast Asian Nations, *1967 Bangkok Declaration*, 8 August 1967. For example, the Preamble to the Bangkok Declaration includes the following, along with several other references to peace. ‘DESIRING to establish a firm foundation for common action to promote regional cooperation in South-East

ASEAN is to ‘maintain and enhance peace, security and stability and further strengthen peace oriented values in the region.’<sup>257</sup> Of the 14 ‘Principles’ set out in the ASEAN Charter, eight are concerned with the preservation of peace, largely through respect for sovereignty. Concerns with development and the environment are also prominent in the Charter. The Preamble to the ASEAN Charter resolves ‘to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process’ and Article 1(9) of the Charter lists as one of the ‘purposes’ of ASEAN promoting ‘sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples.’<sup>258</sup>

It is interesting to note, from the working papers of the drafting group of the ASEAN Human Rights Declaration, that some debate surrounded the issue of *where* in the Declaration certain solidarity rights—such as the right to peace—should be located. Some representatives proposed putting the right to peace in the Declaration’s ‘General Principles’, before the right to life, indicating that peace was perceived as an individual right. Others within the drafting group argued for having the provisions included near the right to development, aligning it with other collective rights. In the end, as we have seen, the right to peace was placed with collective rights. But the text of the AHRD nonetheless states that peace is a right *of every individual*.<sup>259</sup>

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Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region.’

<sup>257</sup> Association of Southeast Asian Nations, Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008), Article 1.

<sup>258</sup> ASEAN Charter, *ibid.*, Article 1(9).

<sup>259</sup> It is notable that the *African Charter on Human Rights and Peoples’ Rights* mentions the right to peace only as a right of the peoples. The African Charter does, however, specifically name the right to national (domestic) peace as well as international peace.

## 5.4 Conclusion

This dissertation is about the legitimacy and potential of a regional approach to international human rights law in Southeast Asia. In this chapter, I have examined the process of the creation of the 2012 ASEAN Human Rights Declaration, and the content of the Declaration, as a means of explicating a number of questions relevant to my hypothesis. These include the following: To what extent is there consensus within Southeast Asia on the nature and value of human rights? How do different actors within the region (governments, civil society groups, religious groups, rights-holders) view the nature and value of rights? What degree of legitimacy attaches to the work of AICHR in drafting the ASEAN Human Rights Declaration, and what legitimacy does the instrument itself possess, as ‘a framework for human rights cooperation in the region,’<sup>260</sup> and a contribution ‘to the ASEAN community building process’<sup>261</sup>?

In the course of tracing the drafting of the Declaration, and analysing its contents, this chapter has demonstrated the importance of deliberative democracy in the realisation of an effective regional human rights system in Southeast Asia. This chapter shows how the absence of debate, argumentation and justification, and the exclusion of key stakeholders from the drafting process, shut down opportunities for a regional conversation on how and why rights mattered. AICHR’s Commissioners, who have an express mandate to engage with civil society, did little (as a group) to promote meaningful discourse. It is notable, however, that in those ASEAN states that possess political systems closer to the model of liberal democracy (Indonesia, the Philippines and Thailand) processes of public deliberation about what the Declaration should include and whether and how rights should be limited *did* occur, and that some exchanges on the justification of different rights served an important public

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<sup>260</sup> AHRD, Preamble.

<sup>261</sup> *Ibid.*

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purpose in clarifying the scope of conflicting views. But overall, in relation to my hypothesis, this chapter shows how the absence of deliberative democracy in the drafting of the Declaration constrains the emergence of a regional understanding of human rights and limits the legitimacy of the nascent regional human rights system.

## **Chapter 6: The Rights of Women at the Global, Regional and Local Levels**

### **6.1 Introduction**

### **6.2 The Global Level: CEDAW**

### **6.3 ASEAN States and CEDAW**

### **6.4 The Emerging Regional Order**

### **6.5 Conclusion**

### **6.1 Introduction**

In Chapter 1, I described how the original post-World War II vision of a legalised international human rights order (with judicial oversight, mechanisms for enforcement and sanctions for non-compliance) has faded, and how less muscular ideas about ‘norm awareness’ and ‘gradual socialisation’ have moved to the foreground. Today, it is (by and large) accepted that international human rights law ‘works’ by enabling domestic constituencies (and in some cases the international community) to make political demands of governments. In propitious circumstances (for example, where there is an active civil society, democratic conditions enabling freedom of expression, and a politically responsive government), then international human rights law can play a constraining role, changing

expectations about what constitutes appropriate behaviour for governments.<sup>1</sup> Scholars have various ways of describing the processes that bring about change: norm socialisation,<sup>2</sup> acculturation,<sup>3</sup> mobilisation through discursive interaction and political communication,<sup>4</sup> the translation of global law into the vernacular.<sup>5</sup>

A feature of all of these processes is communicative action in the form of persuasion, discourse and learning. In Chapter 1, I put forward the hypothesis that these communicative processes, in general, occur more readily between and amongst states (and other actors) within *regions*, and that this was part of the explanation for the particular kind of legitimacy which (I argue) underpins and pervades regional human rights systems, *vis-à-vis* the global regime for the promotion and protection of human rights. Communicative processes within regions sometimes occur in the form of juridification of human rights norms, as we see in the European human rights system.<sup>6</sup> Sometimes, however, they take place *via* less formal means,

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<sup>1</sup> Thomas Risse, C. Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (2013) Cambridge University Press, New York.

<sup>2</sup> Thomas Risse, C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge University Press, New York. The authors describe a ‘spiral model’ of progressive change towards rights-respecting behaviour by states, where international and transnational networks of civil society actors use the language and standards of international human rights norms to draw attention to and ultimately change the repressive behaviour of governments. This leads first to denial by the oppressing state; then to tactical concessions by the oppressor; then to the norms assuming prescriptive status (including the signing of treaties); and finally to rights consistent behaviour.

<sup>3</sup> Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54(3) *Duke Law Journal* 621.

<sup>4</sup> Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2011) Cambridge University Press, New York. Charles Beitz draws on a similar idea of human rights norms as ‘political values’ that ‘inform and motivate action by nongovernmental group agents with both indigenous and external participants, when he attempts to explain why ostensibly domestic concerns, such as the rights of women, are in fact matters of international concern.’ Charles Beitz, *The Idea of Human Rights* (2009) Oxford University Press, Oxford, 195. For Beitz, something can only be an ‘international human right’ if international action or intervention can effect positive change.

<sup>5</sup> Sally Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108(1) *American Anthropologist* 38.

<sup>6</sup> Juridification—used here in the Habermasian sense of ‘a tendency towards an increase in formal (or positive, written) law.’ Jürgen Habermas, *The Theory of Communicative Action, Vol. 2* (1987) Beacon Press, Boston, 359.

such as diplomatic interactions and public debate between neighbouring governments and regional civil society organisations and networks.

In this chapter and the next chapter, I set out to test the proposition that communicative processes that take place within regional settings lead, or are capable of leading to, greater commitment to human rights than those that occur at the global level.

How might this proposition be tested? One way would be to examine rights from a comparative regional/global perspective, and to ask how states within a region have responded to the promotion of a particular issue at the global level, as compared to the regional level. In this way, we could adduce whether there was (1) greater propensity to commit to norms promoted at the regional level, and (2) greater levels of compliance with norms, evidenced by rule-consistent behaviour.

At the centre of this inquiry is the question of how abstract general principles are applied to particularistic and unique local contexts. I return here to the hypothesis set out in Chapter 1, about the greater propensity for regional organisations to contextualise rights and specify their meaning with a degree of precision. This propensity, I argue, has two important consequences. First, it results in a greater willingness on the part of states to subscribe to regional norms. The reason for this is that (in general) states are reluctant to subscribe to international law when it is not clear what the effect will be on domestic laws, regulations and policy. Second, specificity is relevant to the question of compliance, because states justify interpretive discretion by referring to the imprecision of texts, and justify ignoring or avoiding the advice, recommendations and reports of treaty monitoring bodies or oversight bodies on the grounds that these bodies have an incomplete and inadequate understanding of

how a right should be interpreted in a specific local context.<sup>7</sup> For these reasons, I argue, within regional communities we should find a greater propensity to commit to norms and a greater degree of compliance (both of which are elements of legitimacy).

There is in the first place an empirical question here, about whether or not norms articulated at the regional level do in fact evidence a higher degree of specificity, leading to greater acceptability, which in turn leads to greater commitment and greater compliance. There are also a raft of deeper questions that go to determining what the reasons for this might be, and whether it is the case across all states within a region (given their political, ethnic, socio-cultural and economic differentiations) and finally, whether it is the case across different kinds of rights. There is also a temporal element to all of this. It is possible that the logic that guides state subscription to norms (which occurs at the beginning of the norm life cycle) is different to the logic that guides rule-consistent behaviour (which occurs at the end of the norms life cycle), and that the regional or global effect is more significant at one stage than at another.

Clearly, there is no room in this dissertation to run a comparative regional/global legitimacy study of all civil and political, and all economic, social and cultural rights. Indeed, given the complexity of the undertaking, it might seem a sufficiently large endeavour to examine a single right in global/regional comparative perspective. One of my intuitions, however, is that the regional and global levels operate differently (with different degrees of legitimacy) in relation to different rights.<sup>8</sup> If this is so, then it is important to find a basis for arbitrating among the different reasons for this, which can only be done by comparing different rights at both the global and regional levels.

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<sup>7</sup> We saw an example of this in the case of the United States' defence of the use of water-boarding, on the grounds that the practice does not meet the definition of 'torture'. Risse, Ropp and Sikink, *The Persistent Power of Human Rights* (2013) above n 1, 12; Oona Hathaway, 'Testing Conventional Wisdom' (2003) 14(1) *European Journal of International Law* 185.

<sup>8</sup> See Chapter 1.

The idea I am getting at here is that state responsiveness to human rights might have something to do with the nature of the right itself. This has been hinted at in some of the academic literature.<sup>9</sup> Keck and Sikkink, for example, in their work on transnational activism, have noted that rights that relate to bodily integrity, prevention of bodily harm for ‘innocent groups’, and equality of opportunity, are particularly effective transnationally and cross-culturally.<sup>10</sup> In a later study, Lutz and Sikkink compare three areas of human rights law (torture, disappearance, and democratic governance) and find the least compliance in the most ‘legalised’ area (torture), and the most compliance in the least ‘legalised’ area (democratic governance).<sup>11</sup> Simmons’ work on compliance traverses a range of rights: civil rights, women’s equality rights, torture, and the rights of the child. Her theory is that international human rights law assists the mobilisation of domestic constituencies, and she discerns a marked difference in the ability of domestic pressure groups to galvanise action, based on the different kinds of rights they are dealing with. Simmons writes, ‘[S]ome issues and some constituencies are much easier to rally around than others. Just look at the difference between issues that are perceived to be connected with national (or at least regime) security and those that are not.’<sup>12</sup>

Nonetheless, the relationship between the particular character of a right and the dynamics that underpin state commitment to the right and compliance with obligation to respect it remains generally unexamined and under-theorised. Thomas Risse, Stephen Ropp

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<sup>9</sup> However, the question of whether or not there is a distinction between commitment and compliance at the regional and global levels is not touched upon at all in Risse, Ropp and Sikkink, *The Persistent Power of Human Rights* (2013), above n 1, or in prior work that serves as the foundation for constructivist approaches to analysing mechanisms and modes of social action in relation to human rights.

<sup>10</sup> Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998) Cambridge Univ. Press, Cambridge; Daniel A. Bell, ‘The East Asian Challenge to Human Rights: Reflections on an East West Dialogue’ (1996) 18(3) *Human Rights Quarterly* 641.

<sup>11</sup> Ellen Lutz and Kathryn Sikkink, ‘International Human Rights Law and Practice in Latin America’ (2000) 54(3) *International Organization* 633. Lutz and Sikkink conclude that legalization (precision and delegation) does not enhance commitment. Instead, commitment to human rights norms follows from the sense of obligation created by social processes of interaction.

<sup>12</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, above n 4, 357-358.

and Kathryn Sikkink, for example, in their book *The Persistent Power of Human Rights*, identify five ‘scope conditions’ for compliance: (1) democratic *vs* authoritarian regimes; (2) consolidated *vs* limited statehood; (3) centralised *vs* decentralised rule implementation; (4) material vulnerability; (5) social vulnerability. I agree with all of these, and throughout the final two chapters of this dissertation, I give several examples of the ways some of these conditions influence the responsiveness of ASEAN states. But I argue that the character of a norm also has a marked effect on state responsiveness, not just because of the different degrees to which different rights are legalised (Lutz and Sikkink) or the level of appeal of a particular right to domestic activists (Simmons), but because of more fundamental reasons to do with the character and scope of the right itself. Does the right fall within what Michael Walzer describes as ‘the minimal and universal moral code’ on which all states agree, and which includes rights against murder, slavery, torture, and genocide?<sup>13</sup> Or does it fall within the ‘grey area’ of human rights, involving complex questions of family law, criminal law, religious values, social and economic rights?<sup>14</sup> My intuition is that even if regional systems for the promotion and protection of human rights possess a particular legitimacy, they may not do so *under all conditions*. The juxtaposition of different rights in these final two chapters helps to illuminate the degree to which the nature and character of the right under consideration is a relevant factor in determining whether or not a particular level of governance (regional or global) is more appropriate.

In the final two chapters of this dissertation, I examine and compare two rights: (1) the rights of women; and (2) the issue of trafficking in persons. The reasons why these two rights are selected requires some explanation. First, at the simplest level, in Southeast Asia

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<sup>13</sup> Michael Walzer, *Interpretation and Social Criticism* (1987) Harvard University Press, Cambridge Mass., 24. See also Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994) University of Notre Dame Press, Notre Dame.

<sup>14</sup> Daniel A. Bell, ‘The East Asian Challenge to Human Rights: Reflections on an East West Dialogue’ (1996), above n 10.

there are only a limited number of rights that have been the subject of both regional and global approaches.<sup>15</sup> Women's rights and trafficking in persons are both issues in relation to which all ASEAN states have engaged (though not all to the same extent) at both the regional and the global levels.

Second, it is important that I select two rights that are somewhat similar or related. It would be difficult to draw strong conclusions about the relative responsiveness of states to different levels of governance from a comparison of very dissimilar rights. For example, an attempt to compare state commitment at the regional and global levels on the issue of the prohibition on torture, and commitment to the right to a clean environment, would throw up multiple explanatory factors for different states, ranging from domestic governance issues concerning capacity, to the degree of state sensitivity to international approbation on the issue. Different rights that share a degree of coterminous matter make for a more useful comparison because these kinds of variables are more likely to be similar for both rights. Although the rights of women and trafficking in persons are highly particularistic issues, occurring in specific economic and cultural contexts of disempowerment, discrimination and deprivation, they are both inked to a broader concern about women's rights, in the sense that both issues have at their core ideas about physical and material security, capacity for self-direction (autonomy) and equality.

Third, women's rights are fundamentally matters of domestic politics. No direct benefits flow to states from multilateral coordination in relation to promoting and protecting the equality rights of women. There are no pragmatic or utilitarian reasons to explain why states decide to take joint action on the issue of women's rights at the regional *or* global level. On the other hand, human trafficking is an issue with obvious inter-state ramifications. It is a

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<sup>15</sup> As I have outlined in previous chapters, only two of the major international human rights covenants have been signed by all ASEAN states: the Convention on the Elimination of all forms of Discrimination Against Women, and the Convention on the Rights of the Child.

problem that can readily be framed as a security issue, concerning international crime, the protection of borders and illegal migration. Multilateral approaches are the *only* logical method of addressing the problem. This chapter and the next examine the extent to which this factor is a determinant in the legitimacy and effectiveness of global or regional approaches.

Finally, women's rights and human trafficking both illuminate the role of culture and the issue of cultural relativism, which I have identified as an ongoing issue in the debate about human rights in Southeast Asia. In Southeast Asia, as in other regions, moral beliefs and cultural practices that influence the enjoyment of individual rights have proven particularly resistant to change. An enduring question is the degree of deference that should be shown to these beliefs and practices. It is clear that change, particularly where it concerns culture, must occur from within societies themselves, through intra-cultural contestation, and not be imposed from outside. One of the questions I ask in this chapter and the next, therefore, is whether or not regional and global regimes differ in the way that they permit domestic audiences to navigate questions of culture and how this plays out in assessments of comparative global and regional legitimacy.

Broadly, my theory is that in relation to many rights, the global level is too far removed from the actual circumstances that prompt rights violations to occur. The regional level of governance provides a *via media* between the particularistic nature of rights violations in their local contexts and the ideal of universalism. Up to this point, much of this dissertation has demonstrated that in Southeast Asia, this is not in fact the case; or that only a weak version of this theory stands. My central explanation for this turns on limited levels of democracy within the region (Chapter 2 and Chapter 3).

These final two chapters move my dissertation forward and in a slightly different direction. In these chapters, I return to some of the ideas with which I began this dissertation,

namely the socialising mechanisms at play in the contemporary international human rights regime (coercion, rewards, persuasion and discourse, capacity building), and the interplay between these mechanisms at different stages of the socialisation process (from repressive societies that initially deny human rights abuses and contest the validity of human rights norms, to the making of tactical concessions by states, to the prescriptive status of norms, and finally, to rule-consistent behaviour). Given what we know about these mechanisms and stages, does the global or regional level of engagement offer better prospects for positively influencing the behaviour of states in Southeast Asia?

My intuition is that the answer to this question might be different in relation to different rights, and the conclusions reached in this chapter and the next confirm this. In relation to human trafficking, it does seem to be the case that regional approaches possess a legitimacy that global approaches do not. One reason for this concerns the actual geography of trafficking, which occurs not merely across borders, but in the interstices that exist between states in Southeast Asia and within states themselves. The global approach to trafficking, which is focused almost entirely on sovereignty and borders, is simply not fine grained enough to capture the shifting movements of the human trafficking processes. Another reason for the comparative legitimacy of regional approaches concerns the nature of the global anti-trafficking movement itself, which has been shaped by ideological concerns, many emanating from the United States, that do not sit easily with the actual experiences of Southeast Asian women or the reality of trafficking.

I find that the issue of women's rights, however, does *not* appear to be one in relation to which regional discourse and regional institutions possess a greater legitimacy than global ones. The reasons for this, I argue, have to do with the nature of ASEAN states commitment to women's rights, which in terms of the norm life cycle, remains largely at a stage of 'tactical concessions' (in the form of ratification of CEDAW) rather than prescriptive status

(for example, the transposition of commitments into domestic law). It seems that at the tactical concession stage of the spiral model, the invocation of *global* norms by civil society and rights advocates is more effective than appeal to regional norms: in Southeast Asia at least, civil society activists find that an appeal to global norms has greater legitimacy as a source of influence, and engenders greater state responsiveness. Interestingly, while this line of argument holds in relation to women's equality rights (particularly when they are posited against religious norms) it does not appear to be the same across all aspects of women's rights. For example, in relation to the issue of violence against women, we see a move in Southeast Asia from tactical concession to prescriptive status: all ASEAN states have laws that criminalise violence against women, and the issue of violence against women has emerged as a regional issue, with regional dynamics reinforcing and supporting compliance.

One final introductory point should be made. Earlier in this dissertation, I noted the ways in which the global and regional levels of governance influenced one another, and I drew attention to the dangers of attempting to artificially distinguish between and isolate regional and global norms (Chapter 1). These final chapters show how the form of regional texts and the shape of regional institutions are inevitably marked by global influences and how the nature and design of a regional system, including its evolution and purpose, cannot be considered in isolation from developments at the global level.<sup>16</sup> The global influence on regional developments may be positive (as in the case of the drafting of the ASEAN Human Rights Declaration, where the pull towards universal standards served as a counter-weight to the insistence by some states of relative standards), or negative (as we see in the next chapter

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<sup>16</sup> In some cases, of course, regional instruments influence global developments. A good example of this is the way that the 1993 Bangkok Declaration, agreed to by Asian states in the lead-up to the 1993 Vienna World Conference on Human Rights, influenced the final version of the Vienna Declaration on Human Rights. (Hereinafter 'Vienna Declaration'); Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Report of the Regional Meeting for Asia of the World Conference on Human Rights A/Conf.1 57/ASRM/ 8-A/Conf.157/PC/59 (7 April 1993) ('hereinafter 'Bangkok Declaration').

on human trafficking, where the domestic policies of states are driven by the need to maintain levels of aid and support from the United States).

## 6.2 The Global Level: CEDAW

In 1979, the General Assembly, by 130 votes to none, adopted the Convention on the Elimination of all forms of Discrimination Against Women (the Convention).<sup>17</sup> The aim of the Convention is radical: to bring about ‘a change in the traditional role of men as well as the role of women in society and in the family’ in order to achieve ‘full equality between men and women.’<sup>18</sup> Simmons argues that only in the final years of the 1970s could such an ambitious enterprise have been accepted by almost all of the world’s governments: the Cold War, which for more than thirty years had stymied the evolution of multilateral human rights endeavours, had been mitigated by *détente*; women’s groups were in the ascendancy during the United Nations ‘Decade for Women’ (1975–1985); religious fundamentalism, as a political force, was (temporarily) absent.<sup>19</sup> Today, the Convention remains the centrepiece of global efforts to obtain equality for women.<sup>20</sup>

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<sup>17</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [accessed 27 October 2013] (hereinafter, ‘the Convention’). There were 10 abstentions; the Convention entered into force in 1981.

<sup>18</sup> *Ibid.*, Preamble, the Convention.

<sup>19</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, above n 4, 205–206.

<sup>20</sup> Equality between men and women is, of course, mentioned in other post-war human rights instruments. The Preamble to the United Nations Charter reaffirms ‘...faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’ Charter of the United Nations (adopted 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945). The Universal Declaration of Human Rights contains three provisions that focus on women: the general provision which prohibits discrimination on the basis of a number of attributes, one being sex (Article 2); the provision relating to family life (Article 16); and the provision on ‘motherhood and childhood’ (Article 25(2)) (UNGA Res. 217 A (III), Universal Declaration of Human Rights, A/810 (10 December 1948)). The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), affirms these rights, with ICESCR additionally recognising women’s equality in relation to work rights. International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171,

It is important for my argument in this chapter to understand the strength and scope of the international regime to protect the rights of women. The Convention's anti-discrimination provision prohibits 'any distinction' on the basis of sex which has the 'effect or purpose' of impairing or restricting the exercise or enjoyment by women of human rights 'in the political, social, cultural, civil or any other field' (Article 1). The Convention's most notable provisions are contained in Article 2, which as well as prohibiting discrimination, places an obligation on states to 'take all appropriate measures, including legislation, to modify or abolish existing law, regulations, customs and practices which constitute discrimination against women.'<sup>21</sup> Article 5(a) requires parties 'to modify social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.' Article 9 provides equal rights in relation to nationality; Article 15 accords women equality with men before the law; Article 16 sets out a range of measures required to ensure equality in marriage and family relations, such as equal rights for men and women to: enter marriage; choose a spouse; end marriage on equal terms; decide on the number and spacing of children and exercise equal rights in relation to care and guardianship or children.

The Convention's monitoring body, the United Nations Committee on the Elimination of all forms of Discrimination Against Women (CEDAW) has stated that Articles 2 and 16 are core provisions of the Convention, in relation to which reservations are impermissible.<sup>22</sup> CEDAW has also stated that States parties should move towards withdrawing *all*

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entered into force 3 November 1976); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, 993 UNTS 3, entered into force 3 January 1976).

<sup>21</sup> The Convention, above n 13, Art 2(f).

<sup>22</sup> CEDAW, Report of the Committee on the Elimination of Discrimination against Women, Eighteenth and Nineteenth Sessions, A/53/38/Rev.1 (14 May 1998), 6.

reservations, particularly to Articles 9, 15 and 16 of the Convention. Particular attention has been drawn to the importance of withdrawing reservations to Article 16.<sup>23</sup>

The Convention provides for optional jurisdiction of the International Court of Justice, but general oversight of compliance is provided by CEDAW, which publishes ‘General Recommendations’ that clarify and in some cases broaden the scope of the Convention. For example, the Convention itself does not explicitly mention a prohibition on violence against women.<sup>24</sup> But General Recommendations 12 and 19 provide that: ‘discrimination includes gender-based violence, that is violence that is directed at a woman because she is a woman or that affects women disproportionately’ and that ‘includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty.’<sup>25</sup> In 1999, an Optional Protocol, to which reservations are not allowed, gave individuals and groups a right to complain about their government’s violation of the treaty provisions, and enables CEDAW to commence an inquiry procedure where there is reliable information of ‘grave or systematic violations.’<sup>26</sup>

Since the Convention opened for signature, international instruments focusing on women’s rights have multiplied. Women’s rights are prominent in the 1993 Declaration and

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<sup>23</sup> United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Convention on the Elimination of All Forms of Discrimination Against Women: Reservations to CEDAW, available at: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> [accessed 27 October 2013].

<sup>24</sup> CEDAW passed a resolution at its eighth session in Vienna in 1989, expressing concern that this issue be on its agenda and instructing states to include in their periodic reports information about statistics, legislation, and support services in this area. CEDAW Newsletter, 3rd Issue, A/44/38 (13 April 1989), 2 (Summary of U.N. Report on the Eighth Session, UN Doc. A/44/38, 14 April 1989).

<sup>25</sup> UN Convention on the Elimination of Discrimination Against Women (CEDAW), General Recommendations Nos. 9, 10, 11, 12 and 13, adopted at the Eighth Session, A/44/38 (1989) available at: <http://www.refworld.org/docid/453882aa10.html> [accessed 27 October 2013]; UN Convention on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, A/47/38 (1992) available at: <http://www.refworld.org/docid/453882a422.html> [accessed 27 October 2013].

<sup>26</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, 2131 UNTS 83 entered into force 22 December 2000).

Program of Action adopted at the 1993 Vienna World Conference on Human Rights.<sup>27</sup> That same year, the United Nations General Assembly passed the Declaration on the Elimination of Violence Against Women.<sup>28</sup> In 1994, a Special Rapporteur on Violence Against Women was appointed by the UN Commission on Human Rights. The United Nations sponsored a series of World Conferences on Women, held every five years, which became platforms for activism on women's rights across the world.<sup>29</sup> The 1999 Rome Statute of the International Criminal Court includes crimes against women as crimes against humanity, war crimes, and in some instances, genocide.<sup>30</sup> In 2000 and 2008, the Security Council passed Resolutions 1325 and 1820 on Women, Peace and Security.<sup>31</sup>

The sum of these efforts, argue many scholars, signals 'a sustained feminist presence in the international realm, and one that has challenged the depiction of international law as concerned exclusively with a narrow range of matters related to affairs among states.'<sup>32</sup> The architecture of women's rights at the global level is built upon the common understanding that inequality between men and women is a great evil and should be abolished, and that culture is not a justification for tolerating inequality. The 1993 Declaration on the Elimination of Violence Against Women, for example, states at Article 4 that: 'States should condemn

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<sup>27</sup> Vienna Declaration, above n 16, Art. 18.

<sup>28</sup> UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

<sup>29</sup> See Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, above n 4, 208.

<sup>30</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002), Article 7(1)(g).

<sup>31</sup> UN Security Council, Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts, S/RES/1820 (2008) (19 June 2008) available at: <<http://www.refworld.org/docid/3b00f4672e.html>> [accessed 11 November 2013]; UN Security Council, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), available at: <<http://www.refworld.org/docid/485bbca72.html>> [accessed 11 November 2013].

<sup>32</sup> Doris Buss and Ambreena Manji, 'Introduction' in Doris Buss and Ambreena Manji *International Law: Modern Feminist Approaches* (2005) Hart Publishing, Oxford and Portland, Oregon, 1–16.

violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.<sup>33</sup>

### **6.3 ASEAN States and CEDAW**

Cambodia, Indonesia, Laos, the Philippines and Vietnam were among the Convention's first signatories, although Cambodia did not accede until 1992.<sup>34</sup> Laos and the Philippines ratified the Convention in 1981; Vietnam in 1982; Indonesia in 1984. Thailand acceded to the Convention in 1985, and Singapore and Malaysia did so a decade later, in 1995. Myanmar acceded in 1997. Brunei was the last of the ASEAN states to join the Convention, acceding in 2006. CEDAW's Optional Protocol, which permits the CEDAW Committee to receive communications from individuals where domestic remedies have been exhausted, has been ratified by Cambodia, the Philippines and Thailand.<sup>35</sup>

Given the radical nature of CEDAW and its potential to unsettle cultural practices, coupled with the reluctance of some ASEAN states to sign other major international human rights treaties, it is somewhat surprising that all ASEAN states have ratified CEDAW. It should be borne in mind that Malaysia and Singapore acceded to CEDAW at the height of the Asian Values debate.<sup>36</sup> You will recall from Chapter 3 that this was a time when the leaders

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<sup>33</sup> UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

<sup>34</sup> Cambodia, Indonesia, the Philippines and Vietnam signed the Convention in 1980; Laos PDR signed in 1981.

<sup>35</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, 2131 UNTS 83 entered into force 22 December 2000). Indonesia has signed but not ratified the Protocol.

<sup>36</sup> See: Government of Singapore, 'The Singapore White Paper on Shared Values' (1991) available at: [www.academia.edu/1740666/White\\_paper\\_on\\_shared\\_values\\_1991](http://www.academia.edu/1740666/White_paper_on_shared_values_1991) [accessed 27 October 2013]. At paragraph 44, discussing Confucianism, the paper states that 'traditional Confucian family relationships are strictly hierarchical. Sons owe an absolute duty of unquestioning piety and filial obedience to fathers. Males take precedence over females, brothers over sisters, and the first-born over younger sons. But in Singapore, the parent-child relationship is more one of respect rather than absolute subordination. Sons and daughters are

of both Singapore and Malaysia were extolling neo-traditionalist idea of ‘the family’, particularly ‘the Asian family’, based on conservative interpretations on Islam and Confucianism that imply a subordinate role for women and emphasise conventional authority relations and traditional gender roles.<sup>37</sup>

How do we explain the ratification of CEDAW by ASEAN states? We can see that ratification occurs in temporal clusters around three points. The first is the period when CEDAW opened for signature, which was the middle of the United Nations Decade for Women (1976–1985), immediately before the Second World Conference on Women, which was held in Copenhagen in 1980. Half the ASEAN states signed the Convention at this point and all (except Cambodia) ratified soon after the Copenhagen Conference. The second is the time of the Third World Conference on Women, which took place in Nairobi in July 1985. Thailand’s accession to CEDAW took place on 9 August 1985, one month after the Nairobi Conference. The third is around the time of the Fourth World Conference on Women, which took place in Beijing in 1995. Malaysia and Singapore acceded to CEDAW within months of this conference taking place. Myanmar acceded two years later.

As an explanatory factor, this perspective leads us towards a conclusion that emphasises the role of socialisation, acculturation, identification, and status maximisation. Several scholars have noted that ‘world events’ such as the Women’s Conferences provide excellent opportunities for states and other international actors such as transnational non-government organisations to persuade other states to ratify human rights treaties, or to make proclamations that affirm the state’s reputation as a rights-respecting actor in the international

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increasingly treated equally. The relationship between younger and older siblings is less authoritarian. In all these respects Singaporean practices must continue, without eroding cohesion and loyalty within the family unit.’

<sup>37</sup> See Chapter 5 of this dissertation; also, see: Maila Stivens, ‘Family Values’ and Islamic Revival: Gender, Rights and State Moral Projects in Malaysia’ (2006) 29 *Women’s Studies International Forum* 354.

community.<sup>38</sup> Accession to human rights treaties in anticipation of conferences, or announcements at the conference itself that accession will occur, enables a state to present itself favourably to its peers. The role of civil society (which was prominent in the Women's Conferences) amplifies the reputational stakes, by drawing attention to a state's shortcomings, by encouraging ratification and by disseminating information to the international community and to domestic audiences. In this way, civil society brings national constituencies into the calculation of the benefit that states might expect to gain from accession to a human rights treaty.

The temporal clustering also makes it possible to draw conclusions about diffusion—particularly regional diffusion. As I explained in Chapter 1, there is often a tendency for states to follow other states in ratification as part of a 'contagion' effect.<sup>39</sup> Contagion operates in the sense that one state's ratification increases the probability of another state within a particular spatial clustering ratifying within a fairly circumscribed period of time. It is reasonable to assume that half of all ASEAN states ratifying CEDAW within its first five years acted as a spur to the remaining ASEAN states.

We find no correlation between level of economic development and speed of ratification. Malaysia and Singapore, which are among ASEAN's more developed states, were among the last to ratify. There is, however, a degree of correlation between the political systems of particular ASEAN states and alacrity in ratification of CEDAW. Brunei, an Islamic Sultanate, was the last to ratify the Convention. It is notable that ASEAN's two communist states, Vietnam and Laos, were among CEDAW's first signatories. In Vietnam and Laos, the 'woman question' in the classic works of Engels helped to shape a state

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<sup>38</sup> Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004), above n 1.

<sup>39</sup> Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

ideology of feminism that has been generally overlooked. In the 1970s and early 1980s, in these two countries, the position of women, in terms of political representation, decision-making, and participation in the work force, was higher than in other ASEAN states.<sup>40</sup> In Vietnam and Laos, before the economic ‘renovation’ that began in 1986, there was accessible childcare; women were paid a subsidy to raise children; and there was considerable flexibility in the employment market because of the goal of full employment. In relation to Vietnam, Turley writes, ‘undoubtedly, women’s relative position improved under communism, with a reduction of early forced marriages, the public condemnation of wife-beating, free childcare and the recognition of housework.’<sup>41</sup> Turley notes that the ‘three submissions’ to which Vietnamese women had traditionally been subjected (to father, husband, and eldest son) lost their authority in the wake of women’s prolonged contribution to the Vietnam War effort, and equality-inspired legislation passed by the Communist government. Despite the existence of gaps between traditions or laws on the one hand, and practices on the other, there would have been no official dissonance between the terms of the Convention and the official state ideologies of Vietnam and Laos.

How can we tell whether or not ratification is a ‘tactical concession’ or evidence of a state’s genuine desire to work towards the realisation of rights?<sup>42</sup> We can glean part of the answer to this question by considering the nature and extent of state’s reservations to the Convention. We can assume, for instance, that genuine commitment is diminished to the extent that reservations undercut the purpose and effect of the treaty. In relation to CEDAW, all states except Laos, Cambodia and the Philippines have entered reservations in respect of

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<sup>40</sup> Steffanie Scott and Truong Thi Kim Chuyen, ‘Gender research in Vietnam: Traditional approaches and emerging trajectories’, Paper presented at the Women’s Studies International Forum (2007). Stephanie Fahey, ‘Vietnam’s Women in the Renovation era’ in Krishna Sen and Maila Stivens (eds) *Gender and Power in Affluent Asia* (1988) Routledge, New York, 222–249.

<sup>41</sup> William Turley, ‘Women in the communist revolution in Vietnam’ (1972) 12(9) *Asian Survey* 793, 799.

<sup>42</sup> Beth Simmons, ‘From Ratification to Compliance’ (2013) in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights* (2013) Cambridge University Press, Cambridge, 43–59, 52.

the jurisdiction of the International Court of Justice. ASEAN states with Islamic populations (Malaysia, Brunei and Singapore) have entered general reservations regarding provisions of CEDAW that may be contrary to religious beliefs. Malaysia and Singapore have entered reservations in relation to granting women equal rights with men in respect of the nationality of their children (Article 9(2)). Singapore has reserved the right not to apply the provisions of Article 2 (the cornerstone anti-discrimination provision, which exhorts states to embody the principle of equality) or Article 16, relating to marriage, in its entirety. Thailand, as well, has entered a reservation in respect of the whole of Article 16.<sup>43</sup>

Malaysia has been particularly obdurate in relation to reservations. Malaysia has indicated that it does not consider itself bound by: Article 5(a), the key article concerning state obligations to take measures to modify social and cultural patterns with a view to achieving the elimination of prejudices; Article 7(b), which obliges states to take appropriate measures to eliminate discrimination against women in the political and public life, by providing them with the right to participate in the formulation of government policy and the implementation and to hold public office and perform all public functions at all levels of government; Article 9, which provides that states parties shall grant women equal rights with men to acquire, change or retain their nationality, particularly in marriage; and Article 16, which provides women with equal rights to enter marriage; possess the same rights and responsibilities during marriage and at its dissolution; have the same rights and responsibilities with regard to guardianship of children; possess the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation. In 1988, Malaysia withdrew its reservations to some provisions of Article 16.

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<sup>43</sup> On reservations generally see: Jennifer Riddle 'Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Art 28 and the Effectiveness of the Reporting Process' (2002) 34 *George Washington International Law Review* 625–28; on ASEAN states reservations specifically, see: Susan Linton, 'ASEAN states, their reservations to human rights treaties and the proposed ASEAN Commission on Women and Children' (2008) 30(2) *Human Rights Quarterly* 436.

It could be argued that conscientious adherence to reporting obligations provide another form of evidence about genuine commitment vs tactical concession. ASEAN states have been tardy in their obligation to submit their initial and then four-yearly reports to CEDAW (Lao PDR failed to submit its initial report until twelve years after ratification<sup>44</sup> and Brunei has never submitted a report).<sup>45</sup> Yet this should not be overstated. Capacity to comply with reporting is an issue for many states, particularly developing ones, and has been so since CEDAW's inception.<sup>46</sup>

What follows from a finding that for most ASEAN states, ratification of CEDAW was merely a tactical concession? The point made by Risse, Ropp and Sikkink in *The Power of Human Rights* is that even tactical concessions have power, because states can be forced to translate these concessions into actual reform. This will occur when civil society or the international community puts pressure on the state to adhere to the promise of change implied in accession to the treaty. Regardless of original intentions, by the mere fact of accession, states are forced to accept the validity of international human rights and may ultimately be cajoled or corralled into adjusting domestic law to bring it into conformity with international obligations. Between the stage of 'tactical concession' and 'behavioral change' is a stage where norms assume 'prescriptive status'. Simmons notes that the 'prescriptive status' stage

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<sup>44</sup> Laos submitted a combined initial, second, third, fourth, and fifth periodic reports in 2003 (reviewed in the 32nd session of the CEDAW Committee, 2005). A combined sixth and seventh periodic report was submitted in 2008 (reviewed in the 44th session of the CEDAW Committee, 2009).

<sup>45</sup> In July 2012, Brunei's Acting Assistant Director of Community Development Department (JAPEM) Hjh Siti Aynah Hj Mohd Yaakub, stated that Brunei was planning to submit its first-cum-second report to the CEDAW Committee by the end of 2012. See: Sally Piri, 'Brunei to Submit Report on Women Issues to UN Soon' (6 July 2012) *The Brunei Times* available at: <<http://www.bt.com.bn/news-national/2012/07/06/brunei-submit-report-women-issues-un-soon>> [accessed 28 October 2013]. Brunei eventually submitted its first combined report to the 59<sup>th</sup> session of the Committee, 20 October – 7 November 2014 (CEDAW/C/BRN/1-2).

<sup>46</sup> In General Recommendation No. 11, CEDAW pointed out that as at 3 March 1989, 96 States had ratified CEDAW, but that only 60 initial and 19 second periodic reports had been received and that 36 initial and 36 second periodic reports were due but had not yet been received. UN Women, Convention on the Elimination of all Forms of Discrimination Against Women General Recommendations, Eighth Session (1989) available at: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom11>> [accessed 8 November 2013].

of the spiral model is the most unexamined and the least tested: ‘it is standard to skip any attention to rhetoric and skip straight to behavioural outcomes—dependent variables indicative of improved rights practices.’<sup>47</sup>

What evidence is there of the prescriptive status of Convention norms in the national legal systems of ASEAN? As CEDAW frequently points out, the status of the Convention in the domestic legal systems of ASEAN states is unclear.<sup>48</sup> The constitutions of Cambodia, Laos, Indonesia, the Philippines and Vietnam, recognise treaty law. Nonetheless, in Cambodia and Laos, I have found no cases where CEDAW has been invoked in judicial proceedings as an actionable source of rights. Most judges, it seems, believe that implementing legislation is required.<sup>49</sup> This is not the case in Indonesia and the Philippines. In 1988, Indonesia informed CEDAW that the Convention has been cited before the courts.<sup>50</sup> The Convention has been cited in several cases before the Supreme Court of the Philippines.<sup>51</sup> In Malaysia, the position seems to be changing. In July 2011, in a case involving a woman who had her job offer retracted by the Education Ministry because she was pregnant, the High Court of Malaysia held that the Convention had ‘the force of law.’<sup>52</sup>

This case is worth considering in some detail, as it provides an illustration of precisely what we are looking for in relation to the move to prescriptive status of international norms on domestic law in Southeast Asia: a correlation between accession to the Convention, the

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<sup>47</sup> Simmons, ‘From Ratification to Compliance’, above n 42, 53.

<sup>48</sup> See in relation to Laos, CEDAW/C/LAO/CO/7 para 9; See in relation to the Philippines, CEDAW/C/PHI/CO/6.

<sup>49</sup> This is so, even though in Cambodia, the Constitution stipulates recognition of and respect for international human rights agreements. Article 45.1 of the Constitution calls for the abolition of all forms of discrimination against women, and under the Constitution the Convention takes precedence over domestic law. Yet there is no evidence in practice that the Convention is regarded as self-executing.

<sup>50</sup> CEDAW, Indonesia: Concluding Comments, A/53/38/Rev.1 (1998), [276].

<sup>51</sup> See, for example, *Marcos vs. Commission on Elections*, GR. No. 119976 (18 September 1995).

<sup>52</sup> *Chayed bin Basirun & Ors v Noorfadilla bt Ahmad Saikin* [2012] 1 MLJ 832. See: Christopher Leong, Malaysian Bar Council, ‘A Right Step in a Long and Unfinished Journey’ (30 June 2013) available at: [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_a\\_right\\_step\\_in\\_a\\_long\\_and\\_unfinished\\_journey.html](http://www.malaysianbar.org.my/press_statements/press_release_a_right_step_in_a_long_and_unfinished_journey.html) [accessed 28 October 2013].

activation of domestic pressure groups, ‘speech acts’ and rights improvement: evidence, in fact, ‘of the importance of rhetorical entrapment in explaining eventual rule-consistent behaviour.’<sup>53</sup> Moreover, it is an example taken from Malaysia, which, as we saw in Chapter 3, is a country that can be characterised as a ‘partial democracy’. In *Mobilizing for Human Rights*, Simmons predicts that the spiral model is most likely to work its way to a positive conclusion in a country that is transitioning to, backsliding from or in a state of partial democracy, because these are the circumstances where pressure ‘from below’ is most likely to be exercised. In repressive autocracies, fear will often prevent mobilisation, whereas in stable democracies, generally responsive government reduces the motivation for mobilisation.<sup>54</sup>

The facts of the Malaysian case, *Chayed bin Basirun & Ors v Noorfadilla bt Ahmad Saikin* (‘Noorfadilla’) are these. In 2009, Malaysia’s Ministry of Education withdrew an offer of employment that had been made to Noorfadilla Binit Ahmad Saikin, after Noorfadilla informed the Ministry that she was three months pregnant. The Ministry explained its decision on the following basis: (i) the period between the time of delivery and ‘full health’ was too long (an estimated 2 months); (ii) pregnant women were frequently unable to attend work because of various health reasons; (iii) after the birth, Noorfadilla would have to be replaced, and the replacement would require training.

Article 8(2) of Malaysia’s 1953 Federal Constitution prohibits discrimination against citizens on the ground of religion, gender, race, descent or place of birth.<sup>55</sup> ‘Gender’ was added as an amendment to the Constitution in 2001, following lobbying by the Malaysian Human Rights Commission (SUHAKAM), the Ministry of Women, Family and Community

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<sup>53</sup> Simmons, ‘From Ratification to Compliance’, above n 42, 53.

<sup>54</sup> Simmons, *Mobilizing for Human Rights*, above n 4.

<sup>55</sup> The Article stipulates that the prohibition applies in relation to the holding or disposition of property or establishing or carrying on of any trade, business, profession, vocation or employment.

Development, and women's NGOs. These groups argued that amendment was necessary in order to ensure Malaysia's compliance with its obligations under the Convention, which it had ratified some six years earlier.<sup>56</sup> In the *Noorfadilla* case, which was decided in the High Court of Malaysia, Justice Zaleha held that the Convention was relevant to the interpretation of Article 8(2) of the Constitution.<sup>57</sup> In her decision, her Honour referred to: the Convention definition of discrimination (Article 1); the obligation on states to take measures to eliminate discrimination against women in the field of employment (Article 11(1)(b)); the obligation on states to take measures to prohibit dismissal on the grounds of pregnancy (Article 11(2)(a)).<sup>58</sup> Justice Zaleha also referred to the 'Bangalore Principles,' which emanated from a high level judicial colloquium on the Domestic Application of International Human Rights Norms, held in India in 1988. Noting that the Chief Justice of Malaysia had participated in the colloquium, Justice Zaleha drew attention to the inclusion of 'equality' as one of the Bangalore Principles to which judges should adhere in carrying out their duties.<sup>59</sup>

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<sup>56</sup> Constitution (Amendment) Act 2001 Act A1130. See: SUHAKAM, 'Report on the Status of Women's Rights in Malaysia', Selangor Darul Ehsan (2010) available at: <<http://www.suhakam.org.my/wp-content/uploads/2013/11/SUHAKAM-Report-on-The-Status-of-Women-s-Rights-in-Malaysia-2010.pdf>> [accessed 8 November 2013]. In its initial report to CEDAW in 2004, Malaysia stated that as a consequence of this amendment, all existing laws were being reviewed in order to ensure gender equality, including: the Domestic Violence Act 1994; the Penal Code; the Criminal Procedure Code; the Evidence Act; the Law Reform (Marriage and Divorce) Act 1976; the Land (Group Settlement Areas) Act 1960. CEDAW, Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women Combined Initial and Second Periodic Reports of States Parties—Malaysia, CEDAW/C/MYS/1-2 (14 April 2004) available at: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/309/80/PDF/N0430980.pdf?OpenElement>> [accessed 4 November 2013].

<sup>57</sup> In the court hierarchy, the High Court of Malaysia sits below the Federal Court and the Court of Appeal.

<sup>58</sup> The Court in *Noorfadilla* took note of recent correspondence between the Malaysian government and the United Nations, in which the government pledged its continued commitment to CEDAW.

<sup>59</sup> The Bangalore Principles provide that: 'it is within the proper nature of judicial process and established judicial functions for national courts to have regards to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.' (Bangalore Principles of Judicial Conduct (2002), reported in UN Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, Annex E/CN.4/2003/65 (10 January 1993), Article 7). See: Michael Kirby, 'Implementing the Bangalore Principles on Human Rights Law' (1989) 106 *South African Law Journal* 104.

The Court also referred to several cases from other jurisdictions: the Australian case *Minister for Immigration and Ethnic Affairs v. Teoh*,<sup>60</sup> in which the Australian High Court held that statutes are to be interpreted and applied, as far as language permitted, so as to conform with the established rules of international law, particularly conventions to which states are a party; and the Indian case *Vishaka v. State of Rajasthan AIR*,<sup>61</sup> in which the Court had interpreted the Indian constitution in light of the government's support of the Beijing Statement of Principles of the Independence of the Judiciary and the Fourth World Conference on Women in Beijing. The Court's conclusion, in the *Noorfadilla* case, was that Noorfadilla had suffered discrimination on the basis of pregnancy and that this discrimination was a prohibited form of gender discrimination.

The Malaysian government initially appealed the decision. However, it withdrew its appeal in July 2013, urged to do so by the Malaysian Bar Council and civil society organisations (CSOs). In the wake of the announcement that the appeal was withdrawn, the Bar Council and CSOs called upon the government to enact specific anti-discrimination law, pointing out that the CEDAW Committee had advised the Malaysian government to do this in its 2006 report.<sup>62</sup>

The approach taken in *Noorfadilla* is notably different to that taken by the Federal Court of Malaysia in the case of Beatrice Fernandez, which was decided seven years earlier. In the *Fernandez* case, an airline steward was forced to resign after becoming pregnant.<sup>63</sup> The court held that the constitutional amendment prohibiting discrimination on the grounds of

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<sup>60</sup> [1995] 128 ALR 353.

<sup>61</sup> [1997] SC 3011.

<sup>62</sup> Isabelle Law, 'Malaysian Bar Wants Specific Anti-gender Discrimination Laws' (30 June 2013) *The Nation* available at: <http://www.thestar.com.my/News/Nation/2013/06/30/Malaysian-Bar-wants-specific-anti-gender-discrimination-laws.aspx> [accessed 7 November 2013].

<sup>63</sup> *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*, Civil Appeal No: W-02-186-96 (5 October 2004). In the *Fernandez* case, a clause in the steward's employment contract required the steward to resign on becoming pregnant gave the company the right to terminate her services if she refused to do so.

gender had not yet taken effect, but that *in any event*, it would not have found that an employment provision allowing for termination on grounds of pregnancy was discriminatory: ‘just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men.’<sup>64</sup> The court held that guarantees of equality under the Constitution only related to infringements perpetrated by the State, and not by other individuals or private companies. This was because (in the court’s view) constitutional law deals only with the contravention of individual rights by the State itself or its agencies:

The very concept of a ‘fundamental right’ involves State action. It is a right guaranteed by the State for the protection of an individual against arbitrary invasion of such right by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but the constitutional remedy would not be available.<sup>65</sup>

Perhaps the most marked difference between the *Fernandez* case and the *Noorfadilla* case is the openness of the court in *Noorfadilla* to the idea of employing, as Anne-Marie Slaughter puts it in her discussion of transnational judicial networks, ‘the common values that all judges share in guaranteeing litigant rights while also safeguarding an efficient and effective system.’<sup>66</sup> The court in *Fernandez* was entirely dismissive of counsel’s attempts to rely on comparable discrimination cases from other jurisdictions, such as India.<sup>67</sup>

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<sup>64</sup> Malaysian Bar Council Report, ‘Gender Discrimination: Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor 2004 [CA]’ (5 October 2004) available at: [http://www.malaysianbar.org.my/selected\\_judgements/gender\\_discrimination\\_beatrice\\_fernandez\\_v.\\_sistem\\_penerbangan\\_malaysia\\_anor\\_2004\\_ca.html](http://www.malaysianbar.org.my/selected_judgements/gender_discrimination_beatrice_fernandez_v._sistem_penerbangan_malaysia_anor_2004_ca.html) [accessed 10 November 2013].

<sup>65</sup> The Court in the *Fernandez* case, above n 64, was at this point quoting from Dr. (Justice) Durga Das Basu in his book *Comparative Constitutional Law*.

<sup>66</sup> Anne-Marie Slaughter, *A New World Order* (2004) Princeton University Press, Princeton and Oxford, 102.

<sup>67</sup> In *Fernandez*, above n 64, counsel for the appellant attempted to rely on the Indian Supreme Court case *Air India v. Nergesh Meerza* [1981] 68 AIR 1829 (SC). The court stated: ‘We do not think we have to dwell at length on that case. After all it is a decision of a court in a different jurisdiction based on the law in that country, the peculiar position of Air India vis-à-vis the State and the facts of that case. We are always of the view that it is very dangerous merely to lift one or two passages from a judgment in a foreign jurisdiction and apply it as if it is our written law.’

Litigation is not the only method for drawing international law into the domestic arena and instigating discourse with government on rights issues. Consider the example of polygamy, which is permitted for Islamic men in Malaysia, Indonesia, Brunei and Singapore under provisions of the Koran, and provides that a husband has a right to four simultaneous marriages.<sup>68</sup> In July 2013, in an attempt to address the plight of the ‘25,000 single women under 60 still eligible for marriage’ in Kelantan State in Malaysia, the Kelantan Government introduced an ‘Ideal Polygamist’ programme, involving publicising happy polygamous marriages and providing rewards for men who treat their wives well.<sup>69</sup>

The international Islamic feminist organisation Sisters in Islam (SIS) has a longstanding objection to the practice of polygamy, on the grounds that it undermines women’s equality and dignity. In relation to the ‘ideal polygamist’ programme, however, Sisters in Islam did not call for a prohibition on polygamy. Instead, they interrogated the program based on concepts of fairness and justice that exist within Shari’a law itself. SIS pointed out that Section 23 of the Kelantan Islamic Family Law Enactment (2002) lists four requirements that a husband has to satisfy in order to get permission from the Syariah Court

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<sup>68</sup> Polygamy is also practiced in Laos by ethnic groups. An NGO report submitted to the CEDAW Committee for the 2009 review of Laos indicated that polygamy has not been entirely abolished, as ‘there are many instances of ‘minor wife.’ The State party delegation, reiterating that polygamy was illegal, acknowledged this and stated that ‘it is practiced by a number of ethnic groups but is on the decline.’ See: Gender and Development Group, Statement to CEDAW session, 2008:

[http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/GDG\\_Laos\\_44.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/GDG_Laos_44.pdf) [accessed 28 October 2013]. Surah 4:3 ‘...then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them) then (marry) only one....’. Polygamy is also supported by the Prophet’s own Sunnah of marrying more than one wife. See: Ann Black, ‘The Re-positioning of Women in Brunei’ (2006) in Amanda Whiting and Carolyn Evans (eds) *Mixed Blessings: Law, Religion and Woman’s Rights in the Asia Pacific* Martinus Nijhoff Publishers, Leiden and Boston, 211–240, 222. Wan Ubaidah Omar, who heads the Women, Health and Family Development Committee in northeast Kelantan state, said 1,600 polygamous marriages were registered in Kelantan State, Malaysia, in 2012. See: Rafiq A. Tschannen, ‘Malaysian State Mulls Reward for ‘Good’ Muslim Husbands in Polygamous Marriages’ (1 October 2013) *The Muslim Times* available at: <http://www.themuslimtimes.org/2011/06/religion/islam/malaysian-state-mulls-reward-for-good-muslim-husbands-in-polygamous-marriages> [accessed 28 October 2013].

<sup>69</sup> Sharifah Mahsinah Abdullah and Nik Nur Aisyah Nik Len, ‘Looking for the Ideal Polygamist’ (30 July 2013) *New Straits Times* available at: <http://www.nst.com.my/nation/general/looking-for-the-ideal-polygamist-1.329251#ixzz2izf6j9lx> [accessed 28 October 2013].

to commit polygamy: (a) that the proposed marriage is just or necessary; (b) that the husband has the means to enable him to support his wives and dependants; (c) that the husband is able to treat his all his wives fairly, and (d) that the proposed marriage does not cause *darar syarie* (harm to a wife's religion, life, body, mind, dignity or property). SIS raised the question of whether fairness should be judged from the husband's point of view, the wives' point of view, or that of the children.<sup>70</sup> Relevant in the debate was Malaysia's statement before CEDAW in 2006, where it advised CEDAW that polygamy required the permission of the Shari'a court, which would only be granted 'if it is satisfied that the proposed marriage is just and necessary, having regard to such circumstances as sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights or insanity on the part of the existing wife or wives.'<sup>71</sup>

The advocacy of SIS attempts to insert the Convention idea of equality into the Shari'a idea of justice, in order to construct the notion that polygamy is incompatible with both sets of ideas.<sup>72</sup> This is no abstract undertaking. In publicising the issue and in public

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<sup>70</sup> Sisters in Islam Focus On Enforcement of Polygamy Laws (30 July 2013) <<http://www.sistersinislam.org.my/news.php?item.1191.7>> [accessed 13 February 2014].

<sup>71</sup> CEDAW, Consideration of reports submitted by States parties under article 18 of the Convention: Malaysia, CEDAW/C/SR.732 (13 July 2006), [43]. As part of the discussion about what constitutes justice and fairness, SIS referred to the results of a study carried out in 2009: 'The Impact of Polygamy on the Family Institution in the Klang Valley (Malaysia)', in which the Malaysian-based Islamic women's organisation Musawah interviewed 1500 husbands, first wives, subsequent wives and children on their experience of the impact of polygamy, from a financial, social and emotional perspective. Of the respondents, 80 per cent of husbands said that their polygamous arrangements were 'fair' to all involved. 50 per cent of second wives agreed but only 35 per cent of first wives shared this view. The most common reaction of first wives to polygamy was 'sadness, a sense of being wronged and betrayal'. Musawah, Impact of Polygamy on the Family Institution (2009) available at: <<http://www.musawah.org/sites/default/files/CEDAW%20%26%20Muslim%20Family%20Laws.pdf>> [accessed 28 October 2013]; Jo-Ann Ding, 'The Impact of Polygamy in Malaysia' (21 July 2010) *The Nut Graph* <<http://www.thenutgraph.com/the-impact-of-polygamy-in-malaysia/>> [accessed 28 October 2013].

<sup>72</sup> In General Recommendation No. 21, CEDAW stated that: 'Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.' UN Committee on the Elimination of Discrimination Against Women

discussions, SIS fleshed out the Convention idea of equality with reference to specific examples of how the practice of polygamy actually operates: for example, by coercing women into accepting polygamous relationships or into consenting to become additional wives; by keeping women powerless in what invariably becomes ‘an emotionally charged shift in the terms of the marriage contract;’ by denying women dignity by placing them in circumstances where they are highly likely to be degraded or belittled; by contributing to women’s economic and psychological powerlessness, exacerbating inequality.<sup>73</sup>

Underpinning all of this are broader points: (1) that culture, customs and practices are dynamic and can change in accordance with the changing realities of time and place; (2) that cultural and religious elements of practices such as polygamy can be dissociated from one another; (3) that the historical context in which certain practices began and were tolerated (in the case of polygamy, for example, in post-conflict conditions where it was necessary to provide for the welfare of widows and orphaned children), no longer exist.<sup>74</sup> Crucial to the discursive process of engaging state and religious institutions on the issue, however, is:

broad-based consultation among all those who have a stake in and influence on the development of national laws and policies. In each context, this will include a variety of actors such as women’s rights advocates, sociologists, counsellors, lawyers and constitutional experts, religious and traditional leaders, and women on the ground. In this way, the State party can gather information not only on religion and culture, but also on constitutional guarantees and lived realities, and determine how all of these interact with the CEDAW and other international human rights standards. The issue of representation is crucial, as Muslim governments very often tend to regard only those in religious authority as having the right to engage on matters of religion.<sup>75</sup>

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(CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, available at: <http://www.refworld.org/docid/48abd52c0.html> [accessed 27 October 2013], para. 14.

<sup>73</sup> Musawah, above n 71.

<sup>74</sup> The demand of feminist groups is that issues ‘are approached holistically, integrating human rights and Islamic principles in a dynamic and constantly evolving process.’ Ibid.

<sup>75</sup> Ibid.

What matters is drawing the parties into a principled argument based on some shared understandings (for example, that the goal is a just and fair result for all involved), on the basis that the parties are open to being convinced by the better argument.<sup>76</sup> ‘Arguing matters,’ believe constructivist scholars such as Thomas Risse.<sup>77</sup> There is some evidence that states believe that arguing matters, too. At the stage of norm denial, for example, states often refuse or are reluctant to engage in any kind of arguing or justification, because they recognise the danger that the discursive opening of arguing represents.

We see a recent example of this in Brunei, in relation to the announcement, in 2013, that the Sultan of Brunei intends to introduce a new penal code, based on a strict interpretation of Shari’a law, which includes stoning as a punishment for adultery. The law is to take effect in April 2014.<sup>78</sup> Civil society organisations, including Islamic women’s groups based in Southeast Asia and the Middle East, argue that stoning is a violation of CEDAW (as well as being a human rights violation on other grounds) because it affects women disproportionately, and because it is justified by rules and practices that impair or negate the exercise by women of their human rights. In relation to the Sultan’s edict, two principle demands were made of the government of Brunei by women’s groups:

- (1) That Brunei submit its long overdue report to the UN CEDAW Committee in fulfilment of its State obligations under CEDAW to which it is a State party since 2006;

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<sup>76</sup> Ibid.

<sup>77</sup> Thoman Risse, ‘Let’s Argue!’ ‘Communicative action in world politics’ (2000) 54(1) *International Organization* 1.

<sup>78</sup> Women Living Under Muslim Laws ‘Brunei Darussalam: Fundamental Rights and Freedoms Violated under the new Shari’a Penal Code’ (30 October 2013) available at: <http://www.wluml.org/action/brunei-darussalam-fundamental-rights-and-freedoms-violated-under-new-shari%E2%80%99-penal-code> [accessed 9 November 2013].

- (2) That Brunei sign and ratify the ICCPR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention Against Torture).<sup>79</sup>

Brunei has expressed a reservation to the Convention in relation to provisions that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam. Twenty-two states objected to Brunei's reservation, on the grounds that it is incompatible with the object and purpose of the Convention. Brunei would doubtless argue that the 2013 Penal Code, which applies only to Muslims, would fall within the scope of its reservation. Nonetheless, if Brunei submitted its report to CEDAW, it would be called on to withdraw its reservation, and asked to explain its failure to undertake legislative changes necessary to comply with its Convention obligations. CEDAW would doubtless express grave concern about the new penal code. In essence, Brunei would be called upon to justify its interests and preferences, which would then open these to the discursive challenge of other actors, whose perception of the situation would be different to the one held by the Sultan and his family. Engagement in the treaty monitoring process would amplify the voices of those calling for change. The fundamental question would become how Brunei constitutively identifies itself: as an Islamic state, or as a human rights-respecting member of the community of nations? In his speech introducing the new penal code, the Sultan stated that the new law 'does not in any way change our policies ... as a member of the family of nations.'<sup>80</sup> There is in this statement an expression of understanding about what is at stake.

I have already written about the way that Indonesia has recast its identity as a rights-respecting nation and a moral leader within ASEAN (Chapter 4). Because of this, Indonesia

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<sup>79</sup> Ibid.

<sup>80</sup> 'Sultan of Brunei introduces tough Islamic laws' (22 October 2013) *Channel News Asia* available at: <http://www.channelnewsasia.com/news/asiapacific/sultan-of-brunei/856914.html> [accessed 9 November 2013].

is particularly sensitive about protecting its rights credentials and easily drawn into argumentation. For example, in Indonesia, policies of decentralisation, in place since 2004, have granted progressively greater degrees of autonomy to provinces and districts, particularly in the area of religious and traditional or *adat* law. Some of these laws and policies discriminate against women. In Aceh Province, for example, Law No 11 of 2006 establishes the Ulama's Consultative Assembly, a Shari'a Court, and Shari'a police. In June 2013, Indonesia's National Commission on Violence Against Women (*Komnas Perempuan*), identified 15 regulations and by-laws passed by the Ulama Assembly which discriminate against women.<sup>81</sup> Punishments for violations of these regulations can include beating, caning, being bathed in sewage water and forced marriage.<sup>82</sup> Although Indonesia's federal government possesses power to strike down discriminatory provisions inconsistent with the Convention, it has not done so.<sup>83</sup>

In its 2012 response to CEDAW's urging that Indonesia strike down laws in the provinces that 'severely discriminate' against women, Indonesia took umbrage, writing to the Committee at the conclusion of the session (an unusual step) in the following terms:

the term 'severely discriminate against women' is not accurate, as such laws and policies are only in a limited number and have impact in the enjoyment of certain women's rights, while at the same time, in the same provinces or districts, there are more laws and policies which are aimed to empower women and protect women's rights.<sup>84</sup>

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<sup>81</sup> These restrictions include prohibiting women from riding straddle on motorcycles (Circular 2 of 2013, Government of Lhoksemauwe, Aceh) and forbidding the wearing of tight clothing by women. See: Ethics in Action, 'Achieving substantive gender equality in Indonesia' (February 2013) Ethics in Action available at: <<http://www.ethicsinaction.asia/archive/2013-ethics-in-action/2013V7N1/2013V7N1P7>> [accessed 28 October 2013].

<sup>82</sup> Elisabeth Oktofani, Khabar Southeast Asia 'ACEH women say they suffer discrimination' (18 June 2013) available at: <[http://khabarsoutheastasia.com/en\\_GB/articles/apwi/articles/features/2013/06/18/feature-03](http://khabarsoutheastasia.com/en_GB/articles/apwi/articles/features/2013/06/18/feature-03)> [accessed 28 October 2013].

<sup>83</sup> See: CEDAW/C/IDN/CO/6-7.

<sup>84</sup> See: Permanent Mission of the Republic of Indonesia, Communication from Permanent Mission of the Republic of Indonesia to the United Nations New York, 424/SOC-301/Viii/12 (6 August 2012).

What is notable about this response is that Indonesia finds it necessary to justify its position on the meaning of ‘severely discriminate against women.’ Risse observes a striking development towards arguing as the validity of international norms becomes more accepted. When human rights norms are no longer denied (evidenced, for example, by a state ratifying a human rights convention) then ‘a discursive opening is created for their critics to challenge them further: If you say that you accept human rights, then why do you systematically violate them? The usual response is that such violations either did not occur or are marginal developments.’ Risse writes:

The discourse then shifts toward the issue of whether norm violations constitute isolated incidents or are systematic in character. At this point during the tactical concession phase, the arguments of both sides become more and more detailed and also more legalistic. It is no longer a discourse on the validity of the norm, but on the interpretation of the law of the land. At the same time, the two sides gradually accept each other as valid interlocutors. They no longer denounce each other as ignorant foreigners or pariah states. Arguments that would not have been acceptable in earlier stages of the debate are now treated as valid points.<sup>85</sup>

The logic of argumentation in public discourse implies that participants are open to being persuaded by the better argument.<sup>86</sup>

Despite the opportunities presented by international human rights law *via* litigation or lobbying and discursive engagement before CEDAW, the end game remains the enactment of domestic legislation to protect rights. To return then to the prescriptive status of CEDAW norms: in 2006, both Vietnam and Laos passed legislation aimed at implementing CEDAW;<sup>87</sup>

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<sup>85</sup> Ibid, 32.

<sup>86</sup> Thoman Risse, ‘Let’s Argue!’ ‘Communicative action in world politics’ (2000) 54(1) *International Organization* 1.

<sup>87</sup> In relation to Laos, see: Prime Ministers Decree No 26/PM of 6 February 2006, on the Implementation of the Law and Development and Protection of Women. The CEDAW Committee has pointed out that there is in this document no definition of ‘discrimination’ that encompassed both direct and indirect discrimination, in

in 2008, the Philippines enacted the ‘Magna Carta for Women’ Act; in Thailand, a law to create a new legal instrument specifically addressing the issue of elimination of discrimination against women is at the time of writing being drafted. In 2006, CEDAW urged Cambodia to pass a comprehensive gender equality legislation, which at the time of writing it has yet to do. Malaysia, as we have learnt, has not passed implementing legislation for CEDAW and neither has Brunei, Myanmar or Singapore. In Indonesia, a federal Bill on Gender Equality, drafted to conform to the provisions of CEDAW, has been under consideration since 2012. Debate on the Bill stalled after opposition from major Islamic organisations, which formally objected on the grounds that some articles opposed Islamic values.<sup>88</sup>

It is interesting to note, though, that on the general issue of violence against women, there is significant evidence of the prescriptive status of the norm in most ASEAN states. All ASEAN states endorsed the United Nations Declaration on the Elimination of Violence Against Women.<sup>89</sup> All states but Myanmar have passed laws prohibiting violence against women, including violence that occurs within the home.<sup>90</sup> This would tend to confirm the

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accordance with Article 1 of the Convention: CEDAW/C/LAO/CO/7. In relation to Vietnam, see: Law on Gender Equality 2006.

<sup>88</sup> Organizations opposed to the bill include the influential Indonesian Ulema Council, the Indonesian Consultative Council for Muslim Women Organizations, Aisyiah, Hizbut Tahrir Indonesia (HTI) and the Islamic Community Party. See: ‘Indonesia Islamists stall Gender Equality Bill’ (9 May 2012) *Jakarta Globe* <<http://www.thejakartaglobe.com/archive/indonesia-islamists-stall-gender-equality-bill/>> [accessed 28 October 2013].

<sup>89</sup> UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

<sup>90</sup> See: The Philippines Anti-Violence Against Women and their Children Act of 2004; Law of the Republic of Indonesia regarding Elimination of Violence in the Household 2004, No. 23/2004; the Thai Protection of Domestic Violence Victims Act, B.E. 2550 (2007); Vietnam’s Law on Domestic Violence Prevention and Control 2007, 02/2007/QH12; Cambodia’s 2005 Law on the Prevention of Domestic Violence and Protection of Victims; Laos Decree on the Promulgation of the Law on Development and Protection of Women 2004, No. 70/PO; Malaysia’s Domestic Violence Act 1994; Singapore’s Women’s Charter (Amendment) Bill 1996. In 2010, Brunei made amendments to the Married Women Act and the Islamic Family Law Order (1999), to provide new provisions relating to *dhararsyarie* (domestic violence). Some of these laws, like Indonesia’s, do not refer to rape or marital rape: See CEDAW/C/IDN/CO/6-7 para. 25(d). In September 2013, Myanmar’s Ministry of Social Welfare, Relief and Resettlement announced that it was drafting a domestic violence law,

observation of Keck and Sikkink (and others) that norms concerning bodily integrity are particularly effective transnationally and cross-culturally.<sup>91</sup> A report by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) points out that the Philippine and Indonesian laws refer explicitly to the Convention (and other international human rights instruments) as the normative framework in the statement of objectives and that the language in the Lao legislation also reflects the Convention commitments.<sup>92</sup> Concordance between international norms and prescriptive status in domestic law is not perfect. For example, neither Indonesia nor Malaysia's domestic violence laws include an offence of marital rape. In 2006, before the CEDAW Committee, Malaysia stated that marital rape could not be an offence because this would be inconsistent with Shari'a law.<sup>93</sup>

To sum up: in Southeast Asia, as in many other regions, there is a significant gulf between the provisions of the Convention, and the actual realisation of women's rights to equality. Nonetheless, the global ideal of equality between men and women, as captured in CEDAW, has in some cases provided civil society with an effective means of agitating for change. In relation to some aspects of women's rights (violence against women) there has been significant advancement. Yet the translation of global norms to domestic law is incomplete, and to the extent that opportunities for engagement and participation are denied to effected actors (as in Brunei) then the potential for global regime to effect change is stymied. Things remain either at the stage of 'tactical concession' (of which Brunei is an

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expected to be enacted in 2014. 'Ministry drafting law on domestic violence' (30 September 2013) *Myanmar Times* available at: <<http://www.mmtimes.com/index.php/national-news/7705-ministry-drafting-law-on-domestic-violence.html>> [accessed 28 October 2013].

<sup>91</sup> Keck and Sikkink, above n 10.

<sup>92</sup> UN Women, 'Domestic Violence Legislation and its Implementation: An analysis for ASEAN countries based on international standards and good practices' (2011) available at: <<http://cedaw-seasia.org/docs/DomesticViolenceLegislation.pdf>> [accessed 28 October 2013].

<sup>93</sup> CEDAW, Consideration of reports submitted by States parties under article 18 of the Convention: Malaysia, CEDAW/C/SR.732 (13 July 2006), [54].

example) or ‘prescriptive status’ (which is closer to the position in which Indonesia finds itself and towards which Malaysia is moving).

#### **6.4 The Emerging Regional Order**

One aspect of my hypothesis is that for a variety of reasons, the regional level of governance is important in moving states from a stage of accepting the ‘prescriptive status’ of norms to a stage of ‘rule consistent behaviour’. Part of the argument can be made from a managerial perspective.<sup>94</sup> Compliance requires, amongst other things, a certain level of state capacity. The institutional and administrative capabilities of a state are as important in enforcing human rights standards as a state’s general willingness to abide by standards.<sup>95</sup> In the final chapter of this dissertation, which deals with trafficking in persons, I show how the work of national human rights institutions (NHRIs), which have been established in the Philippines, Malaysia, Indonesia, Thailand and Myanmar, and the establishment of a regional network of these institutions, works to assist the move from prescription to compliance, through education, information dissemination and training. I argue that the sharing of expertise and experience among neighbouring states that face the same problems drives regional understandings about how best to strengthen approaches to managing particular rights issues. The managerial approach, however, is not directly relevant to the issue of women’s rights. As I explained at the beginning of this chapter, the issue of women’s equality rights is different to the issue of trafficking in persons, in the sense that the issue of women’s rights does not possess the same imperative for transnational cooperation, driven by the cross-border nature of trafficking in persons.

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<sup>94</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) Harvard University Press, Cambridge, MA.

<sup>95</sup> Abram Chayes and Antonia Handler Chayes, ‘On Compliance’ (1993) 47(2) *International Organisation* 175.

There is another sense, however, in which I argue that the regional level is critical. This is in the negotiation of social and cultural attitudes that affect the way women are treated. In Southeast Asia, there are dramatic examples of the disjuncture between the Convention and the treatment of women, in the persistence of practices such as female genital cutting, female infanticide, child betrothal and early marriage. More quotidian and more pervasive examples also exist: the disparity in wealth and income between men and women and disproportionate numbers of men and women in positions of power in government and business. The reason why this state of affairs persists, despite the global pressure towards gender equality, is because the values that underpin the Convention run *contra* to longstanding and deeply embedded cultural norms. These norms are perceived as providing structure, order and stability to society and are very resistant to change. Indonesia, for example, in explaining to CEDAW why the practice of child marriage persists, argued that the most significant reason was ‘the prevailing sociocultural norms of society which encourage the belief that marriage at a later age amounts to shameful conduct and therefore should be prevented.’<sup>96</sup>

Culture and tradition are of course intertwined with religious beliefs. In the Philippines, the teachings and practice of Catholicism foreground marriage stability over sexual rights, and the rights of the foetus over women’s right to bodily integrity. In Thailand, being born a woman is still viewed in Buddhist belief as the result of previous bad karma. Buddhist texts such as the *Pali Canon*, the *Anguttara Nikaya III* and the *Jatakas*, portray the character of women as venal, duplicitous and sub-intelligent.<sup>97</sup> In Singapore, Confucianism historically attributes an exalted position to men and an inferior status to women (*nan sun nu*

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<sup>96</sup> CEDAW, ‘Indonesia: List of Issues and Questions’ CEDAW/C/IDN/Q/5/Add.1 (2007), 25.

<sup>97</sup> Lucinda Peach, ‘Sex or Sangha? Non-normative Gender Roles’ (2006) in Amanda Whiting and Carolyn Evans *Mixed Blessings: Law, Religion and Woman’s Rights in the Asia Pacific* Martinus Nijhoff Publishers, Leiden and Boston, pp 27–29.

bei).<sup>98</sup> In Islam, as we have already seen, it is impossible to escape the way that religion imbricates itself in the discourse on rights. As a delegate from Thailand explained to the CEDAW Committee, '[t]he issue of Islamic law was a sensitive one. The situation was unique because Islam was considered to be not only a religion but a way of life, and the laws related to marriage were considered to be the laws of God, which could not be replaced by the laws of man.'<sup>99</sup> In Malaysia, Brunei, Indonesia and Singapore, and in countries with minority Islamic populations, such as the Philippines and Thailand, women's sexual freedom, reproductive autonomy and marriage equality are constrained on the basis of incompatibility with Islam. Generally, evidence from Southeast Asia supports the findings from Ronald Inglehart and Pippa Norris's study on the relationship between religion and woman's rights: strongly religious societies have a marked tendency to resist embracing norms of female equality associated with secularism.<sup>100</sup>

As I explained in Chapter 1, it is often difficult for those within a culture to scrutinise their own norms and beliefs, because of the difficulties of transcending a positionally limited vision.<sup>101</sup> For this reason, political philosophers such as Amartya Sen have stressed the importance of examination and scrutiny of local practices from *outside* the society in question. The observations and experiences of other societies are essential, Sen argues, because they 'broaden the class and type of questions that are considered in that scrutiny, and because the factual presumptions that lie behind particular ethical and political judgments can

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<sup>98</sup> Li-Ann Thio, 'She's a Woman But She Acts very Fast' (2006) in Amanda Whiting and Carolyn Evans (eds) *Mixed Blessings: Law, Religion and Woman's Rights in the Asia Pacific*, Martinus Nijhoff Publishers, Leiden and Boston, 241–278.

<sup>99</sup> CEDAW, Consideration of reports submitted by States parties under article 18 of the Convention: Thailand, CEDAW/SR.708 (9 February 2006), [54].

<sup>100</sup> Ronald Inglehart and Pippa Norris, *Rising Tide: Gender Equality and Cultural Change around the World* (2003) Cambridge: Cambridge University Press.

<sup>101</sup> Amartya Sen, *The Idea of Justice* (2009) The Belknap Press of Harvard University Press, Cambridge, Mass., 162.

be questioned with the help of the experience of other countries or societies.’<sup>102</sup> In Chapter 1, I argue that regional institutions work as platforms for providing outside scrutiny in a way that global institutions cannot, because they are better able to specify the meaning of rights in particular circumstances, particularly circumstances dominated by strong local understandings that might run counter to the normative content of human rights standards. I suggest that in the inevitable balancing act that must be done between individual rights and community rights and between different rights themselves, the regional level provides a crucial point of balance between the universal and the local.

Do we find evidence of unique and productive *regional* approach to negotiating women’s rights in Southeast Asia, in a way that would support my hypothesis? If not, why not?

The historical perspective is important here. In December 1975, leaders and government representatives from ASEAN nations met in Jakarta to discuss a regional response to the United Nations International Women’s Year Conference, which took place in Mexico in June of that year.<sup>103</sup> The World Conference approved a ten year ‘World Plan of Action’ to advance the status of women across the world and to achieve equality, development and peace, and urged cooperation at the regional and sub-regional levels in order to achieve these goals.<sup>104</sup>

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<sup>102</sup> Ibid, 71.

<sup>103</sup> At that time, ASEAN had five members: Indonesia, Malaysia, the Philippines, Singapore and Thailand.

<sup>104</sup> Originally, the ASEAN Women’s Leaders Conference had planned to create an ‘ASEAN Confederation of Women.’ The Confederation did not eventuate, but the following year, the ASEAN Sub-Committee on Women (ASW) was established. In 1981, the ASW was renamed the ‘ASEAN Women’s Program’ (AWP). In 1999, the ASEAN Women’s Program was given a new name, the ASEAN Committee on Women (ACW). It was included as an ASEAN organ and given a mandate to coordinate and monitor the implementation of ASEAN’s key regional priorities pertaining women’s issues. The ACW devised a ‘Work Plan for Women’s Advancement and Gender Equality’, aimed at advancing the aims of the Declaration. The body’s major work has been the publication of three reports on progress in achieving the goals of the Declaration. The first report was published in 1996 with data from seven ASEAN countries; the second report was published in 2001 with data from all ten ASEAN countries. The third and most recent report, published in 2007, focuses on the impact of globalisation

The ASEAN Women's Leaders Conference was opened by Roesiah Sardjoro, Secretary-General of Indonesia's Department of Social Affairs, who began by quoting the aim of the World Plan of Action:

to launch an international action program including short and long term measures aimed at achieving the integration of women as full and equal partners with men in the total development effort and at eliminating discriminations against women, at achieving the widest involvement of women at strengthening international peace and eliminating racism and racial discrimination.<sup>105</sup>

The response from ASEAN Ministers from Singapore, Malaysia and Indonesia, was hostile. ASEAN Secretary-General, Umarjadi Mjotowijono of Indonesia, stated that:

the fact should not be overlooked that the situation and conditions in the ASEAN region differ from those in the advanced industrial countries. Whereas in developed countries the striving is towards greater equality of opportunity and treatment of women in economic and social life, and towards the elimination of persistent discriminatory practices, in the ASEAN region the first priority should not be to raise the status of women but efforts in the first place should be directed towards the improvement the standards of living of the ASEAN peoples which represent the chief guarantee of the political and regional independence of ASEAN. ASEAN member countries are facing difficulties and serious problems accentuated by the crisis of underdevelopment, unemployment and poverty; the pressure of action, therefore, is not improving the status of women but improving the status of the people in general which can be brought by increased and active participation of women of the ASEAN women in development.<sup>106</sup>

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on women, particularly the effect of market reforms and economic development. This Report references the ASEAN Vision 2020, which describes ASEAN as a socially cohesive and caring region 'where hunger, malnutrition, deprivation and poverty are no longer basic problems, where strong families as the basic units of society nurture their members particularly the children, youth, women and elderly' and the Declaration of ASEAN Concord II (Bali II), which includes the goal of creating 'equitable participation of women in the development process by eliminating all forms of discrimination Against them.' The premise of the ACW's Third Report is that women traditionally enjoy a lesser share in the fruits of economic development, resulting not only in harm to women but to society in general, because: (1) gender based disparities are bad for economic growth, poverty reduction and productivity; (2) gender inequality feeds into cycles of disadvantage; (3) gender inequality erodes human security, deepening structural conflicts. The report references the gender gap in ASEAN in terms of Amartya Sen's human capabilities approach and specifically Sen's Schema of Seven Women's Inequalities. See: ASEAN Committee on Women, 'Third Report on the Advancement of Women in ASEAN', (2007) available at:

[http://www.asean.org/images/2012/Social\\_cultural/ACW/publications/Third%20Report%20on%20the%20Advancement%20of%20Women%20in%20ASEAN.pdf](http://www.asean.org/images/2012/Social_cultural/ACW/publications/Third%20Report%20on%20the%20Advancement%20of%20Women%20in%20ASEAN.pdf) [accessed 28 October 2013].

<sup>105</sup> ASEAN, Report on the ASEAN Women Leaders and International Women's Year Post Conference Meeting, Jakarta (19-22 December 1975), 161.

<sup>106</sup> The point was reiterated by Professor Soenawar Soekawati, Indonesia's Special Minister for People's Welfare for the Republic of Indonesia. *Report of the ASEAN Women's Leaders and International Women's Year Post Conference Meeting*, 19-22 December 1975, Jakarta.

The position of Singapore was that: ‘Singapore women have no need for militant women’s liberation movements ... a quiet but effective transformation has taken place resulting in a gradual and steady integration of women in the whole process of modernization.’ Malaysia’s concern was that ‘the best traditions of our social and cultural values that give special meaning to our quality of life in our countries and a recognition of the uniqueness of womanhood’ should not be ‘eroded or destroyed in our pursuit for progress.’<sup>107</sup> Doubts about the legitimacy of the women’s movement did not only emanate from states. Many women’s rights activists across Southeast Asia were also worried about the divisive effects of recognising the primacy of women’s issues over class-based problems.<sup>108</sup> They argued that the ‘woman question’ was ‘vague, abstract, and does not have a material base,’ a ‘middle class perception with which the majority of women find no identification.’<sup>109</sup>

On this last point, consider, for example, the vexed question of how to deal with gender specific violations perpetrated by ‘private’ agents (for example, in family situations, within the home). Many Western feminists argue that the corpus of human rights must be expanded to include the experiences of women wherever they occurred, even in what was traditionally seen as the ‘natural’, private, invisible domain outside politics and the public sphere.<sup>110</sup> Yet for women’s rights activists in Southeast Asia, this led to some troubling questions. As several anthropologists noted, the concepts of ‘public’ and ‘private’ are products of liberal modernity in the West. In many traditional cultures, there is no clear

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<sup>107</sup> Ibid.

<sup>108</sup> Carolyn I. Sobritchea, ‘Women’s Movement in the Philippines and the Politics of Critical Collaboration with the State’ (2004) in Lee Hock Guan (ed) *Civil Society in Southeast Asia* (2004) Institute of Southeast Asian Studies, Singapore, 101–121.

<sup>109</sup> Aida F. Santos, ‘The Philippine Women’s Movement: Problems of Perception’ Paper presented at the Seminar to Prepare the Alternative Philippine Report on the Impact of the Decade for Women, Quezon City (1984). Quoted in Sobritchea, *ibid*, 103–104.

<sup>110</sup> See: Claire Cutler, ‘Artifice, ideology and paradox: the public/private distinction in international law’ (1997) 4(2) *Review of International Political Economy* 261.

notion of a distinction between the public and private realms.<sup>111</sup> Is there utility for women in developing nations in agitating for extension of rights to a private, domestic realm that does not exist for them? Does conflating women with ‘the private’ threaten to embed the very assumptions about the public/private divide that are being challenged? CEDAW’s stance on other cultural issues has not always met with the whole-hearted support of feminists, particularly feminists writing in the global South. To many, it has seemed that inordinate attention has been given to certain ‘traditional practices’ (polygamy; female genital cutting; suttee; foot-binding) to the detriment of other more quotidian but equally damaging issues, such as economic disadvantage and the absence of education for girls.<sup>112</sup> In this context, the suspicion has arisen that the women’s human rights movement, as part of the broader human rights movement, is an example of Western feminist universalising—a(nother) ‘tool of the West and its self-serving Enlightenment project.’<sup>113</sup>

There have been some convincing responses to claims about the culturally imperialist nature of women’s human rights. Scholars such as Sally Merry argue that culture is rarely simply ‘imposed’ on another culture, and never successfully. Instead, and ideally, what occurs is a process of negotiation and translation, rather than confrontation and conflict, where the boundaries of ideas are expanded, or develop new practices of intervention are developed.<sup>114</sup> Seen this way, culture is not immutable, permanent and bounded: instead, it is

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<sup>111</sup> This is a fact still apparently misunderstood by Western scholars. Barry, for example, writes that: ‘With economic development, women are able to move into the public economy and labor force, breaking their traditional confinement to the private sphere.’ Kathleen Barry *Vietnam’s Women in Transition* (1996) St. Martin’s Press, New York, 2.

<sup>112</sup> Anne Orford ‘Contesting globalization: a feminist perspective on the future of human rights’ (1988) 8 *Transnat’l L. & Contemp. Probs* 171.

<sup>113</sup> Maila Stivens, ‘Introduction: gender politics and the reimagining of human rights in the Asia Pacific’ (2000) in Martha Macintyre, Vera Mackie and Maila Stivens (eds) *Human Rights and Gender Politics: Asia Pacific Perspectives* (2000) Routledge, London and New York, 1-36, 19.

<sup>114</sup> Engle Merry, above n 5.

contested and constantly renegotiated. There is not necessarily conflict between culture and rights, but dialogue and the reformulation of values.<sup>115</sup>

Nonetheless, at least until the end of the 20<sup>th</sup> century, there was persisting ambivalence about the women's rights project in Southeast Asia. At the regional level, this ambivalence is reflected in the tone of the 'Declaration on the Advancement of Women in the ASEAN Region', which was completed and adopted by ASEAN Heads of State in July 1988.<sup>116</sup> The Declaration contains only one reference to the principle of equality. In Article 1, it lists as one of its objectives:

to promote and implement the equitable and effective participation of women whenever possible in all fields and at various levels of the political, economic, social and cultural life of society at the national, regional and international levels.

The Declaration makes no reference at all to cultural impediments that might prevent women from achieving equality and no reference to women's 'rights'.<sup>117</sup> Instead, the Declaration recognises the 'multiple roles of women in the family, in society and in the nation and the need to give full support and provide facilities and opportunities to enable them to undertake these tasks effectively.'<sup>118</sup> It advances as its reason for why ASEAN states should pay attention to women's issues:

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<sup>115</sup> Stivens' observation on this point is powerful. She writes: 'In order to sustain the view that the woman's human rights agenda is simply imposed on 'third world' women, one has to ignore the complex ways in which such women have called upon, negotiated and deployed versions of the concept of human rights both in the past and in the present ... human rights claims by women in the [Asia-Pacific] region demonstrably are not merely an individualist project of 'modern' autonomy-seeking women' Stivens, 'Family Values' and Islamic Revival: Gender, Rights and State Moral Projects in Malaysia' (2006), above n 37, 19.

<sup>116</sup> Declaration of the Declaration of the Advancement of Women in the ASEAN Region, Bangkok, Thailand (5 July 1988).

<sup>117</sup> Article 1 of the Declaration states its purpose: 'To promote and implement the equitable and effective participation of women whenever possible in all fields and at various levels of the political, economic, social and cultural life of society at the national, regional and international levels.'

<sup>118</sup> Declaration of the Advancement of Women in the ASEAN Region, Bangkok, Thailand (5 July 1988), Preamble.

To enable women in the region to undertake their important role as active agents and beneficiaries of national and regional development, particularly in promoting regional understanding and cooperation and in building more just and peaceful societies.<sup>119</sup>

The Declaration refers to the role of women in strengthening ‘national and regional resilience’<sup>120</sup> and ‘strengthening solidarity in the region and international women forum by promoting harmonization of views and of positions.’<sup>121</sup>

Between 1988 and 2004, during which period ASEAN’s membership doubled, the ASEAN Committee on Women (ACW) worked to advance the aims of the Declaration, chiefly through holding meetings and workshops. It also devised a ‘Work Plan for Women’s Advancement and Gender Equality.’ One of the outputs of this was the publication of a series of reports on progress in achieving the goals of the Declaration. The first report was published in 1996 with data from seven ASEAN countries; the second report was published in 2001 with data from all ten ASEAN countries.<sup>122</sup> The ACW was also responsible for producing the 2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region (DEVW).<sup>123</sup>

The DEVW, adopted eleven years after the signing of the United Nations Declaration on the Elimination Violence Against Women,<sup>124</sup> is markedly less utilitarian in tone than the 1988 Declaration on the Advancement of Women. The DEVW states that the purpose of the Declaration is to:

promote an integrated and holistic approach to eliminate violence against women by formulating mechanisms focusing on the four areas of concerns of violence against

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<sup>119</sup> Ibid, Article 2.

<sup>120</sup> Ibid, Article 4.

<sup>121</sup> Ibid, Article 5.

<sup>122</sup> The third and most recent report, published in 2007, focuses on the impact of globalisation on women, particularly the effect of market reforms and economic development.

<sup>123</sup> Declaration on the Elimination of Violence Against Women in the ASEAN Region, Jakarta, Indonesia (30 June 2004).

<sup>124</sup> UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

women, namely: providing services to fulfil the needs of survivors; formulating and taking appropriate responses to offenders and perpetrators; understanding the nature and causes of violence against women; and changing societal attitudes and behaviour.<sup>125</sup>

At Article 5, the Declaration links non-discrimination and women's economic independence and empowerment to the prevention of violence. The Preamble to the Declaration notes that violence is an obstacle to the achievement of equality, development and peace. As I noted in the preceding section, within three years of the adoption of this Declaration, all ASEAN states (except Myanmar) passed legislation criminalising violence against women. Most of this legislation was enacted shortly after the adoption of the regional Declaration (the Philippines, Laos and Indonesia in 2004; Cambodia in 2005; Thailand and Vietnam in 2007). Malaysia and Singapore, however, passed domestic violence legislation in 1994 and 1996, respectively, closer in time to the adoption of the UN Declaration on the Elimination of Violence Against Women. What we see, in relation to the issue of violence against women, is a broad alignment between global, regional and local ideas about the moral imperative of preventing violence against women. This follows, it should be noted, the demise of the 'Asian Values' debate at the end of the 1990s, and the admission to ASEAN of communist states Laos and Vietnam (countries with strong histories of promoting women's rights under Marxist principles of equality between the sexes).

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, (ACWC) inaugurated in 2010, has as its aim: 'to promote and protect the human rights and fundamental freedoms of women and children in ASEAN.'<sup>126</sup> The ACWC

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<sup>125</sup> Ibid, Article 2.

<sup>126</sup> Terms of Reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (2010) (hereinafter TOR ACWC) Art. 2(1).

has adopted as its first task advancing the issue of violence against women and children.<sup>127</sup> Despite some excitement at the reference to the ACWC's apparent 'protection' function, it is clear that the ACWC is a consultative body. Its mandate and functions, listed in Article 5, all concern the promotion of the rights of women and children and the Commission's role in coordinating action amongst ASEAN states.<sup>128</sup> Similar to AICHR, ACWC has no investigative, evaluative, or enforcement powers or any early warning mechanisms. ACWC can provide advice to ASEAN sectorial governments upon request and advocate on behalf of women and children to improve their human rights situation.<sup>129</sup>

The ACWC oversaw the drafting of the Declaration on Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, (DEVWC) which

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<sup>127</sup> The ACWC was inaugurated during the 16th ASEAN Summit in 2010. The ACWC Work Plan 2012–2016 includes: the compilation of country of best practices in eliminating violence against women and children (published in mid-2013); a regional workshop to consider common issues towards effective promotion and protection of the rights of women and children (held in June 2013); the creation of a network of social service providers helping women and children victims of violence; and public awareness campaigns, undertaken in conjunction with the International Day to Stop Violence Against Women (25 November 2013).

<sup>128</sup> ACWC has 20 Representatives from ten ASEAN member states. Ten representatives deal with the rights of women, ten with the rights of children.

<sup>129</sup> ACWC's TOR are similar to those of the ASEAN Intergovernmental Commission on Human Rights, in that they specify that the rights of women and children must be understood: 'taking into consideration the different historical, political, sociocultural, religious and economic context in the region and the balances between rights and responsibilities'; with 'respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity'; 'respect for the principles of impartiality, objectivity, non-selectivity, non-discrimination and avoidance of double standards and politicization'; recognition that the primary responsibility to promote and protect the fundamental freedoms and rights rests with each Member State; that a constructive, non-confrontational and cooperative approach to enhancing the promotion and protection of rights should be taken; that a balance must be ensured between the functions of promotion and protection of the rights of women and children; and that an evolutionary approach to the realization of rights should be adopted. TOR ACWC, Art. 2. Like the TOR of AICHR, ACWC's TOR also refer to respect for the principles embodied in Article 2 of the ASEAN Charter (which include respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;<sup>129</sup> non-interference in the internal affairs of ASEAN Member States). TOR ACWC, Art. 2(1)(e). ASEAN Secretariat News, 'Sixth Press Release of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)' (3 April 2013) available at: <http://www.asean.org/news/asean-secretariat-news/item/sixth-press-release-of-the-asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-acwc> [accessed 28 October 2013].

was adopted by ASEAN Leaders at the October 2013 Summit in Brunei.<sup>130</sup> The DEVWC acknowledges the commitment of ASEAN states to international instruments such as the United Nations Declaration on the Elimination of Violence Against Women, but does not include the strong and specific definition of violence that we find in Articles 1 and 2 of the United Nations Declaration.<sup>131</sup> Nor does the ASEAN instrument set out in the body of the text the various rights to which women are equally entitled (life, equality, liberty and security etc).<sup>132</sup> There are other small but not necessarily trivial differences between the two instruments. The Preamble to the DEVWC employs the language of CEDAW, obliging ASEAN Member States to take all appropriate measures to modify social and cultural patterns of conduct with a view to eliminating prejudices and customary practices based on the idea of inferiority or the superiority of either of the sexes.<sup>133</sup> In the United Nations Declaration, this same obligation is placed in the Declaration proper, under Article 4. Like the United Nations instrument, the DEVWC lists the various methods that should be pursued to eliminate violence against women and children, largely by strengthening and making effective legislation, policies and measures to prosecute perpetrators of violence, protect women and children and provide them with access to remedies.<sup>134</sup>

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<sup>130</sup> ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, Twentieth-Third ASEAN Summit (9 October 2013).

<sup>131</sup> UNGA Res. 48/104, Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993).

<sup>132</sup> ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, Twentieth-Third ASEAN Summit (9 October 2013), above n 130, Article 3.

<sup>133</sup> Ibid, Preamble.

<sup>134</sup> Ibid, Art. 3. Civil society organisations (CSOs) objected to the DEVWC, arguing that there had been no consultation on the contents of the Declaration, despite the remit of the ACWC in its TOR to adopt a collaborative and consultative approach with civil society and to engage in dialogue and consultation with civil society. They also objected to the inclusion of the phrases: 'taking into consideration the different historical, political, socio-cultural, religious and economic context in the region' and 'balances between rights and responsibilities.' In the end, the phrase 'balance rights and responsibilities' was removed in the final draft of the DEVWC. Women's Caucus on ASEAN, 'SAPA and Women Caucus appeals ACWC to share Finalized DEVAW/EVAC Draft' (4 September 2013) available at: <http://womenscaucusonasean.wordpress.com/> [accessed 28 October 2013]; Amnesty International, Amnesty International's Briefing to the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children on the Draft ASEAN

In sum, it could be said that on the issue of violence against women, there is a degree of concordance between global, regional and local norms on the issue of women's rights in Southeast Asia and that furthermore, in the work of the ACWC, we see the beginnings of a regional approach to managing the issue. However, we do not find the same robust regional response centred around regional understandings about the meaning of women's equality.

Particularly troubling in ASEAN is the way we see, from 2010, in the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, the rights of women aligned with the rights of children. The Ha Noi Declaration references ASEAN States' commitments to the Women's Convention and the Convention on the Rights of the Child and recognises in its Preamble 'a need to continue to tap on the strength of these groups [women and children] as well as to empower those who are in vulnerable situations.'<sup>135</sup> The 2013 ASEAN Human Rights Declaration, as we have seen, contains Article 4, which discusses the 'inalienable, integral and indivisible rights' of women, who are placed beside other 'vulnerable and marginalised groups' such as 'children, the elderly, persons with disabilities, migrant workers.'<sup>136</sup> It is significant, perhaps, that by this time, any influence Vietnam and Laos had promoting women's rights under the ideology of communism had faded. Globally, the position of women in communist countries deteriorated rapidly after the advent of *glasnost* and *perestroika*.<sup>137</sup> In Vietnam and Laos, after *Doi Moi* (economic 'renovation'), women's representation in the National Assemblies of Laos and Vietnam declined.<sup>138</sup> Subtler changes were also taking place. Prior to Renovation, Vietnam

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Declaration on the Elimination of Violence Against Women and Children (May 2013) available at: <<http://www.amnesty.org/es/library/asset/IOR64/001/2013/en/bb68d82a-eade-4cc6-a10f-f1d896e2e40d/ior640012013en.pdf>> [accessed 28 October 2013].

<sup>135</sup> Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, Ha Noi, Vietnam (28 October 2010).

<sup>136</sup> ASEAN Human Rights Declaration, Phnom Penh, Cambodia (18 November 2012).

<sup>137</sup> Sen, *The Idea of Justice* (2009), above n 101.

<sup>138</sup> John C. Schafer, 'Lê Văn and Notions of Vietnamese Womanhood' (2010) 5(3) *Journal of Vietnamese Studies* 129.

and Laos—at least officially—subscribed to the communist idea of the family as merely a ‘sentimental’ unit. By 2010, with economic liberalism underway, the idea of ‘the family’ was revived, in tandem with regional moves to link the wellbeing and advancement of women with the wellbeing and advancement of children.

The conflation of women’s rights and children’s rights in ASEAN institutions and declarations is problematic for the advancement of women’s equality. The unique characteristic of children (their dependence on adults and their lack of capacity) are of an entirely different character to the attributes of women. Women do have special attributes that require particular attention, such as historical subjugation and the fact of reproductive capacities. However, merging the rights of children with the rights of women perpetuates the idea of women’s biologically determined dependency and the role of women in society as being primarily concerned with home and child-raising. It is too early to say how the ACWC will proceed to fulfil its mandate and whether or not in practice, it will distinguish women’s issues from children’s issues and work to promote policies directed towards substantive equality for women.

Why was a separate regional institution to oversee women and children’s rights created at all, in light of the global trend towards mainstreaming women’s issues? In an influential article published in the *Human Rights Quarterly* in 1990, Charlotte Bunch argued that ‘woman-centred’ strategies had failed and that the separation of ‘women’s rights’ from ‘human rights’ had led to the marginalisation and devaluation of women’s issues. Bunch argued that the effects of this were both material (at the global level, the Human Rights Commission had more power to hear and investigate cases than the Commission on the Status

of Women, ‘more staff and budget, and better mechanisms for implementing its findings’).<sup>139</sup> and ideological (‘human’ rights were considered more important than ‘women’s’ rights, based on an idea that the rights of women are of a lesser order than the ‘rights of man’).<sup>140</sup> In the wake of Bunch’s article and in the shadow of gender-specific events such as ‘ethnic cleansing’ in Bosnia and Rwanda in the early 1990s, a project of ‘gender mainstreaming’ was advocated as a new global strategy for promoting gender equality.<sup>141</sup> At the core of gender mainstreaming was the idea that equality between the sexes should no longer be addressed as a separate ‘woman’s issue’, but must be a part of all UN activities.<sup>142</sup> The Commission on Human Rights defines mainstreaming as ‘the placing of an issue within the pre-existing institutional, academic and discursive framework.’<sup>143</sup> For many feminists, however, mainstreaming means more than that. The goal of Bunch and her colleagues was to impact on and ideally to transform the mainstream: to rebuild the concept of human rights from a feminist perspective, so that it took greater account of the realities and concerns of women’s lives.<sup>144</sup> The ‘women’s rights are human rights’ movement was to a degree successful in

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<sup>139</sup> Charlotte Bunch, ‘Women’s rights as human rights: Toward a re-vision of human rights’ (1990) 12(4) *Human Rights Quarterly* 486, 492.

<sup>140</sup> Ibid. Catharine Mackinnon has put the argument in perhaps its strongest terms: ‘In the record of human rights violations they [women] are overlooked entirely, because the victims are women and what was done to them smells of sex.....What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women. Atrocities committed against women are either too human to fit the notion of female or too female to fit the notion of human. ‘Human’ and ‘female’ are mutually exclusive by definition; you cannot be a woman and a human being at the same time.’ Catharine MacKinnon, ‘Rape, Genocide, and Women’s Human Rights’ (1994) 17 *Harvard Women’s Law Journal* 5, 6.

<sup>141</sup> Office of the Special Advisers on Gender Issues and Advancement of Women, *Gender Mainstreaming: An Overview* (2002) available at: <http://www.un.org/womenwatch/osagi/pdf/e65237.pdf> [accessed 27 October 2013] and Office of the Special Adviser on Gender Issues and Advancement of Women, ‘Gender Mainstreaming: Strategy for Gender Equality’ (2001) available at: <http://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf> [accessed 27 October 2013].

<sup>142</sup> The slogan was ‘woman’s rights are human rights’ and the principle was that gender equality concerned men as much as it did women. Sari Kouvo, ‘The United Nations and Gender Mainstreaming: Limits and Possibilities’ in Doris Buss and Ambreena Manji, *International Law: Modern Feminist Approaches* (2005), above n 32, 237–252.

<sup>143</sup> UN Commission on Human Rights, UN Doc CN4/1988/49, para 8.

<sup>144</sup> Bunch, above n 139, 496. Bunch’s other major policy suggestions were to bring violence and abuse that occurred to women within the fold of the major human rights categories (of civil and political rights, for example by recognising rape as a form of torture; of economic rights and social rights, for example by

bringing women's rights into the fold of broader human rights. Yet the second part of the post-Beijing World Conference project—the goal of reimagining the human rights project to account for the perspective of women, while at the same time recognising difference, specificity and context—was only ever imperfectly realised.<sup>145</sup>

The creation of the ASEAN Commission on Women and Children may be merely an accident of history. In 2003, Vitit Muntarbhorn, academic and activist, at a meeting of the Working Group for an ASEAN Human Rights Mechanism, suggested that the precursor to the creation of a fully-fledged regional human rights commission in Southeast Asia might be the establishment of a body mandated to promote and protect international human rights to which all ASEAN states have already subscribed—namely, those in the Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Rights of the Child. Muntarbhorn's point was that a regional body should subscribe to global norms, and not be established based on a weaker set of regional norms. Yet the end result has been the creation of a separate body for women and children, with no clear relationship to AICHR and a real risk that 'women's issues' will be deflected to what will inevitably become an inferior body.

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recognising the structural societal inequalities that led to economic deprivations) and to create new institutions and laws to counter sex discrimination, based on CEDAW.

<sup>145</sup> See: Therese Murphy, 'Feminism Here and Feminism There: Law, Theory and Choice' in Doris Buss and Ambreena Manji, *International Law: Modern Feminist Approaches* (2005) Hart Publishing, Oxford and Portland, Oregon, 67-86. Yet without this, the scope of women's struggles is limited, 'forcing them into categories of human rights that were for many women highly artificial.' Stivens, 'Family Values' and Islamic Revival: Gender, Rights and State Moral Projects in Malaysia' (2006), above n 37. But see Avigail Eisenberg's work on precisely this endeavour in the Canadian context. Avigail Eisenberg, 'Context, Cultural Difference, Sex and Social Justice' (2002)35(3) *Canadian Journal of Political Science* 613; Avigail Eisenberg 'Diversity and Equality: Three Approaches to Cultural and Sexual Difference' (2003)11(1) *Journal of Political Philosophy* 41; Avigail Eisenberg *Diversity and Equality: The Changing Framework of Freedom in Canada* (2006) Cambridge University Press, Cambridge.

## 6.5 Conclusion

How does this chapter advance our understanding of whether or not, and the conditions under which, a regional system for the promotion and protection of human rights might possess a particular legitimacy? The picture is neither clear nor neat—nor would we expect it to be, given the complexity of local, regional and global interrelationships, the diverse cultural backgrounds of ASEAN states, and the long history towards (but only very recent establishment of) regional human rights institutions in Southeast Asia. Nonetheless, we can draw several tentative conclusions.

First, leaving aside the specific issue of violence against women, we see amongst ASEAN states tactical concessions to global international norms relating to women's rights. The most plausible explanation for these concessions, given the temporal and spatial dimensions of ASEAN states ratification of the Convention on the Elimination of all forms of Discrimination Against Women, centres on socialisation (primarily through the World Conferences on Women) or diffusion (through the regional 'neighbour' effect). We do not yet see a full-blown translation of these concessions into prescription (domestic law reflecting genuine commitment to international norms). What we can see, however, are examples of the way that domestic groups have employed commitments to the Convention in order to move states along the path to prescription. The examples provided of activism in Malaysia, Indonesia and Brunei, usefully illustrate the different dynamics at play in different political contexts. In Malaysia, which is a demi-democracy, litigation and lobbying around international norms has proven to be an effective strategy for engaging government in accepting the validity of a particular norm (the Malaysian government, under pressure, withdrew its appeal in the *Noorfadilla* case). In Indonesia, a state that prides itself on its democratic credentials, discursive processes of argumentation are more evolved, and directed

towards exploring the meaning of norms in particular contexts (what does it mean to *severely* discriminate against women?). In Brunei, where there is no political opposition, civil society activity is curtailed and religious norms are dominant in society, the government is reluctant to engage in discussion or argumentation at all—the state is still in the ‘denial’ stage. Simmons argues that: ‘the findings are remarkably robust: international legal commitments improve the legitimacy of women’s demands for equality and help to elicit social change.’<sup>146</sup> She notes, however, that ratification makes little difference in countries where the conditions do not exist for ‘mobilisation’ or litigation: ‘CEDAW effects could never be shown to exist in countries with established, stable official religions or in countries with nonperforming judicial systems.’<sup>147</sup> In ASEAN, Brunei—at present—stands as an example of this.

Second, regional instruments and institutions in Southeast Asia, at present, only weakly reflect a commitment to the idea of women’s equality. This ambivalence, I argue, stems from several factors. The first has to do with the historical development of ASEAN’s women’s rights institutions. States were advised, in 1975 after the First World Conference on Women, to devise a regional response to the issue of promoting and protecting women’s rights. ASEAN states reluctantly came together to do so. But at this particular stage of the economic development of ASEAN states, what mattered (to governments at least) was the equality and social welfare of *all* citizens. The idea of women’s right to equality was resisted by governments, based on the poor economic and social position of both men *and* women in Southeast Asia. Where governments were forced to pay attention to the issue, the advancement of women was couched in instrumental terms, concerned with the contribution that women’s advancement could make to the wellbeing of *all* people within the region. This alignment sat neatly with national conversations orchestrated by many ASEAN states about

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<sup>146</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2011), above n 4, 254.

<sup>147</sup> *Ibid*, 255.

‘family’ and ‘family values’.<sup>148</sup> Yet it is important not to overstate ASEAN’s singularity in this regard. Deep and unresolved tensions also undercut the global women’s rights movement. On the question of culture, for example, CEDAW consistently refuses to allow traditional family structures to excuse or justify the unequal treatment of women. It could hardly do otherwise, given the text of Article 5(a) of CEDAW).<sup>149</sup> Yet the discourse of other agencies of the United Nations has not been uniform. For example, other agencies have prominently advanced the role and importance of the family, without necessarily emphasising equality within the family.

Third, civil society groups, which might have pushed states towards a regional consensus on equality issues, had (at least initially) reservations about the global women’s movement, and focused their energies locally. Regional networks of activists, of the kind I discuss in the next chapter, did not develop until the 1980s. What we do see, in more recent times, is a trans-regional movement by civil society groups such as Sisters in Islam. The focus of SIS is not on specifying the meaning of women’s rights in the regional context, but on specifying the meaning of women’s rights in the context of Islam. We also see that increasing levels of democratisation in countries such as Malaysia are progressively widening the space for civil society activism, which is further encouraged by growing judicial sensitivity to global human rights developments.

Fourth, in relation to the most recent institutional developments, we can see the results of a certain pragmatism underpinning the drive to create a regional human rights institution. The fact that all ASEAN states had acceded to the Convention on the Elimination

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<sup>148</sup> The tone of these conversations was frequently apocalyptic, warning of a drastic decline in the sanctity of the family, leading to grave social ills. Gill Jagger and Caroline Wright, *Changing Family Values: Difference, Diversity and the Decline of Male Order* (1999) Routledge, New York. The role of women was seen as essential to ‘moulding happy families’. Maila Stivens, “Family values” and Islamic revival: Gender, rights and state moral projects in Malaysia.’ (2006) Paper presented at the Women’s Studies International Forum, Elsevier.

<sup>149</sup> Except in the case of positive discrimination.

of all forms of Discrimination Against Women (though with reservations, as we have seen) and the Convention on the Rights of the Child, prompted the push towards the establishment of an institution dedicated to promoting and protecting the rights of women and children. But as I have argued, the conflation of the rights of women and the rights of children has a deleterious effect on generating an autochthonous regional understanding about women's equality. It is unclear at the time of writing how the work of the ASEAN Commission on Women and Children will evolve. It is a positive sign, perhaps, that the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN hints at an understanding that the needs of women and children are of a different order (we see this in the bifurcated phrasing of the title of the Declaration).<sup>150</sup>

Finally, related to this last point, it is significant that the issue of violence against women has gained significant traction at global, regional and state levels. This confirms the view that norms protecting the physical security of innocent or vulnerable actors have a particular purchase: as a norm, they possess an 'oughtness' that sets them apart from other kinds of norms. Because of this, we see a stronger push to reach precise understandings about what constitutes 'appropriate' or 'proper' behaviour in relation to the promotion and protection of this particular norm and more standard-setting taking place. Furthermore, greater disapproval and stigma attaches to state failure to translate the norm into prescriptive form. Regional examples of how this should be done, in the form of domestic legislation, are highly relevant.

But overall, we do not see, at the regional level, the development by states of a distinct regional response to the meaning of equality between men and women and the

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<sup>150</sup> The Preamble to the Declaration also states that: 'EMPHASISING that the rights of children to special protection and care are different than those of women, given that parents have the responsibilities in the upbringing and development of their children and to protect them from violence, abuse, maltreatment and exploitation, and the obligations of state parties to assist parents in these efforts'. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, above n 17.

abnegation of distinction based on gender, or the laying out of specific ways, relevant to states in the region, of how states might begin to modify social and cultural patterns of conduct of men and women with a view to eliminating prejudices. We can conclude, then, that in relation to the issue of women's rights, a particular legitimacy does *not*—at the present time, given the particular stage of the norm life cycle presently occupied by ASEAN states—attach to the regional approach in Southeast Asia. On the subject of women's rights, the global regime currently has greater utility as an instrument of change.

## **Chapter 7: Trafficking in Persons**

### **7.1 Introduction**

### **7.2 The Global Regime to Prevent Trafficking in Persons**

### **7.3 Response of ASEAN States to the Global Regime**

### **7.4 Domestic Response of ASEAN States to Trafficking in Persons**

### **7.5 Responding to Pressure**

### **7.6 ASEAN and Trafficking in Persons**

### **7.7 Conclusion**

### **7.1 Introduction**

Let us return to the original idea sketched out in Chapter 1, of what a regional approach to human rights, meeting the requirements of legitimacy, might look like. First, we would see evidence of a shared understanding of what the problem is, how the problem manifests itself in specific local circumstances and why, adopting a political conception of human rights, a certain issue qualifies as a human rights issue; second, we would see dense interaction between states within a particular constrained geographical area, in the form of joint instruments and shared institutions created to address the problem, and also in the form of less formal interactions, between networks of actors at different levels of governance (bureaucrats, members of the executive, civil society organisations); third, we would see all this occurring against a backdrop of shared economic, political or security interests.

## Chapter 7: Trafficking in Persons

This chapter describes how in relation to the issue of trafficking in persons, precisely this type of regional approach exists (or is in the process of being formed) in Southeast Asia. We should not find this particularly surprising. Trafficking, as defined in the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ('the Trafficking Protocol')<sup>1</sup>, involves the prominent violation of a range of individual civil liberties (the prohibitions against slavery, servitude and compulsory labour; liberty and security of the person; and, potentially, life). There seems to be, at least at the level of rhetoric, a global consensus that trafficking is a moral evil and that states have a duty to prevent it. Furthermore, unlike the rights of women, addressing the problem of human trafficking requires collaboration between countries of origin (from which victims are transported), countries of transit (through which victims are trafficked) and countries of destination (where exploitation occurs). Unilateral action to address the problem and its consequences will be ineffective. The issue lends itself, therefore, in a practical way, to intergovernmental cooperation.

In particular, the issue is one that would seem to lend itself to intergovernmental cooperation among states within a particular geographic region. Recall the sorts of ideas put forward in Chapter 1 about proximity and levels of interaction and concern that exist between states at the regional level. In relation to the issue of trafficking in persons, we would anticipate that: institutions situated at the regional level would be more likely to possess more intimate knowledge of the economic geographies that influence trafficking flows; they would be more likely to be in a position to foster co-operative efforts at borders and in relation to the return of trafficked persons; and they might be better able to frame the issue in a way that

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, 2237 UNTS 319, entered into force 25 December 2003) (hereinafter 'the Trafficking Protocol'). See: Anne T. Gallagher, *The International Law of Human Trafficking* (2010) Cambridge University Press, New York, 36.

establishes links between trafficking and high-priority regional issues such as transnational crime, increasing the political palatability of state responses. Furthermore, we might anticipate that regional arrangements would have a comparative advantage to global schemes given the sheer number of states participating in the global regime and the diverse forms the problem takes in different geographical regions. This last point is what concerns Emmers *et al.*, in their discussion of human trafficking and other forms of transnational crime. The authors argue that: ‘Within the international arena there are simply too many states, with too great a capacity gap, to allow for the swift resolution of a particular problem.’<sup>2</sup> Emmers and his colleagues argue strongly for regional levels of governance, which act as ‘a supporting horizontal structure where states at particular levels of development, with similar needs, can work together in enhancing their security.’<sup>3</sup> Regional programs, they claim, ‘allow states to develop transnational responses to such threats [as transnational crime] with mutual confidence in their other partners based on their similarities rather than their differences.’<sup>4</sup>

In this Chapter, I argue that ASEAN’s efforts to prevent trafficking in persons are the result of precisely the sorts of regional-level processes that I describe in Chapter 1: moral consciousness-raising, argumentation and persuasion amongst regional peers, by national and regional actors, both governmental and non-governmental, coupled with the alignment of interests among states that share instrumental reasons for advancing a particular joint project. I argue that what emerges is a specifically *regional* understanding of the problem of trafficking that is particularly well-suited to promoting the internalisation of norms about preventing trafficking. In this way, I offer this chapter as an example that provides (overall) support for my hypothesis about the legitimacy of regional systems for the promotion and

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<sup>2</sup> Ralph Emmers, Beth K. Greener and Nicholas Thomas, ‘Securitising human trafficking in the Asia-Pacific’ in Siu-lun Wong and Melissa G. Curley (eds) *Security and Migration in Asia: The Dynamics of Securitisation* (2008) Routledge, London and New York, 59-82, 77.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

protection of human rights. I argue that the 2004 ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children and the ASEAN Convention on Trafficking in Persons (currently being negotiated) are reflections of this regional vision.

This chapter is also about how global mechanisms of influence might (under certain conditions) distort and delay the internalisation of human rights norms. In this chapter I demonstrate how different modes of influence (persuasion, material inducement, fines) implemented at the *global* level, do not necessarily complement processes of socialisation at the regional level. I argue that interaction between different mechanisms of influence can have negative effects, and that global attempts to influence state responsiveness on the issue of human trafficking in Southeast Asia, predominantly the actions of the United States under the Trafficking Victims Protection Act, provide an example of this.

## 7.2 The Global Regime to Prevent Trafficking in Persons

The extent of trafficking in persons in Southeast Asia is difficult to assess. There are several reasons for this: the borders of many Southeast Asian states are porous and trafficking may go undetected; citizenship and birth records do not exist in parts of Southeast Asia, making it difficult to identify trafficked persons; trafficked persons may be reluctant to make reports to the police because the result can be deportation.<sup>5</sup> The extent of internal trafficking occurs on a scale and magnitude that is even more difficult to assess than cross-border trafficking.<sup>6</sup> The United Nations reports that in 2012 there were 10,000 cases of trafficking in persons in South Asia, East Asia and the Pacific.<sup>7</sup> It appears that since 1997 and the Asian Financial Crisis,

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<sup>5</sup> A. Murray, 'Debt-bondage and Trafficking; Don't Believe the Hype' in Reina Lewis and Sarah Mills (eds) *Feminist Post-colonial Theory: A Reader* (1988) Routledge, New York, 51-64.

<sup>6</sup> Ibid.

<sup>7</sup> United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, Vienna (2012).

trafficking has increased.<sup>8</sup> Although charting the geography of inter-state trafficking flows is complicated, the overall pattern seems to be that people are trafficked from Laos, Cambodia, Vietnam, Indonesia, the Philippines and Myanmar, into the relatively rich and developed countries of Malaysia and Singapore, and (sometimes) further abroad to Australia, Europe and the United States.<sup>9</sup> China and Thailand are countries of both origin and destination, and also places where internal trafficking occurs.<sup>10</sup>

The centrepiece of the global effort to end human trafficking is the Trafficking Protocol.<sup>11</sup> The central elements of the Protocol are as follows. First, the Protocol depicts human trafficking as a complicated form of organised crime, systematically run by subnational and transnational corporate agencies.<sup>12</sup> Indeed, the Protocol only applies only to trafficking conducted by ‘an organized criminal group.’<sup>13</sup> Second, in relation to the

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<sup>8</sup> Ruchira Gupta, ‘Human Trafficking in Asia: Trends and Responses’ in Ellen Laipson and Amit Pandya (eds) *On the Move: Migration Challenges in the Indian Ocean Littoral* (2010) Henry L. Stimson Centre, Washington, 69–118, 69.

<sup>9</sup> Pierre Le Roux, ‘A Lethal Funnel: Prostitution and Trafficking for Women for Sexual Exploitation in Southeast Asia’ in Pierre Le Roux, Jean Baffie and Gilles Beullier (eds) *Trade in Human Beings for Sex in Southeast Asia* (2010) Bangkok, White Lotus Co., 111–150, 145.

<sup>10</sup> United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, Vienna (2012); Cheah Wuiling, ‘Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region’ (2006) 3(1) *Essex Human Rights Review* 46.

<sup>11</sup> The Trafficking Protocol, above n 1, is one of three protocols attached to the Convention against Transnational Organized Crime (adopted 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003) (hereinafter ‘Transnational Crime Convention’). Article 1 of the Convention defines its purpose: ‘to promote cooperation to prevent and combat transnational organized crime more effectively.’ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, 976. The UN has also adopted other international instruments that address trafficking in children, such as the International Labor Organisation (ILO) Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (‘Worst Forms of Child Labour Convention’) (adopted 17 June 1999, 2133 UNTS 161, entered into force 19 November 2000) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (adopted on 25 May 2000, 2171 UNTS 227, entered into force on 18 January 2002).

<sup>12</sup> Trafficking Protocol, above n 1, Art. 4.

<sup>13</sup> The United Nations Convention against Transnational Organized Crime, under which the Trafficking Protocol exists, defines an ‘organized criminal group’ as ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes.’ Convention against Transnational Organized Crime, *ibid*, Art. 2 (b): ‘Serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’; Article 2(c) ‘Structured group shall mean a group that is not randomly formed for the immediate commission of an offence

prevention of trafficking, the Protocol places significant emphasis on border control.<sup>14</sup> Third, the Protocol attempts to distinguish human trafficking from practices such as people smuggling and illegal migration by emphasising the elements of coercion and exploitation inherent in human trafficking.<sup>15</sup> The Protocol provides that consent is irrelevant in circumstances where coercion is present.<sup>16</sup> Finally, although the Trafficking Protocol encompasses all forms of exploitation, there is an emphasis placed on sexual exploitation.<sup>17</sup>

The United States Trafficking Victims Protection Act (2000) (TVPA)<sup>18</sup> was passed less than one month before the General Assembly adopted the UN Protocol on Human Trafficking. Like the Trafficking Protocol, the TVPA has two primary purposes: combatting human trafficking (largely through the prosecution of traffickers) and protecting the human rights of trafficked persons.<sup>19</sup>

The TVPA contains a set of Minimum Standards for combating trafficking, which require the government of a country to: prohibit severe forms of trafficking in persons and to punish acts of trafficking by making trafficking a criminal offense; provide adequate punishment; prescribe appropriate sentences in cases of sex trafficking involving children or which include aggravated circumstances, such as rape, kidnapping, or death; prescribe

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and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.’

<sup>14</sup> Trafficking Protocol, above n 1, Arts. 10(1)(a); 11(1)-(6); 12; 13.

<sup>15</sup> Trafficking Protocol, *ibid*, Art. 3(a). See: Phil Williams, ‘Trafficking in Women: the Role of Transnational Organised Crime’ in Sally Cameron and Edward Neuman (eds) *Trafficking in Humans: Social, Cultural and Political Dimensions* (2008) United Nations University Press, Tokyo, New York, Paris, 126–158, 133.

<sup>16</sup> Trafficking Protocol, above n 1, Art 3(b).

<sup>17</sup> Trafficking Protocol, *ibid*, Art.3(a), definition of trafficking in persons: ‘Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’ Gallagher, above n 1, 984-985. Negotiations surrounding the drafting of the Trafficking Protocol were marked by intense debate about the ‘forced’ or ‘voluntary’ nature of prostitution. Gallagher, above n 1, 984-985, esp. footnotes 62-63; L. Sandy, ‘Sex Work in Cambodia: Beyond the Forced/Voluntary Dichotomy’ (2006) 15(4) *Asian and Pacific Migration Journal* 449, 449-470.

<sup>18</sup> Victims of Trafficking and Violence Protection Act of 2000 [United States of America], Public Law 106-386 [H.R. 3244], 28 October 2000, available at: <http://www.refworld.org/docid/3ae6b6104.html> [accessed 8 October 2013].

<sup>19</sup> TVPA, *ibid*, Section 102(a) and (b).

‘sufficiently stringent’ punishment for severe forms of trafficking to deter others from committing the crime and to reflect the serious nature of the crime; make ‘serious and sustained efforts’ to eliminate trafficking.<sup>20</sup> In order to determine whether a government’s implementation efforts are ‘serious and sustained,’ the TVPA delineates seven criteria. The first three criteria measure government efforts in the areas of prosecution, protection, and prevention. The remaining four criteria measure the degree of international cooperation, including investigation of severe forms of trafficking, extradition of traffickers, monitoring of immigration and emigration, and investigation and prosecution of public officials involved in trafficking.<sup>21</sup>

The Office to Monitor and Combat Trafficking in Persons, located within the US State Department, publishes an annual ‘Trafficking in Persons’ report (TIP), in which countries are ranked into ‘tiers’ of compliance with the TVPA: Tier 1 (fully compliant); Tier 2 (not fully compliant but making efforts to ensure compliance); Tier 2 Watch List (where a country is not compliant and the problem of trafficking is significant or increasing, and where a country makes a commitment to take additional steps to combat trafficking the following year but cannot provide evidence of doing so); Tier 3 (not compliant).<sup>22</sup> There is a two-year time limit for countries on the Tier 2 Watch List: at the end of this two-year period, those Tier 2 Watch List countries that have not made significant efforts to address human trafficking are classified as Tier 3.<sup>23</sup>

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<sup>20</sup> TVPA, *ibid*, Section 108(a).

<sup>21</sup> TVPA, *ibid*, Section 108(b).

<sup>22</sup> United States Department of State, Trafficking in Persons Reports, available at: <<http://www.state.gov/j/tip/rls/tiprpt/index.html>> [accessed 29 October 2013].

<sup>23</sup> *Ibid*. In 2008, the reauthorization of the TVPA established a 2-year time limit for the Tier 2 Watch-list because previous practices allowed countries to remain indefinitely on this tier classification without incurring sanctions.

## Chapter 7: Trafficking in Persons

The TIP Office works closely with foreign governments to ‘bring their domestic anti-trafficking laws and policies into compliance with the US Minimum Standards.’<sup>24</sup> For example, the State Department provides a set of model provisions for states to consider incorporating into their own domestic legislation (the ‘Legal Building Blocks to Combat Trafficking in Persons’).<sup>25</sup> The definition of ‘exploitation’ in the Trafficking Protocol and the Legal Building Blocks are identical, except for the inclusion as part of the Building Blocks definition: ‘engaging in any other form of commercial sexual exploitation, including but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, child pornography.’<sup>26</sup>

In contrast to the Trafficking Protocol, which under the Organised Crime Convention has no machinery for oversight or enforcement,<sup>27</sup> the TVPA provides for a program of unilateral sanctions against countries deemed non-compliant with the Minimum Standards.<sup>28</sup>

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<sup>24</sup> Janie Chuang, ‘The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking’ (2006) 27(2) *Michigan Journal of International Law* 441.

<sup>25</sup> Office to Monitor and Combat Trafficking in Persons, ‘Legal Building Blocks to Combat Trafficking in Persons’ (February 2004) in Chuang, *ibid*, 467.

<sup>26</sup> The TVPA defines ‘severe forms of trafficking’ as:

a. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or

b. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

TVPA, above n 18, Sections 103(8)(a) and (8)(b). See Chuang, above n 24, 467; Alison Brysk, ‘Sex as Slavery? Understanding Private Wrongs’ (2011) 12 *Human Rights Review* 259.

<sup>27</sup> United Nations Convention against Transnational Organised Crime, above n 1, Article 32(1); Conference of Parties to the United Nations Convention against Transnational Organised Crime, Decision 1/5, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, 2237 UNTS 319, entered into force 25 December 2003) reproduced in Conference of Parties to the United Nations Convention against Transnational Organised Crime, ‘Report of the Conference of Parties to the United Nations Convention on Transnational Organised Crime on its first session, held in Vienna from 28 June to 8 July 2004’, OTOC/COP/2004/6 (23 September 2004), 5. The Organised Crime Convention establishes a Conference of Parties (COP) with the power to review implementation of the Convention, request and receive information on implementation of the Trafficking Protocol and make recommendations to improve the Protocol and its implementation. Gallagher writes that under this mechanism: ‘reporting rates are low and the information received is uneven, shallow and often ambiguous. There is no opportunity to seek clarification from, or for dialogue with, state parties.’ Gallagher, above n 1, 469.

<sup>28</sup> TVPA, above n 18, Section 110.

Sanctions for failure to meet TVPA standards can include the denial of non-humanitarian aid, non-trade-related assistance, certain development-related assistance and aid from international financial institutions, specifically the International Monetary Fund and multilateral development banks such as the World Bank.<sup>29</sup> In applying the US Minimum Standards, the State Department considers whether countries are of origin, transit or destination for trafficking; the extent to which government actors are involved or complicit in the trafficking; and what measures would be reasonable given a countries resources and capabilities.<sup>30</sup> The object of the TIP Reports is to pressure governments to institute policies and strategies to reduce the trafficking of persons, using the threat of US-imposed sanctions and the shame attached to international approbation that follows a low ranking in the TIP reports.

Anne Gallagher, international expert on the law of human trafficking, argues that there is no substantive difference between US standards relating to trafficking in persons and those that have emerged from the United Nations.<sup>31</sup> The indicators for both are largely the same (criminalisation of trafficking, number of prosecutions, number of ‘victims’ repatriated and their conditions of care). Nonetheless, Gallagher champions the Trafficking Protocol and is, by and large, highly critical of the US approach. In 2007, Gallagher produced a ‘Shadow

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<sup>29</sup> United States Department of State, ‘Trafficking in Persons Report 2003’ (June 2003) available at: <<http://www.state.gov/j/tip/rls/tiprpt/2003/index.html>> [accessed 8 October 2013].

<sup>30</sup> TVPA, above n 18, Section 100 (b)(3).

<sup>31</sup> Anne Gallagher, ‘A Shadow Report on Human Trafficking in Lao PDR: The US Approach v. International Law’ (2007) 16(1) *Asian and Pacific Migration Journal* 525, 531. Gallagher writes: ‘In several important respects there is not much substantial difference. The US definition of what constitutes trafficking does not vary significantly from the definition contained in the Protocol. Both sets of standards highlight the need for criminalization, victim protection, prevention and cooperation with other countries. While the US framework of prosecution, protection and prevention is overly simplistic, it does potentially have the capacity to capture most of the major international legal obligations set out above.’

Report on Human Trafficking in Lao PDR: the US Approach vs International Law.<sup>32</sup> In it, she argues that:

the U.S. government, through its annual TIP report, has developed a unilateral assessment system based on standards derived from its own national legislation and reflecting its own understandings of the problem and its own views on the best solutions. Part One of this study has demonstrated that such an approach is conceptually faulty, politically divisive, and ultimately unpersuasive. It hampers international norm development and thereby directly serves the interests of those States that wish to weaken and disengage from international rules, systems and processes.<sup>33</sup>

While recognising that there may be some role for unilateral assessments of state's efforts in some cases, Gallagher nonetheless contends that:

the impetus for development of an effective national response to trafficking must come from within. Unilateral assessments that do not derive their legitimacy from internationally agreed standards will therefore never be as significant or as legitimate as a judgment made on the basis of commitments voluntarily accepted by Lao PDR and endorsed by the international community of States. This is the value and the strength of international law.<sup>34</sup>

The fundamental distinction Gallagher perceives, between the US approach and the UN approach, lies in the idea that greater legitimacy attaches to the Trafficking Protocol than to the TVPA by virtue of the fact that the former was negotiated and agreed upon in a multilateral forum, and then voluntarily accepted by states. Over the past decade, however, the US approach and the UN approach to the issue of trafficking in persons have been conflated, both in perception and in the way that anti-trafficking measures are undertaken by UN agencies and non-governmental organisations (NGOs). The TIP reports exhort states to subscribe to the Trafficking Protocol, giving the impression that the objectives of the two regimes are identical. At the same time, measures taken to prevent trafficking, under the

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid, 549.

<sup>34</sup> Ibid, 550.

auspices of the UN, are often funded by the US, meaning that in general, greater attention is paid to the issue of trafficking for the purposes of sexual exploitation than, for example, trafficking for exploitation of labour.<sup>35</sup>

### 7.3 Response of ASEAN States to the Global Regime

The engagement of ASEAN states with the United Nations regime for combating human trafficking has been equivocal.<sup>36</sup> Brunei and Singapore have still not signed the Trafficking Protocol. Thailand signed the Protocol in 2001, but is yet to ratify it. Indonesia did not ratify the Protocol until 2009. All other ASEAN states have ratified or acceded to the Protocol, with Vietnam's accession, in 2012, being the most recent. Only the Philippines and Cambodia have accepted Article 15(2) of the Protocol, which provides for the submission of disputes to arbitration, or failing that, to the International Court of Justice.

One explanation for the reluctance of ASEAN states to engage with the international regime is the disjuncture that exists between the global conception of the problem of trafficking, and the dimensions and scope of the problem as it exists in Southeast Asia. Let us consider this further.

First, the Trafficking Protocol emphasises the nature of trafficking as an organised transnational crime. The idea of trafficking in the Trafficking Protocol is usually described along the following lines:

Over the last ten years, the issue of illegal migration has been increasingly linked to organised criminal groups that now largely control the smuggling and trafficking of people. People traffickers and smugglers make high profits while risking relatively

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<sup>35</sup> Chuang, above n 24.

<sup>36</sup> Ashley Blackburn, Robert W Taylor and Jennifer Elaine Davis, 'Understanding the Complexities of Human Trafficking and Child Sexual Exploitation: The Case of Southeast Asia' (2010) 20(1–2) *Women & Criminal Justice* 105.

short prison sentences in comparison with drug dealers. They are connected to other transnational criminal networks involved in narcotics, arms trafficking, money laundering and counterfeit documentation and dispose over the necessary funds to purchase modern equipment and corrupt police and other government officials. Their activities rely on complex infrastructures and are taken more and more seriously by states.<sup>37</sup>

But there is scant evidence that trafficking in Southeast Asia is practiced predominantly as a systematic, patterned and organised form of crime. Indeed, recent ethnographically-oriented research points in precisely the opposite direction.<sup>38</sup> Molland's work, for example, carried out along the Thai-Lao border, reveals that much trafficking is *not* the prerogative of organised and calculating criminal groups,<sup>39</sup> but takes place on an opportunistic basis, by friends, acquaintances and sex workers themselves, who recruit among their peers on visits back to their village communities.<sup>40</sup> The research of Derks *et al*, carried out in the Mekong region, also concludes that trafficking is a 'cottage industry' involving family members, neighbours and friends and that no specific studies have revealed the 'criminal networks' of human traffickers.<sup>41</sup> The work of Thierry Bouhours and his colleagues, in Cambodia, also casts doubt on claims about the high prevalence, profitability, or role of organised crime in human trafficking. Bouhours points out that incarcerated

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<sup>37</sup> Ralf Emmers, 'The Threat of Transnational Crime in Southeast Asia: Drug Trafficking, Human Smuggling and Trafficking, and Sea Piracy' (27 February 2009) *Research Unit on International Security and Cooperation (UNISCI) Discussion Paper*, 5.

<sup>38</sup> An example of this kind of work can be found in Michele Ford, Lenore Lyons and Willem van Schendel's book, *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (2012) Oxford, Routledge.

<sup>39</sup> Sverre Molland, 'The Inexorable Quest for Trafficking Hot-spots Along the Thai-Lao Border' in Michele Ford, Lenore Lyons and Willem van Schendel, *ibid*, 57-74. See also R. Väyrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime' (2003) Discussion Paper No. 2003/72, Helsinki, United Nations University – World Institute for Development Economics Research,

<sup>40</sup> Sverre Molland, 'The perfect Business': Human Trafficking and Lao-Thai Cross-Border Migration (2010) 41(5) *Development and Change* 831, 848; Sverre Molland 'The Value of Bodies: Deception, Helping and Profiteering in Human Trafficking Along the Thai-Lao Border' (2010) 34(2) *Asian Studies Review* 211, 222.

<sup>41</sup> A. Derks, R. Henke, L.Y. Vanna, *Review of a Decade of Research on Trafficking in Persons in Cambodia* (2006) Phnom Penh Centre for Advanced Study.

traffickers in Cambodia are poor, uneducated individuals, and 80 per cent of them are women:

Their activities are unsophisticated and conducted by sole operators or small casual or informal networks. Pushed by a lack of legitimate opportunities and pulled by the presence of illegitimate opportunities, they engage in trafficking for very modest gains.<sup>42</sup>

Second, the Trafficking Protocol emphasises the presence of coercion as the element that distinguishes trafficked persons from migrants or participants in people-smuggling schemes.<sup>43</sup> Yet in Southeast Asia, the circumstances of poverty which cause people to move or makes them susceptible to being moved involuntarily (trafficked) severely complicates notions of consent. There is a significant body of research demonstrating that in many cases, at least initially, the ‘victim’ of trafficking in Southeast Asia is a willing participant in a scheme that promises benefits, which might be economic (work, food, housing) or social (in the form of *chiwit thyansamay*, the ‘taste for modern life’).<sup>44</sup> Molland argues that while there does appear to be some cases of abduction, more commonly what occurs is deceptive recruitment, primarily about conditions of work (which are sometimes more restrictive than described) and earnings (which can be less than described).<sup>45</sup> In this way, much trafficking in

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<sup>42</sup> Thierry Bouhours, Roderic Broadhurst, and Chenda Keo, ‘Human Trafficking and Moral Panic in Cambodia: the Unintended Consequences of Good Intentions’ (2012) available at:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190704) [accessed 12 December 2012].

<sup>43</sup> Above, n 15.

<sup>44</sup> Blackburn, Taylor, and Davis, ‘Understanding the Complexities of Human Trafficking and Child Sexual Exploitation: The Case of Southeast Asia’ (2010), above n 36; Larissa Sandy, ‘Sex Work in Cambodia: Beyond the Voluntary/Forced Dichotomy’ (2006) 15(4) *Asian and Pacific Migration Journal* 449; M.B. Mills, ‘Contesting the Margins of Modernity: Women, Migration and Consumption’ (1997) 24(1) *American Ethnologist* 37.

<sup>45</sup> Molland, ‘The Inexorable Quest for Trafficking Hot-spots Along the Thai-Lao Border’, above n 39; Mely Caballero-Anthony, ‘Human Trafficking and Human Rights in Asia: Trends, Issues and Challenges’ in G. Shabbir Cheema, Christopher McNally and Vesselin Popovski, *Cross Border Governance in Asia: Regional Issues and Mechanisms* (2011) Tokyo, United Nations University Press, 219–266, 219; Michele Ford, Lenore Lyons and Willem van Schendel (eds) above n 38.

Southeast Asia is conflated with, or hidden within the broader (and more difficult to prevent) phenomenon of illegal migration.<sup>46</sup>

Third, it is not at all clear that in Southeast Asia the majority of trafficking occurs for the purpose of prostitution or sexual exploitation. The evidence would seem to show that in Southeast Asia, exploitation of labour is at least as prevalent as sexual exploitation.<sup>47</sup> For those migrating from Lao PDR, for example, the largest site of exploitation seems to be labour outside of the sex industry.<sup>48</sup> Even in Cambodia, where there is significant evidence that trafficking does occur for the purpose of work in the sex industry, there is also evidence that equally as many (mainly men) are trafficked into other industries, such as ‘factories, the agricultural sector and fishing industries where they work in circumstances of actual or potential exploitation, for legal and illegal work, legal and illegal marriages, organ trade, camel racing and bonded labour.’<sup>49</sup>

Finally, the Trafficking Protocol places an emphasis on maintaining the integrity of borders. Yet many of Southeast Asia’s borders were imposed (sometimes arbitrarily) by colonial rulers. Prior to this, they were ‘frontier’ areas, where neighbours and family travelled and traded without restriction.<sup>50</sup> In many cases, the traditions of unfettered trade and exchange have continued, because states lack either the incentive or the capacity to stem

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<sup>46</sup> Didier Bertrand, ‘Migrations and Trafficking in the Lao PDR: Contextual Analysis of Sexual Exploitation and Victimisation’ in Pierre Le Roux, Jean Baffie and Gilles Beullier (eds) *Trade in Human Beings for Sex in Southeast Asia* (2010), above n 9, 159.

<sup>47</sup> Ashley G. Blackburn, Robert W Taylor and Jennifer Elaine Davis, ‘Understanding the Complexities of Human Trafficking and Child Sexual Exploitation: The Case of Southeast Asia’ (2010) 20(1–2) *Women & Criminal Justice* 105.

<sup>48</sup> Susan Kneebone and Julie Debeljak, ‘Combating Transnational Crime in the Greater Mekong Subregion: the cases of Laos and Cambodia’ in Leslie Holmes (ed) *Trafficking and Human Rights: European and Asian Perspectives* (2010) Edward Elgar Publishing Limited, Cheltenham, UK, 133–152, 137.

<sup>49</sup> *Ibid*, 140.

<sup>50</sup> Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (1994) Silkworm Books, Bangkok, 73; Pierre-Arnaud Chouvy, ‘Illegal Trades Across Mainland Borders of Southeast Asia’ in Pierre Le Roux, Jean Baffie and Gilles Beullier (eds) *Trade in Human Beings for Sex in Southeast Asia* (2010) While Lotus Co. Bangkok, 305-326, 312.

unofficial cross-border commerce.<sup>51</sup> In Hekou, for example, where the Nanxi River and the Red River merge, and China and Vietnam meet, tens of thousands of undocumented Vietnamese women, many of them under the age of eighteen, enter China illegally by boat.<sup>52</sup> In the Isaan region, where the Mekong River marks the border between Thailand and Laos, government regulations on both sides make legal migration a lengthy, expensive and difficult process, unfamiliar to many people and avoided by most.<sup>53</sup>

The inadequacy of the global regime in reflecting the particularities of the practice of trafficking in Southeast Asia might plausibly explain the reluctance of states to subscribe to the Protocol. Yet, as the following section shows, the majority of ASEAN states have passed, or are in the process of passing, legislation aimed at addressing trafficking in persons. This legislation, without exception, draws heavily on the text of the Protocol and the TVPA. This raises two central and related questions. First, why, over the period of a decade, despite the disjuncture between the practice of trafficking and the global anti-trafficking architecture, have the ten member states of ASEAN passed broadly similar legislation, consonant with international norms, directed at preventing human trafficking and protecting the human rights of trafficked persons? In the language of compliance scholarship, this question can be put in the following way: what factors led to the decision on the part of states to give international human rights norms prescriptive status in domestic law? Second, what is the effect of global norms in these circumstances? Is it the result compliance (rule-consistent behaviour)? If not, then what is the explanation for this?

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<sup>51</sup> Susan Kneebone and Julie Debeljak, 'Combating Transnational Crime in the Greater Mekong Subregion: the cases of Laos and Cambodia' in Leslie Holmes (ed) *Trafficking and Human Rights: European and Asian Perspectives* (2010) Edward Elgar Publishing Limited, Cheltenham, UK, 133–152, 137. (2010)

<sup>52</sup> Zhang Juan, 'A Trafficking hot-spot in a China-Vietnam border town' in Michele Ford, Lenore Lyons and Willem van Schendel (eds) *Labour Migration and Human Trafficking* (2012) Routledge, Oxford, 95–111.

<sup>53</sup> Bertrand, above n 46; José Edgardo Gomez Jr., Nittana Southiseng, John Walsh and Samuel Sapuay, 'Reaching across the Mekong: local socioeconomic and gender effects of Lao-Thai cross-border linkages' (2011) 30 *Journal of Current Southeast Asian Affairs* 3.

#### 7.4 Domestic Response of ASEAN States to Trafficking in Persons

Except for Laos and Singapore, every ASEAN state has passed specific legislation relating to human trafficking. In all cases, the legislation includes provisions for the protection of victims of trafficking, as well as for the prosecution of perpetrators. All legislation references, to different extents, the Trafficking Protocol definition of ‘trafficking in persons’. In 2003, the Philippines passed the Anti-Trafficking in Persons Law of the Philippines, which sets the issue of trafficking within a human rights framework and provides a broad definition of ‘trafficking,’ deeming the issues of ‘consent’ irrelevant.<sup>54</sup>

In February 2013, President Aquino signed the expanded Anti-Trafficking in Persons Act,<sup>55</sup> which strengthens powers to prosecute those who engage or attempt to engage in human trafficking, and provides increased protection for the rights of trafficked persons.<sup>56</sup> In 2004, the Government of Brunei announced the passage of the Trafficking and Smuggling Persons Order of 2004.<sup>57</sup> The means for procuring trafficking as set out in Section 4 of the Brunei legislation (threat, use of force or other forms of coercion etc) is identical to the means set out in the Trafficking Protocol.<sup>58</sup> In 2005, Myanmar’s ‘Anti-Trafficking in Persons Law’ was decreed. Again, Myanmar’s legislation sets out in identical form the prohibited

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<sup>54</sup> The Philippines, Republic Act 9208.

<sup>55</sup> The Philippines, Republic Act 10364.

<sup>56</sup> Michael Lim Ubac, ‘Aquino signs Expanded Anti-trafficking law’ (14 February 2013) *Philippine Daily Inquirer* available at: <<http://globalnation.inquirer.net/64303/aquino-signs-expanded-anti-trafficking-law>> [accessed 8 December 2013].

<sup>57</sup> Trafficking and Smuggling of Persons Order, 2004 (No. S 82) Government Gazette, 2004–12–22, Part II, No. 43, pp. 2651–2662.

<sup>58</sup> Trafficking Protocol, above n 1, refers at Article 3 to: ‘the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.’ Section 4 of the Brunei Trafficking and Smuggling of Persons Order, *ibid*, refers to: ‘(a) threat; (b) use of force or other forms of coercion; (c) abduction (d) fraud; (e) deception; (f) abuse of power or of a position of vulnerability; (g) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.’

means of procuring persons for the purpose of exploitation.<sup>59</sup> Myanmar's anti-trafficking law also replicates the definition of 'exploitation' contained in the Trafficking Protocol.<sup>60</sup> In 2007, the Malaysian House of Representatives passed the Anti-Trafficking in Persons Act, which adopts the Trafficking Protocol language regarding means of trafficking<sup>61</sup> and the Trafficking Protocol definition of exploitation.<sup>62</sup> The Malaysian Act deems consent to be irrelevant and provides some measures for the care and protection of trafficked persons.<sup>63</sup>

In June 2008, Thailand introduced the Anti-Trafficking in Persons Act,<sup>64</sup> which replaced the 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act.<sup>65</sup> Thailand's 2008 Act extends protection to male victims of trafficking, and significantly strengthens the protection for victims of trafficking. The Thai legislation does not mirror the Protocol language as precisely as does the legislation of Myanmar, Brunei and Malaysia. However, the Thai legislation does contain the essential elements of the Protocol definition of trafficking.<sup>66</sup> The same may be said of Cambodia's Law on the Suppression of Human Trafficking and Commercial Sexual Exploitation, passed in 2008.<sup>67</sup> In March 2011, Vietnam's National Assembly passed the Anti-Human Trafficking Law and introduced a \$13.5 million dollar, five-year anti-trafficking plan.<sup>68</sup> Laos, at the time of writing, is drafting

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<sup>59</sup> The Anti-Trafficking in Persons Law (The State Peace and Development Council Law No. 5/ 2005) (The Waxing Day of Tawthalin, 1367, M.E.) (September 2005), Section 3(a).

<sup>60</sup> *Ibid*, Section 3(a) 'Explanation': 'Exploitation includes receipt or agreement for receipt of money or benefit for the prostitution of one person by another, other forms of sexual exploitation, forced labour, forced service, slavery, servitude, debt-bondage or the removal and sale of organs from the body'.

<sup>61</sup> Anti-Trafficking in Persons Act 2007, Act 670 Part V, Section 13(a)-(h) (Malaysia).

<sup>62</sup> *Ibid*, Section 2.

<sup>63</sup> *Ibid*, Section 16; Section 25–26.

<sup>64</sup> The Anti-Trafficking in Persons Act 2008, B.E 2551 (Thailand)

<sup>65</sup> Measures in Prevention and Suppression of Trafficking in Women and Children Act 1997, B.E 2540 (Thailand).

<sup>66</sup> The Anti-Trafficking in Persons Act, above n 64, Section 4.

<sup>67</sup> Cambodia, NS/RKM/0208/005.

<sup>68</sup> Socialist Republic of Vietnam Law No. 66/2011/QH12 on Human Trafficking Prevention and Combat. See: *Voice of America*, 'New Law in Vietnam to Tackle Changing Face of Human Trafficking' (28 November 2011) *Voice of America* available at: <<http://www.voanews.com/content/new-law-in-vietnam-to-tackle-changing-face-of-human-trafficking-134671708/168246.html>> [accessed 10 October 2013].

specific anti-trafficking legislation.<sup>69</sup> Singapore's government continues to rely on provision of existing criminal and labour law to prosecute traffickers and protect victims.<sup>70</sup> However, in 2012, Singapore's government implemented a National Plan of Action designed to combat human trafficking.<sup>71</sup>

Bilaterally, there are a host of agreements and Memorandums of Understanding between ASEAN states on the issue of trafficking: between Lao PDR and Vietnam;<sup>72</sup> between Cambodia and Thailand;<sup>73</sup> between Lao PDR and Thailand;<sup>74</sup> between Cambodia and Vietnam;<sup>75</sup> between Myanmar and Thailand;<sup>76</sup> between Thailand and Vietnam;<sup>77</sup> between Myanmar and China.<sup>78</sup> Not all of these agreements include the definition of trafficking contained in the Trafficking Protocol, but most provide details about the way in which trafficked persons should be treated (for example, referring to the provision of medical and psychological care) and make reference to the process for their return home (for example, within a certain time frame). No ASEAN-wide extradition treaty exists, although Cambodia and Thailand have signed one between themselves.<sup>79</sup>

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<sup>69</sup> BJ Murphy, 'Anti-Trafficking Activities to Combat Human Trafficking' (21 December 2012) available at: <http://laospdrnews.wordpress.com/category/anti-trafficking/> [accessed 8 October 2013].

<sup>70</sup> United States Department of State, 'Trafficking in Persons Report 2013' (June 2013) available at: <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm> [accessed 10 October 2013].

<sup>71</sup> Ibid.

<sup>72</sup> Memorandum on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (3 November 2010) (Lao PDR and Vietnam).

<sup>73</sup> Memorandum on Bilateral Cooperation in Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (31 May 2003) (Cambodia and Thailand).

<sup>74</sup> Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children (13 July 2005) (Thailand and Lao PDR).

<sup>75</sup> Agreement on Bilateral Cooperation For Eliminating Trafficking In Women And Children And Assisting Victims Of Trafficking (10 October 2005) (Cambodia and Vietnam).

<sup>76</sup> Memorandum of Understanding on Cooperation to combat trafficking in persons, especially Women and Children (24 April 2009) (Myanmar and Thailand).

<sup>77</sup> Agreement on Cooperation to Eliminate Trafficking in Persons (24 March 2008) (Thailand and Vietnam).

<sup>78</sup> Memorandum of Understanding on Strengthening the Cooperation on Combating Human Trafficking (11 November 2009) (Myanmar and China).

<sup>79</sup> Treaty on Extradition, Bangkok (6 May 1998) (Thailand and Cambodia).

It is helpful to recap briefly, at this point, some of the various theories canvassed in Chapter 1, about why states commit to international human rights norms and then translate their commitments into domestic laws and policies. First, the assumption of compliance scholars such as Risse, Ropp and Sikkink, and many others, is that states do not of their own accord effect measures to protect international human rights—states must be coerced, persuaded or socialised by the international community into doing so.<sup>80</sup>

Theories about why states commit to international human rights cluster around three main ideas. First, many scholars, following the ‘spiral theory of human rights’ described by Risse, Ropp and Sikkink in *The Power of Human Rights*, argue that states act instrumentally in committing to international human rights norms, rationally balancing the costs and benefits of material and/or social sanctions and rewards.<sup>81</sup> The central argument of Risse, Ropp and Sikkink is that tactical concessions by states (such as treaty ratification) provide domestic and international actors with the leverage and lobbying power to pressure states to give norms prescriptive status.<sup>82</sup> In this way, eventually, the passing of domestic legislation will follow ratification. In Section 7.5 (below), I argue that the first stage of this process—tactical concessions motivated by sanctions and rewards—explains why ASEAN states passed domestic legislation to prevent trafficking. As I will show, however, this stage is not necessarily followed by compliance.

There are two other ways in which human rights change is commonly held to occur. One is where there is a community of states that practice certain patterns of behaviour, and states within that community behave in ways that the community deems appropriate. Where

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<sup>80</sup> T.A Borzel and T. Risse, ‘Human Rights in Areas of Limited Statehood’ in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink *The Persistent Power of Human Rights* (2013) Cambridge University Press, Cambridge U.K., 63-84.

<sup>81</sup> Jeffrey Checkel, ‘Why comply? Social learning and European identity change’ (2001) 55(3) *International Organization* 553.

<sup>82</sup> A similar argument underpins Simmons work on compliance: Beth Simmons, *Mobilizing for Human Rights* (2009) Cambridge, Cambridge University Press.

the adoption of international human rights norms is part of this pattern, then states will, like their peers, also adopt human rights norms.<sup>83</sup> This is connected to (but distinct from) the third process of human rights change. This is where interaction, social learning and deliberation about human rights norms occur between and among a group of states. The result is that states gradually redefine the way they think about themselves and reshape their interests and preferences.<sup>84</sup> My theory about the legitimacy of regional human rights system posits that within a regional system of states or as a result of regional-level interaction, these last two processes take place, and that the result is a deeper level of commitment and better level of compliance, because norms are developed and articulated by (and between) a small number of states which share similar backgrounds, histories, borders and concerns. We see this occurring, I argue, in relation to the response of ASEAN states to the issue of trafficking in persons (Section 7.6).

## 7.5 Responding to Pressure

The most plausible explanation for why ASEAN states transposed international norms into domestic legislation centres on the influence and effect of the TVPA in encouraging the passage of domestic legislation and in generating policy measures. The history of Indonesia's anti-trafficking measures provides an illustration of the way the TVPA operates in this regard. In 2001, the United States published its first Trafficking in Persons Report, placing Indonesia in the Tier-3 category. Indonesia remained in the Tier 3 category in the 2002 report. On 30 December 2002, through Presidential Decree Number 88, 2002, Indonesia announced a 'National Plan of Action' (NPA) to end human trafficking. The NPA references

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<sup>83</sup> James G. March and Johan P. Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52(4) *International Organization* 943.

<sup>84</sup> Emanuel Adler and Michael Barnett(eds) *Security Communities* (1998) Cambridge University Press, Cambridge.

the specific criticisms made of Indonesia in the 2002 TIP (for example, ‘that there is currently not a comprehensive and specific trafficking law in Indonesia’) and lists amongst its objectives: ‘the passage of laws to punish trafficking and traffickers and to protect victims of violence, witnesses, and migrant workers.’ The NPA recognises ‘the need to ratify the Convention against Transnational Organized Crime of 2000 and two associated international protocols related to trafficking in persons in order to meet international standards’ and the need to ‘synchronize international standards on trafficking with national laws through revision of the Criminal Code, Criminal Procedural Code, Marriage Law, Immigration Law, and the Law on the Human Rights Tribunal.’<sup>85</sup> The NPA adopts a definition of human trafficking that conforms to the definition contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. Following these efforts, in the 2003 TIP, Indonesia was placed in the Tier-2 category.<sup>86</sup>

By 2006, however, Indonesia had still not passed comprehensive anti-trafficking legislation and in the view of the US, had not provided evidence of increasing efforts to combat trafficking.<sup>87</sup> In 2006, Indonesia was downgraded to the Tier 2 Watch-list. Following this, in April 2007, Indonesia’s President signed into law a comprehensive anti-trafficking bill. In the 2007 TIP, Indonesia was again returned to Tier 2. Observers within Indonesia are candid about the fact that Indonesia’s response to human trafficking has been motivated by the need to escape sanctions from the US, such as restrictions on funds not only for counter-trafficking measures but also for non-humanitarian and non-trade aid.<sup>88</sup>

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<sup>85</sup> Neha Misra, ‘The National Plan of Action’ undated, available at: <http://www.solidaritycenter.org/files/IndoTraffickingPlan%20of%20Action.pdf> [accessed 10 October 2013].

<sup>86</sup> Chuang, above n 24, 467.

<sup>87</sup> United States Department of State, ‘Trafficking in Persons Report 2006’ (June 2006) available at: <http://www.state.gov/j/tip/rls/tiprpt/2006/index.html> [accessed 8 October 2013].

<sup>88</sup> Yuyun Wahyuningrum, ‘Gender Politics in Trafficking Discourses in Indonesia’ Paper presented at the International Conference on Mainstreaming Human Security: Asia Contribution, Bangkok (4–5 October 2007). Copy on file with author.

There are many examples of this kind of responsiveness in Southeast Asia. In 2010, the Philippines was placed on the Tier 2 Watch-list, which, according to Philippines Vice-President Jejomar C. Binay, placed at risk ‘some \$700 million worth of non-humanitarian and non-trade related aid from the US.’<sup>89</sup> Increased efforts to prevent trafficking, including the Philippines ‘Expanded Anti-Trafficking Act’ (2013) were passed explicitly: ‘to make the fight against human trafficking more effective, as the country remains in the United States State Department’s radar as a venue that harbors the modern form of slavery.’<sup>90</sup> Vice-President Binay stated that:

increasing the number of anti-human trafficking monitoring teams in entry and exit points in the country, strengthening anti-trafficking legislation and speeding up prosecution for trafficking cases. With all these initiatives in play, Tier 1 classification [fully compliant with anti-trafficking standards] is more than possible. Indeed, it is only a question of time.<sup>91</sup>

The government discourse surrounding the introduction of the 2013 Act was entirely focused on the potential for the new measures to change the Philippines position in the TIP rankings. Introducing the bill, Presidential spokesperson Edwin Lacierda said that:

It is Malacañang’s [the Presidential Palace] hope that the new law would result in the United States’ removing the Philippines from its anti-trafficking watchlist. This is a concern and a priority of our President and this measure will be enforced by the different agencies, especially by the Department of Justice as well as our police agencies..... [o]ver a year ago we were taken out of that category—Tier 2. [But] we’re still in the watchlist. We would like to improve our standing in the watchlist and we hope that, with this expanded coverage of anti-trafficking, we will be able to remove ourselves from the watchlist.<sup>92</sup>

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<sup>89</sup> ASEAN Trade Union Council, Press Release: ‘ASEAN Convention on Human Trafficking Sought’ (13 July 2011) available at: <<http://aseantuc.org/2011/07/asean-convention-on-human-trafficking-sought/>> [accessed 20 October 2013].

<sup>90</sup> Michael Lim Ubac, ‘Stricter Anti-human Trafficking Law Signed’ (13 February 2013) *Philippine Daily Inquirer* available at: <<http://www.philstar.com/headlines/2013/02/13/908396/stricter-anti-human-trafficking-law-signed>> [accessed 10 October 2013].

<sup>91</sup> ASEAN Trade Union Council (press release), ‘ASEAN Convention on Human Trafficking Sought’ (13 July 2011) available at: <<http://aseantuc.org/2011/07/asean-convention-on-human-trafficking-sought/>> [accessed 31 October 2013].

<sup>92</sup> Michael Lim Ubac, ‘Aquino Signs Expanded Anti-trafficking Law’ (14 February 2013) *Philippine Daily Inquirer* available at: <<http://globalnation.inquirer.net/64303/aquino-signs-expanded-anti-trafficking-law>> [accessed 8 December 2013].

In Thailand, the Thai government Minister of Social Development and Human Security, Santi Promphat, announced on 3 April 2013 the drafting of new anti-trafficking laws, designed to respond to the fact that:

the United States has placed Thailand in the Tier 2 Watch List for three consecutive years in the Trafficking in Persons Report of its Department of State, which could affect Thailand's image. The image of Thailand's exports into the American market could also be affected, especially seafood products, which have been determined as products that involve the use of child labor and illegal foreign workers, and human trafficking.<sup>93</sup>

Writing specifically in relation to Southeast Asia, trafficking expert Anne Gallagher claims to have observed 'multiple instances in which the open threat of a negative grade in the U.S. TIP Report provided the impetus for major reform initiatives, including the criminalization of trafficking.'<sup>94</sup>

Although several ASEAN states appear to have passed reforms directly in response to US pressure, there has been cavilling (which has been public, in the case of Singapore) about the lack of transparency and the subjective methodology employed to rank states into tiers of compliance and accusations that ranking are based less on empirical evidence than on the political preferences of the United States.<sup>95</sup> Myanmar, for example, despite passing significant legislation directed to addressing trafficking in persons in 2005, has been consistently ranked 'Tier 3'. Myanmar finally achieved a 'Tier 2 watch-list' ranking in 2012, the same year that the US dropped many of its sanctions against Myanmar, and after

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<sup>93</sup> 'Thailand Serious about Combating Human Trafficking and Protecting Victims' (17 January 2013) *Inside Thailand* available at: <[http://thailand.prd.go.th/view\\_news.php?id=6606&a=2](http://thailand.prd.go.th/view_news.php?id=6606&a=2)>.

<sup>94</sup> Gallagher, above n 31, 485. Gallagher writes: 'As explored at various points throughout this book, some of these responses have been highly problematic in human rights terms, a side effect that is not explored or even acknowledged by the U.S. Department of State's reports themselves.'

<sup>95</sup> 'Singapore Urges U.S. to Adopt More Objective Methodology in Human Trafficking Report' (26 June 2013) *Xinhua Singapore* available at: <<http://www.kpl.net.la/english/E-newspaper/2013/June/26.pdf>> [accessed 20 October 2013]. In 2013, 'The Prevention of Human Trafficking Bill' was introduced into Parliament.

Myanmar agreed to a joint plan on trafficking with the United States.<sup>96</sup> Chuang notes that Indonesia achieved a Tier 2 ranking in 2003, at around the same time that Indonesia became a key US ally in the War against Terrorism.<sup>97</sup>

One of the criticisms of the TIP reports is that they place significant emphasis on the numbers of convicted traffickers, and an increase in the number of convictions from previous years is viewed as an indicator of a country's success in addressing the issue of trafficking.<sup>98</sup> For example, in 2004, Laos' anti-trafficking office reported five convictions for trafficking-related crimes. The 2005 TIP Report placed Laos in the 'Tier 2' category.<sup>99</sup> The following year, Laos reported only one conviction for trafficking. Noting this, that year, the US placed Laos in the Tier 3 category.<sup>100</sup> In 2007, however, the TIP Report lauded the fact that the Lao government had demonstrated progress in its anti-trafficking law enforcement efforts, reporting 27 trafficking investigations that resulted in the arrests of 15 suspected traffickers, 12 of whom were prosecuted. Laos was returned to Tier 2. In relation to Thailand, the 2012 TIP report noted that the Royal Thai Police initiated 83 investigations of trafficking in 2011: 67 for sex trafficking and 16 for forced labour, involving 155 suspected offenders and representing an increase from 70 such investigations in 2010. However, it also noted that investigations led to only 67 prosecutions in 2011, compared to 79 prosecutions in 2010. The

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<sup>96</sup> US Department of State, 'United States – Myanmar Joint Plan on Trafficking in Persons' (18 November 2012) available at: <<http://www.state.gov/r/pa/prs/ps/2012/11/200675.htm>> [accessed 20 November 2012].

<sup>97</sup> Chuang, above n 24.

<sup>98</sup> Judy Hemming and Nicola Piper, 'Trafficking and Human Security in Southeast Asia: A Sociological Perspective' (2004) available at: <[http://www.idss-nts.org/theme\\_illegal3.htm](http://www.idss-nts.org/theme_illegal3.htm)> [accessed 10 October 2013]; Alese Wooditch, 'The Efficacy of the Trafficking in Persons Report: a Review of the Evidence' (2011) 22(4) *Criminal Justice Policy Review* 471.

<sup>99</sup> United States Department of State, 'Trafficking in Persons Report 2005' (June 2005) available at: <<http://www.state.gov/j/tip/rls/tiprpt/2005/index.html>> [accessed 13 October 2013].

<sup>100</sup> United States Department of State, 'Trafficking in Persons Report 2006' (June 2006) available at: <<http://www.state.gov/j/tip/rls/tiprpt/2006/index.html>> [accessed 8 October 2013].

report also noted that there were 12 trafficking-related convictions in 2011, a decrease from the previous year's 18 convictions.<sup>101</sup> Thailand remained on the Tier 2 Watchlist in 2011.

The problem with what Anne Gallagher describes as a 'success by numbers' approach is that it:

serves to discourage the development of longer-term capacities, systems and processes that are actually required for an effective criminal justice response. Conversely, it promotes a focus on the easy wins, the small players who can be identified and apprehended much more easily than those who are reaping the real financial rewards. The US standards are also silent on the issue of quality. All prosecutions seem to count, irrespective of their adherence to international criminal justice standards. The absence of an explicit qualitative element in the crucial area of prosecutions risks undermining basic rights including the right to fair trial as dysfunctional, often corrupt, national criminal agencies are called in to help secure a positive report card.<sup>102</sup>

I return here to some of the discussion in Chapter 1, where I explained how international relations theorists drew on individual level psychology (shame, social status, material reward) to explain what motivates macro-level state practices. In Chapter 1, I noted that although there have been questions and criticisms about how appropriate it is to employ theories about what motivates individuals to explain the behaviour of states, that most theories of human rights did this, either explicitly or implicitly.<sup>103</sup> Part of my argument about legitimacy in Chapter 1, drawing on macro-level psychology, was that there was likely to be greater compliance with human rights norms in cases where states were intrinsically motivated because of congruence between human rights norms and their own interests, or between human rights norms and social norms that have significant legitimacy locally. I argued that without this congruence or local acceptance, the result was likely to be

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<sup>101</sup> See: United States Department of State, 'Trafficking in Persons Report 2012' (June 2012), available at: <<http://www.state.gov/j/tip/rls/tiprpt/2012/index.html>> [accessed 8 October 2013].

<sup>102</sup> Anne Gallagher, 'A Shadow Report on Human Trafficking in Lao PDR: The US Approach vs. International Law', above n 31.

<sup>103</sup> Jose Alvarez, 'Do States Socialize?' (2005) 54(4) *Duke Law Journal* 961, 969.

diminished incentive for compliance. From this perspective, let us consider the operation of the TVPA in relation to Southeast Asian states.

One of the primary ways that the TVPA operates as an external motivator is through material inducement and material disincentive. The problem with material rewards or punishment is that it has the potential to ‘crowd out’ intrinsic motivation states may have to follow norms for non-material reasons.<sup>104</sup> Incentive-based or punishment-based policies suggest to states that preferred behaviour (preventing trafficking, protecting the rights of trafficked persons) is ‘not self-evidently appropriate or that the broader social environment does not adequately value self-motivated rule adherence.’<sup>105</sup> As Goodman and Jinks argue, if action can be justified by both normative sentiments and externally imposed material incentives or disincentives, then the result may be a negative effect on the internalisation of norms.<sup>106</sup> The reasons are as follows.

First, the purpose of a regime of penalties and incentives is two-fold: to supply states with a rational reason for pursuing certain behaviour; and to supply a signalling effect, indicating that the proscribed behaviour is abhorrent to a community of actors. In relation to the former, the inference that is generally drawn from the presence of material incentives or disincentives is that the reason for action is the material incentive, rather than a state’s moral character or principled beliefs. We see this clearly in the statements that have emanated from government representatives of the Philippines, Thailand and Indonesia, when they have supplied reasons for their actions in relation to anti-trafficking measures. References to the importance of protecting the human rights of trafficked persons (where any exist) are almost entirely drowned out by references to the importance of avoiding negative sanctions from the

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<sup>104</sup> Ryan Goodman and Derek Jinks, ‘Social Mechanisms to Promote International Human Rights: Complementary or Contradictory?’ (2013) in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights* (2013) Cambridge University Press, Cambridge U.K., 106.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

United States. At a minimum, this creates confusion: how can one tell whether a government is acting out of a principled belief about how it ought to behave, or in pursuit of a material benefit? In relation to the ‘expressive function’ of punishment (as a signal that the international community condemns the proscribed behaviour), Goodman and Jinks argue that this is diminished if penalties and rewards issue from actors who have insufficient social standing vis-à-vis the signalled actors—‘a narrow band of donor countries, a remote foreign court, unrepresentative segments of civil society, a hostile country.’<sup>107</sup> In relation to most Southeast Asian states, in relation to most human rights issues, the United States would fall within the category of actors with ‘insufficient social standing vis-à-vis the signalled actors’ (see the discussion on democracy in Chapter 3).

Second, Goodman and Jinks argue that over-justification effects self-perception, causing actors to lose cognitive track of their motives for abiding by a norm. In these circumstances, actors are most likely to attribute their actions to material incentives. The result is that the strength of intrinsic motivation for observing a social norm is lost.<sup>108</sup> That is, states that comply (or would have complied) with a norm because it is an extension of their identity or internal value system, lose track of this as the reason for compliance, because of the presence of material reasons. This can delay the final stages of rule consistent behaviour or make it more shallow and difficult to sustain:

Accordingly, communicative exchanges within a domestic setting might shift toward the more limited agenda of powerful international institutions when those institutions promote human rights through material inducements. One concern is that, had actors been left to their own devices, a broader and stronger human rights agenda might have emerged.<sup>109</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid, 111.

<sup>109</sup> Ibid, 114.

Third, and relatedly, the provision of material incentives often compromises a sense of self-determination and degrades intrinsic motivation for engaging in behaviour.<sup>110</sup> Goodman and Jinks suggest that where international coercion through material incentives is considered controlling, actors resist even normative practices that they would otherwise agree with. We can see this in the attitude taken by Singapore to the requirements of the TVPA. Singapore, despite implementing policies designed to prevent trafficking, has refused to pass legislation for this purpose and has publicly expressed resentment at U.S. attempts to influence the domestic agenda.

One might argue that this does not matter much. After all, if states are not intrinsically motivated to follow certain norms, then it is irrelevant how they are brought to include human rights norms on the domestic agenda. What matters is that they do *something*, regardless of why, or whether it is the result of coercion. It might also be argued that even if states are initially spurred to action by crude measures of coercion and bribery, this may begin a process (of education and reflection) that ends in genuine acceptance of and respect for a particular norm.

My response to such arguments is that *does* matter by what means states are lead to adopt different norms, because this affects how deeply and sincerely norms are promoted and acted upon. Granted, in circumstances where there is a blanket rejection of norms and denial that violations exist, then coercion and bribery that results in even superficial change might be seen as better than no change at all. But where intrinsic motivation *does* exist, as I argue is the case in Southeast Asia in relation to the issue of trafficking in persons, then I maintain that coercive measures can lead to over-justification and problems around self-perception and self-determination.

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<sup>110</sup> Ibid, 112.

Let us turn then, finally, to my argument that an autochthonous regional conception of the importance of preventing trafficking in persons exists in Southeast Asia. What evidence is there to support the idea that if ASEAN states ‘had been left to their own devices, a broader and stronger human rights agenda might have emerged’?<sup>111</sup> What is the evidence that ASEAN states are sufficiently motivated to conform to norms about trafficking for non-material reasons? In the following section of this chapter, I describe how ASEAN states do in fact possess intrinsic motivation for pursuing anti-trafficking norms, born out of long-standing and deeply held concerns about state sovereignty and the threat posed by the illegal traffic of persons across borders; and also, more recently, born out of the work of the regions National Human Rights Institutions (NHRIs), which have focused on the human rights aspects of the practice of trafficking in persons. These reasons for actions are occluded by the discourse around the introduction of anti-trafficking measures, which focuses on immediate responsiveness to US threats and TIP rankings.

## **7.6 ASEAN and Trafficking in Persons**

In 2004, the same year that ASEAN states signed the Declaration on the Elimination of Violence Against Women,<sup>112</sup> and agreed upon the Vientiane Action Program (which explicitly commits ASEAN to promote the awareness, education and protection of human rights),<sup>113</sup> ASEAN states signed the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children.<sup>114</sup> As well as identifying trafficking in persons as a security concern, the Declaration notes the link between social and economic rights,

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<sup>111</sup> Ibid, 114.

<sup>112</sup> Declaration on the Elimination of Violence Against Women in the ASEAN Region, Jakarta, Indonesia (30 June 2004).

<sup>113</sup> Vientiane Action Program, Tenth ASEAN Summit, Vientiane, Lao PDR (29 November 2004).

<sup>114</sup> ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children, Vientiane, Lao PDR (29 November 2004).

migration and vulnerability to trafficking, and strikingly, draws attention to the ‘immorality and inhumanity of this common concern.’<sup>115</sup> 2004 was also the year that the ASEAN Inter-Parliamentary Organization passed a ‘Resolution on the role of Parliament in Combating Trafficking in Women and Children in the ASEAN region,’<sup>116</sup> drawing attention to ‘the lack of education, unequal treatment and low status of women, poverty and unemployment of women, particularly in the ASEAN region, are major factors contributing to the causes of trafficking of women and minors.’<sup>117</sup>

Seven years later, AICHR identified human trafficking as one of the thematic studies to be undertaken within the first five years of the commission and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) included a focus on victims of trafficking in its 2012–2016 work-plan.<sup>118</sup> In their 2007 Joint Communiqué, ASEAN leaders foreshadowed the development of an ASEAN Convention on Trafficking in Persons,<sup>119</sup> currently being prepared by the Philippines, and at the time of writing under consideration by the ASEAN Senior Officials Meeting.<sup>120</sup>

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<sup>115</sup> Ibid, Preamble.

<sup>116</sup> ASEAN Inter-Parliamentary Organization, Resolution on the Role of Parliament in Combating Trafficking in Women and Children in the ASEAN region, 25th General Assembly, Phnom Penh, Cambodia (12-17 September 2004).

<sup>117</sup> Ibid.

<sup>118</sup> ASEAN Intergovernmental Commission on Human Rights, Five-year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010 – 2015); The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Work Plan (2012–2016) and Rule of Procedure (2012) available at: [http://srsg.violenceagainstchildren.org/sites/default/files/political\\_declarations/The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2012-2016-and-Rules-of-Procedures-ROP.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/political_declarations/The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2012-2016-and-Rules-of-Procedures-ROP.pdf) [accessed 8 October 2013]. At the time of writing, neither AICHR nor ACWC have produced any reports or made any investigations related to trafficking in persons.

<sup>119</sup> ASEAN, Joint Communiqué of the Sixth ASEAN Ministerial Meeting on Transnational Crime (AMMTC) (2007) available at: <http://cil.nus.edu.sg/rp/pdf/2007%20Joint%20Communique%20of%20the%206th%20ASEAN%20MM%20on%20Transnational%20Crime-pdf.pdf> [accessed 8 October 2013], [7].

<sup>120</sup> In 2006, ASEAN published its ‘Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims’: ASEAN, ‘Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims’ (2006) (Supplement and Update, 2007). A set of guidelines on trafficking in persons, endorsed by SOMTC in 2007, provides guidance to criminal justice practitioners on international cooperation relating to trafficking in persons cases. See: Ralf Emmers, ‘ASEAN and the Securitization of Transnational Crime in Southeast Asia’ (2003) 16(3) *Pacific Review* 419.

In this final section, I argue that a regional approach to the issue of human trafficking in Southeast Asia has been generated from the ‘top down’ by states with similar concerns about sovereignty, territorial integrity and threats to state security; and from the ‘bottom up’, by engagement between and among regional networks of non-governmental organisations and national human rights institutions (NHRIs). The driving factors behind these two interests in developing a regional approach to trafficking in persons are entirely different, and because of this, there is inconsistent and sometimes conflicting emphasis placed on different aspects of the issue of trafficking in persons; on the protection of borders and the prosecution of the crime of trafficking, for example, as against the protection of the rights of trafficked persons. Nonetheless, divergent interests in eliminating trafficking are broadly congruous with a regional approach to the problem, and this explains why ASEAN states have shown increasing willingness to cooperate amongst themselves on the problem of trafficking in persons, even to the extent of appearing willing to subscribe to a legalised regime for addressing the issue. The backdrop to cooperative efforts is the imminent creation of a single ASEAN economic community.<sup>121</sup>

The ASEAN Economic Community (AEC) Blueprint envisages, by 2015, the following: (a) a single regional market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. The AEC is expected to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.<sup>122</sup> As we have seen, one of the aims stated in the ASEAN Charter is to alleviate

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<sup>121</sup> In 1997, on the thirtieth anniversary of ASEAN, ASEAN leaders adopted ‘the ASEAN Vision 2020’, foreshadowing the community: ten years later, the date for its birth was accelerated to 2015. Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, Cebu, Philippines (13 January 2007). Each of the ASEAN pillars has its own Blueprint, and together, these blueprints form the Roadmap for an ASEAN Community 2009–2015.

<sup>122</sup> ASEAN Economic Community, <<http://www.aseansec.org/18757.htm>> [accessed on 5 February 2011].

poverty and address the development gap between ASEAN states.<sup>123</sup> The AEC, arguably, will generate economic growth, resulting in more jobs, improved livelihoods and an overall reduction in poverty. But it also has the potential to accentuate disparities within and between ASEAN countries and increase relative poverty and inequality, leading to cross-border migration and trafficking.<sup>124</sup>

First, let us consider the ‘top down’ perspective of states. Why is trafficking in persons an issue of joint concern to states in Southeast Asia? One part of the explanation centres on the particular notion of state security that prevails in the region. The idea of ‘comprehensive’ or ‘overall security’, originally coined by Japan in the 1970s, was adopted by Indonesia, Malaysia, the Philippines and Singapore a decade later.<sup>125</sup> Within the framework of comprehensive security, national security depends not only on the absence of external military hostility, but also on the presence of socio-economic development.<sup>126</sup> Internal threats as well as external threats are recognised as having the potential to destabilise the state and undermine sovereignty. Different ASEAN states developed different perceptions about the nature of these internal threats, based on their different historical experiences. For example, Malaysia’s concern with societal order grew out of its experience containing the communist insurgency in the period 1948–60, and the recognition that its racial and religious cleavages could lead to dangerous disharmony. Indonesia’s concern, shaped by its struggle against Dutch colonialism, focused on the necessity of building a united Indonesian state. For Singapore, a small island state, internal stability was viewed as exacerbating external

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<sup>123</sup> Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008), Article 1(6).

<sup>124</sup> Phil Marshall, ‘Globalization, migration and trafficking: some thoughts from the Southeast Asian region’, Paper presented to the Globalization Workshop, Kuala Lumpur (8-10 May 2001) available at: <[http://www.childtrafficking.com/Docs/marshall\\_uniap\\_mekong\\_2001\\_.pdf](http://www.childtrafficking.com/Docs/marshall_uniap_mekong_2001_.pdf)> [accessed 7 December 2013].

<sup>125</sup> Jim Rolfe, ‘Pursuing Comprehensive Security: Linkages between National and Regional Concepts, Some Applications’ (1996) in Mohamad Jawhar Hassan and Thangam Ramnath (eds) *Conceptualizing Asia-Pacific Security* (1996) Institute of Strategic and International Studies, Kuala Lumpur.

<sup>126</sup> David Dewitt, ‘Common, comprehensive, and cooperative security’ (1994) 7(1) *Pacific Review* 1.

vulnerabilities. The idea of ‘resilience’ took shape amongst ASEAN’s original members as part of the political discourse (Malaysia)<sup>127</sup> and as part of official policy (*keratasan nasional* ‘national resilience’) (Indonesia). In Indonesia’s case, national resilience consisted of strengthening and developing the nation’s ideological, political, economic, socio-cultural, security and defence capacities.<sup>128</sup>

As early as 1976, the idea emerged that the stability and internal and external security of individual states was dependent on the stability of other states in the region, and that regional resilience and national resilience were interdependent. At the first ASEAN Summit, ASEAN’s five members declared, ‘The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience.’<sup>129</sup> The Treaty of Amity and Cooperation in Southeast Asia, agreed upon at this same meeting, requires ASEAN member states to ‘endeavour to strengthen their respective national resilience in their political, economic, socio-cultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities.’<sup>130</sup>

Transnational crime—specifically drug trafficking—was identified early on as a threat to comprehensive security and hence to national and regional stability.<sup>131</sup> Drug

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<sup>127</sup> Mutthiah Alagappa, ‘Comprehensive Security: Interpretations in ASEAN countries’ in Robert A. Scalapino et al (eds) *Asian Security Issues: Regional and Global* (1988) Institute of East Asian Studies, University of California, Berkeley, 50-78, 62.

<sup>128</sup> Alagappa, *ibid.*

<sup>129</sup> Declaration of ASEAN Concord, First ASEAN Summit, Bali, Indonesia (24 February 1976).

<sup>130</sup> Dato Musa Hitam, ‘Malaysia’s Doctrine of Comprehensive Security’, Speech at the Fourteenth Anniversary Dinner Harvard Club of Singapore (1984), published in 17(1) *Foreign Affairs* (Malaysia). Hitam identified Malaysia’s doctrine of comprehensive security, including ‘a secure Southeast Asia’ and ‘a strong and effective ASEAN community.’ He argued these goals required adherence to the principle of non-intervention and ‘the building of a structure of trust, confidence and goodwill between the ASEAN states’. Hitam, 94, 96.

<sup>131</sup> Declaration of ASEAN Concord, First ASEAN Summit, Bali, Indonesia (24 February 1976) called for ‘[i]ntensification of cooperation among member states as well as with the relevant international bodies in the prevention and eradication of the abuse of narcotics and the illegal trafficking of drugs’. Subsequently, the

addiction and trafficking in drugs and crime were perceived as indicators of a state's inability to control its borders, and thus as signs of a weak state where leaders were unable to maintain social order.<sup>132</sup> Later, in the 1980s, drug trafficking and drug use fed concerns about Acquired Immune Deficiency Syndrome (AIDS) and the views of some ASEAN member states that AIDS was the result of homosexuality, prostitution and heroin use.

In 1983, the Malaysian government officially declared illicit drug trafficking to be a threat to national security. In 1988, ASEAN issued a Joint Declaration in which it stated that the illicit drug trade was a problem that 'could escalate to such a level where perpetrators can pose serious political and security threats to the region.'<sup>133</sup> ASEAN Ministers argued, '[T]he management of such transnational issues is urgently called for so that they would not affect the long-term viability of ASEAN and its individual member nations.'<sup>134</sup> In this context, the decision to expand the membership of ASEAN in the 1990s to include Myanmar and Laos, which were major cultivators of opium poppies, led to increased concern about drug trafficking. At a regional conference on transnational crime held in the Philippines in 1997, Philippine President Fidel Ramos declared, 'regional security continues to be assaulted by transnational crime and from time to time international terrorism.'<sup>135</sup> Following this conference, at the 1997 meeting of ASEAN Ministers, it was agreed that 'sustained regional cooperation' was necessary in order to deal with 'the problems of terrorism, narcotics, arms smuggling, piracy and human trafficking.'<sup>136</sup>

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ASEAN Declaration of Principles to Combat the Abuses of Narcotics Drugs (26 June 1976) was adopted in Manila, and this led to some initial proposals in responding to the issue of narcotics.

<sup>132</sup> Alagappa, above n 127.

<sup>133</sup> ASEAN, Joint Declaration for a Drug-Free ASEAN, Manila (25 July 1998).

<sup>134</sup> Ibid, [44].

<sup>135</sup> Speech by His Excellency Fidel V. Ramos at the Meeting of ASEAN Ministers of Interior/Home Affairs (AMIHA) and First Conference to Address Transnational Crimes, Manila, Philippines (20 December 1997).

<sup>136</sup> ASEAN, Joint Communique of the 30th ASEAN Ministerial Meeting Subang Jaya, Malaysia (25 July 1997) available at: <<http://www.asean.org/communities/asean-political-security-community/item/joint-communique-the-30th-asean-ministerial-meeting-amm-2>> [accessed 10 October 2013], [52].

The ASEAN Declaration on Transnational Crime, signed by Heads of State in 1997, draws attention to: ‘the pernicious effects of transnational crime ... on regional stability and development, the maintenance of the rule of law and the welfare of the region’s peoples’ and recognises the need for effective regional modalities to combat these forms of crimes.<sup>137</sup> In 1999, ASEAN implemented a ‘Plan of Action to Combat Transnational Crime’, which instituted the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and the Senior Officials Meeting on Transnational Crime (SOMTC), both bodies established to promote cooperation and coordination amongst ASEAN states in addressing human trafficking (as well as other transnational crimes).<sup>138</sup>

Although it had been mentioned earlier, it was not until the early 1990s that trafficking in persons came to be identified as another transnational crime that had the potential to threaten economic, political and societal stability.<sup>139</sup> ASEAN’s concern about human trafficking was threefold: first, it was seen as linked to drug trafficking (Thailand’s government in particular viewed trafficking of drugs and persons from Myanmar as an immediate threat to its security); second, it had the potential to undermine orderly, legal migration and hence, jeopardise relations between states, thereby threatening peace and

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<sup>137</sup> ASEAN Declaration on Transnational Crime, Manila, Philippines (20 December 1997).

<sup>138</sup> ASEAN, ‘Plan of Action to Combat Transnational Crime’ (1997) available at:

<http://cil.nus.edu.sg/rp/pdf/1999%20ASEAN%20Plan%20of%20Action%20to%20Combat%20Transnational%20Crime-pdf.pdf> [accessed 10 October 2013].

<sup>139</sup> In July 1996, the ASEAN Ministerial Meeting (AMM) declared that transnational crimes that included drug trafficking and money laundering: ASEAN, Joint Communique of The 29th ASEAN Ministerial Meeting Jakarta (20-21 July 1996) available at: <http://www.asean.org/communities/asean-political-security-community/item/joint-communique-of-the-29th-asean-ministerial-meeting-amm-jakarta-20-21-july-1996> [accessed 10 October 2013]. The ASEAN Vision 2020, adopted by ASEAN leaders at the Second Informal Summit in 1997, foreshadowed the evolution of agreed rules of behaviour and cooperative measures to deal with issues such as drug trafficking, trafficking in women and children and other transnational crimes. The following year, at the ASEAN Summit in December 1998, ASEAN leaders adopted the ‘Hanoi Plan of Action’, which began the process of articulating a platform for collaboration in combating human trafficking. In 1999, Foreign Ministers adopted the ASEAN Plan of Action to Combat Transnational Crime and in 2002, ASEAN countries agreed on a Work Programme to Implement the Plan of Action. Ralf Emmers, ‘Globalization and Non-Traditional Security Issues: A Study of Human and Drug Trafficking in East Asia’ (2004) *IDSS Working Papers*, no. 62, 18; ASEAN, ‘Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims’ (2006), 66–67, 81.

security;<sup>140</sup> third, it was something that was viewed as having the potential to undermine the moral foundation of the nation. In relation to this last point, in Indonesia, for example, the Islamic-based Justice and Prosperity Party (PKS) argued that trafficking ‘disgraced Indonesia’s dignity and identity as a nation,’ giving the impression that Indonesia is ‘incapable to protect its citizens and is grouped with countries which have bad records on trafficking in persons.’<sup>141</sup> An official at the Indonesian Ministry of Women Empowerment agreed: ‘Indonesia is committed to eliminate human trafficking, especially women and children. This is a matter of national dignity and human rights.’<sup>142</sup> Trafficking implied that the state cannot protect its citizens, particularly its ‘most vulnerable’ citizens (*especially* women and children).

The 1997 Asian Financial Crisis exacerbated poverty, intensified pressure for political change (most dramatically in Indonesia), and increased voluntary and involuntary irregular migration. Thailand, recently democratic, urged that a solution to these problems was a reconceptualisation of security along the lines of ‘human security’, which (it was argued) emphasised the needs of individuals and communities rather than the state and regime

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<sup>140</sup> For example, Malaysian-Thai relations were strained by illegal entry into Malaysia of large numbers of undocumented workers from Bangladesh, Myanmar and Thailand. In 2011, Malaysia announced a general amnesty for illegal immigrants to leave the country without punishment. More than 300,000 illegal workers, mostly from Indonesia, left Malaysia under the voluntary repatriation programme. In September 2013, Malaysia announced plans to build a security fence along the border that separates Malaysia’s Kelantan state from Thailand’s Narathiwat province and to strengthen military patrols. ‘Malaysia to Erect Wall Along Thai-Malaysian River Border’ (28 September 2013) *Thailand Construction News* available at: <<http://www.thailand-construction.com/news/903-construction-news/1642-malaysia-to-erect-wall-along-thai-malaysian-river-border-.html>> [accessed 10 October 2013]. See: Ralf Emmers, ‘The Threat of Transnational Crime in Southeast Asia: Drug Trafficking, Human Smuggling and Trafficking, and Sea Piracy’ (2009), above n 37.

<sup>141</sup> Quoted in Yuyun Wahyunigrum, ‘Gender Politics in Trafficking Discourses in Indonesia’ (2007), above n 88, 16.

<sup>142</sup> ‘Indonesia Belum Serius Antisipasi Perdagangan Manusia’ [‘Indonesia Is Not Yet Serious in Anticipating Human Trafficking Problem’] (26 August 2006) <[www.detiknews.com](http://www.detiknews.com)> quoted in Rizal Sukma, ‘Different Treatment: Women Trafficking in the Securitisation of Trans-national Crimes’, Paper presented at the 2nd NTS Convention, Beijing (9-11 November 2008) available at: <<http://www.rsis-ntsasia.org/activities/conventions/2008-beijing/rizal.pdf>> [accessed 4 November 2013].

security.<sup>143</sup> The idea was that poverty, illiteracy, and economic dislocation lead to violence, rebellion and instability, all of which threatened the stability of the region as a whole. Economic development was viewed as the central plank of domestic stability.<sup>144</sup> In 1998, at the ASEAN Post-Ministerial Conference (ASEAN-PMC) in Manila in 1998, a Caucus on Human Security was held and the following year, an ASEAN-PMC Caucus was established on Social Safety Nets. Human security was taken up with alacrity by ‘track-two’ regional processes such as ASEAN ISIS and the Council on Security Cooperation in the Asia Pacific: there were some thirty track-two meetings from 1998 to 2002 that had human security as the principal focus or a major theme. In the ASEAN Political-Security Community Blueprint (2009), human trafficking is identified as a ‘non-traditional security issue’. The Blueprint exhorts states to ‘further strengthen criminal justice responses to trafficking in persons, bearing in mind the need to protect victims of trafficking in accordance with the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children.’<sup>145</sup>

What I have described above shows the historical pedigree of the issue of trafficking in persons as a regional concern. This is precisely what I argued, in Chapter 1, was a necessary prerequisite for legitimacy in constructing a regional approach to a particular issue. There is ample evidence of state-led autochthonous regional conceptions around the importance of preventing trafficking in persons, as part of a normative framework that involves the idea of transnational crime as a threat to the survival of the state.

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<sup>143</sup> Surin Pitsuwan, ‘ASEAN Keynote Address Vision 20/20: Strengthening Human Security in the Aftermath of the Economic Crisis’ in Pranee Thriparat (ed) *The Quest for Human Security: the Next Phase of ASEAN?* (2001) Institute of International and Security Studies, Bangkok; Amitav Acharya, ‘Human Security: East Versus West’ (2001) 56(3) *International Journal* 442.

<sup>144</sup> Amitav Acharya and Arabinda Acharya, ‘Human Security in the Asia-Pacific: Puzzle, Panacea or Peril?’ (2000) *CANCAPS Bulletin*.

<sup>145</sup> The 2008 ASEAN Charter establishes ‘the ASEAN Political-Security Council’ (APSC), to coordinate the work of the ASEAN foreign ministers meeting, the ASEAN Law Ministers Meeting and the ASEAN Ministerial Meeting on Transnational Crime. ASEAN, ‘ASEAN Political-Security Community Blueprint’ (2008) available at: <<http://law.nus.edu.sg/sybil/downloads/articles/SYBIL-2008/SYBIL-2008-281.pdf>> [accessed 10 October 2013], B.4.1(iv).

The emphasis placed on securing the state by preventing crime and ensuring the integrity of borders does not necessarily translate into concern for protecting the human rights of trafficked persons. Indeed the framing of trafficking as a transnational crime and security issue has the potential to undermine the rights of trafficked persons and elide key aspects of the reasons why trafficking occurs. The ‘national dignity’ rhetoric, which emphasises trafficked persons as rights-bearers *because* they are citizens of the state, and holds the value of these persons to be their role as emblems of the dignity of the state, is deficient in its failure to appreciate the nature of trafficking as a rights issue involving the denial of individual autonomy and self-direction.

In the final part of this section, I argue that there is also evidence of regional-level concern about trafficking in persons as a distinct human rights issue, caused by economic and social inequity. This concern has been generated from the ‘bottom-up’ by the region’s national human rights institutions, by institutions within different states that have a human rights focus, and by networks of civil society actors.

The 1999 Bangkok Declaration on Irregular Migration (the Bangkok Declaration), which was agreed upon by ASEAN states (and others) at the conclusion of an International Symposium on Migration, ‘Towards Regional Cooperation on Undocumented/Illegal Migration’, acknowledges the links between migration, irregular migration and human trafficking, notes the complexity of the issue of returning irregular migrants, and the human rights dimensions of the problem of trafficking in persons and worker exploitation. It explicitly recognises poverty as a root cause of trafficking and the need for international cooperation to promote sustained economic growth and sustainable development in the countries of origin as a long-term strategy to address irregular migration.<sup>146</sup> The Declaration

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<sup>146</sup> The conference was organised by the Government of Thailand in cooperation with the Office of the High Commissioner for Human Rights and the International Office for Migration (IOM), and attended by ministers

is of course not legally binding, and although the Symposium recognised the need for a regional mechanism to deal with the problem of trafficking in persons and migration, the Declaration does not refer to the creation of an institution to promote, monitor or enforce its goals.<sup>147</sup> The Bangkok Declaration has been followed by many other Southeast Asian regional declarations and statements that profess a commitment to addressing trafficking in persons as a human rights issue.

It could be argued, of course, that such statements remain at the level of rhetoric; that ASEAN states are ‘mimicking’ concern for norms prioritised by the international community;<sup>148</sup> or that these instruments reflect the views of international experts who are called in to advise on the drafting of regional statements and declarations.

However, the way these ideas have evolved belies this interpretation. Prominent in generating a human rights approach to trafficking has been the region’s National Human Rights Institutions (NHRIs). In Southeast Asia, NHRIs have been established in the Philippines (1987), Indonesia (1996), Malaysia (1999), Thailand (2001), and Myanmar (2011). NHRIs are independent institutions created by governments, with a mandate to promote and protect human rights. They are tasked with critiquing government laws, actions and policies that might hinder the realisation of human rights or violate rights. Part of their role is to engage with the United Nations and to promote its treaties and policies; the other part is to engage with civil society and government within their own country. NHRIs are

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and government representatives from all ASEAN states and from other states within the broader Asia Pacific region (Australia, Bangladesh, China, Hong Kong, Japan, Republic of Korea, New Zealand, Papua New Guinea, Sri Lanka). The Bangkok Declaration encourages participating countries to strengthen their channels of dialogue, to reinforce their efforts to prevent and combat irregular migration by improving their domestic laws and measures and to pass legislation to criminalize smuggling of and trafficking of persons.

<sup>147</sup> See: Joakim Palme and Kristof Tamas (eds) *Globalizing Migration Regimes: New Challenges to Transnational Cooperation* (2006) Ashgate Publishing Ltd, Aldershot, UK.

<sup>148</sup> Mathew Davies, ‘Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights’ (2013) *Pacific Review* 1–22; Hiro Katsumata, ‘ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?’ 22(5) *Pacific Review* 619.

positioned, therefore, at the intersection between state, society and the international community. NHRIs across the Asia Pacific are linked by a regional network, the Asia Pacific Forum of National Human Rights Institutions (APF). Southeast Asian NHRIs have formed their own sub-network, the Southeast Asian NHRI Forum (SEANF).<sup>149</sup>

In 1999, the High Commissioner for Human Rights noted that national human rights institutions are ‘an underutilized resource in the fight against trafficking.’<sup>150</sup> That same year, Anne Gallagher, Adviser to the High Commissioner on Trafficking, addressed the APF on the subject of ‘The Role of National Institutions in Advancing the Human Rights of Women; a Case Study on Trafficking in the Asia-Pacific region.’<sup>151</sup> The APF later established a Trafficking Focal Point Network between member institutions and the APF. In 2010, all of the then existing NHRIs in Southeast Asia signed a ‘Memorandum of Understanding Against Trafficking of Women and Children.’<sup>152</sup> The Memorandum begins with a statement about the principle of equal worth and dignity of women and children as members of the human family; adopts the definition of trafficking set out in the Trafficking Protocol; and makes detailed recommendations about the protection of victims, reparations, the provision of legal aid, and the development of victim-centred standards for dealing with trafficked persons. It exhorts states dealing with trafficking in persons to adopt ‘an inclusive perspective in its undertakings,’ be accessible to civil society, be guided by the ‘best interest of the child’

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<sup>149</sup> Catherine Renshaw and Kieren Fitzpatrick ‘National Human Rights Institutions in the Asia Pacific Region: Change Agents Under Conditions of Uncertainty’ in Ryan Goodman and Thomas Pegram (eds) *Human Rights, State Compliance and Social Change* (2012) Cambridge, Cambridge University Press, 150–180.

<sup>150</sup> Mary Robinson, ‘Address to the International Coordinating Committee of National Institutions for the promotion and protection of Human Rights’, Geneva (1999), published in Anne Gallagher, ‘Background Paper: Consideration of the Issue of Trafficking’, prepared for the Advisory Council of Jurists of the Asia Pacific Forum (November 2002). Copy on file with author.

<sup>151</sup> Anne Gallagher, ‘The Role of National Institutions in Advancing the Human Rights of Women; a Case Study on Trafficking in the Asia-Pacific region’ (11–12 November 2002) available at: <http://www.asiapacificforum.net/support/issues/acj/references/trafficking/downloads/reference-on-trafficking/background.pdf> [accessed 2 December 2012].

<sup>152</sup> Southeast Asia National Human Rights Institutions Forum, Memorandum of Understanding Against Trafficking of Women and Children, Manila, the Philippines (30 March 2010).

principle, and the ‘right of a woman against discrimination and gender-based violence in all its forms, particularly trafficking and exploitation.’<sup>153</sup>

The concern of the region’s NHRIs for the issue of trafficking in persons was driven very much from ‘the bottom-up.’ It is important to consider how this kind of concern arises. As critics of constructivist approaches to international law and international relations have pointed out, studies of socialisation too often remain at the level of theory, saying too little about ‘the actual people who are supposed to be engaged in “mimicry”, worried about being shamed, or seeking to achieve substantial affective returns (“cognitive comfort”).’<sup>154</sup> In Chapter 1, I referred to the comment made by Alvarez: ‘states (or ‘organizations’ in the abstract) do not ‘socialize’; people do.’<sup>155</sup>

An example of the sorts of interactions that lead to the evolution of a human rights-based approach to trafficking in persons is the visit of the Human Rights Commissioners from SUHAKAM, the Malaysian Human Rights Commission, to Kajang Women’s Prison, near the Malaysian capital Kuala Lumpur, in January 2003. During their visit, Commissioners noticed that a large number of foreign nationals, mainly young girls, were being held in remand. In conversations with these girls, the Commissioners heard that many of them had come into the country because they had been ‘lured and coerced with promises of jobs as home help, in supermarkets or restaurants, with lucrative incomes, but inevitably ended up in the pernicious flesh trade, often against their will.’<sup>156</sup> Many of the girls were reluctant to tell their stories to officials, for fear of being deported. Distressed by the plight of these women, the SUHAKAM Commissioners formed a sub-committee to look into the issue,

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<sup>153</sup> Ibid.

<sup>154</sup> Jose Alvarez, ‘Do States Socialize?’ (2005), above n 103, 969.

<sup>155</sup> Ibid.

<sup>156</sup> Human Rights Commission of Malaysia (SUHAKAM), ‘Trafficking in Women and Children: Report of the Human Rights Commission of Malaysia (SUHAKAM)’, Kuala Lumpur (2004) available at: [http://www.suhakam.org.my/c/document\\_library/get\\_file?p\\_l\\_id=10127&folderId=26482&name=DLFE-2011.pdf](http://www.suhakam.org.my/c/document_library/get_file?p_l_id=10127&folderId=26482&name=DLFE-2011.pdf) [accessed 20 November 2013].

and the following year organised a forum on ‘Trafficking of Women and Children—A Cross Border and Regional Perspective.’ Prior to the forum, they held a series of roundtable dialogues on the issue of human trafficking, with personnel from the police, immigration officers, representatives of the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Women Development Ministry, welfare officers, prison officers, representatives from the tourism ministry, non-governmental organisations (NGOs), the Bar Council, academics, human rights practitioners and representatives from the embassies of Indonesia, Russia, Thailand, Cambodia, Vietnam, the Philippines, China and Myanmar. Discussion at the forum noted the complexities of the causes of trafficking and made various recommendations: that Malaysia ratify the Trafficking Protocol (it was to do so five years later); that the government should pass an Anti-Trafficking Act (eventually passed in 2007); that the role of NGOs ‘who operate at the grass roots level’ in combatting trafficking should be recognised.<sup>157</sup> Of signal importance is the message contained in the final written report of the forum, where SUHAKAM refers to the need to harbour ‘the political will of the government and social will of the people/civil society’ to protect ‘foreign victims of trafficking,’ and the state’s duty to: ‘reach out to victims and send the message that human freedom and dignity will be protected.’ The report includes a statement about the nature of human trafficking as a rights violation:

Traffickers violate the universal rights of all persons to life, liberty and freedom. It is an obstacle to the achievement of the objectives of equality and development. Trafficking of women and children impairs or nullifies the enjoyment by women and children of their basic human rights and fundamental freedoms.<sup>158</sup>

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<sup>157</sup> The forum was held on 13 and 14 April 2004. Details are reported in Human Rights Commission of Malaysia (SUHAKAM), ‘Trafficking in Women and Children: Report of the Human Rights Commission of Malaysia (SUHAKAM)’, Kuala Lumpur (2004), *ibid.*

<sup>158</sup> *Ibid.*

## *Chapter 7: Trafficking in Persons*

In June 2007, SEANF, then comprising the NHRIs of Malaysia, Thailand, Indonesia and the Philippines, agreed to carry out a series of programs and activities in relation to five human rights issues of common concern, one of which was the issue of trafficking in persons. SEANF also agreed to prioritise encouraging other ASEAN countries to establish NHRIs, so that they could more effectively engage with other institutions in cross-border issues of common concern. After Myanmar established its NHRI in 2011, it also joined SEANF. SEANF agreed to work cooperatively with civil society organisations, such as the Coalition Against Trafficking in Women in Asia-Pacific (CATW-Asia-Pacific) and the Global Alliance against Trafficking in Women (GAATW). Since 2009, AICHR has provided another forum for interaction between different actors around the problem of trafficking. In November 2013, AICHR hosted a Regional Workshop on a Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children.<sup>159</sup> The Workshop discussed the adoption of a legally-binding ASEAN Convention Against Trafficking in Persons (ACTIP) and a Regional Plan of Action to Combat Trafficking in Persons. The Workshop also highlighted the need ‘to infuse the ACTIP with a human rights-based approach.’<sup>160</sup>

What we see, in summary, is that amongst the ASEAN states that have NHRIs, and perhaps more broadly across the region since the establishment of AICHR, evidence of the emergence of a shared understanding of the problem of international trafficking and a shared approach to addressing the problem. Between some key actors within ASEAN states, we see increased levels of exchange (both formal and institutionalised, and informal and voluntary).

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<sup>159</sup> The workshop was held in Makati from 27–28 November 2013. See: Philippines Human Rights Commission Report, ‘Trafficking in Persons’ (29 November 2013) available at: <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/1501-philippines-promotes-human-rights-based-approach-to-combat-trafficking-in-persons-especially-women-and-children-in-asean> [accessed 9 December 2013].

<sup>160</sup> Ibid.

We also see engagement between actors pursuing different policy approaches (border guards, prosecutors, police, and NGOs focused on the protection of trafficked victims).<sup>161</sup>

As Acharya (and others) have argued, actors in democratic states are often more inclined to network with actors in other democratic states, and these networks are more efficient: the exchange of information is better, levels of trust are higher and similar goals are pursued.<sup>162</sup> These things are part of what Amitav Acharya calls ‘participatory regionalism’.<sup>163</sup> Participatory regionalism implies two things. First, acceptance of a more relaxed view of state sovereignty and the norm of non-interference in the domestic affairs of states, which permits more discussion of and action on problems facing the region and creates more space for non-government actors in the decision-making process. Second, a closer nexus between government and civil society in managing regional and transnational issues. The result is greater domestic discussion and debate over foreign policy goals, higher levels of transparency, increased availability of information, greater levels of openness, understanding and trust between states, a greater space for civil society and greater willingness on the part of states to be accommodating to the concerns of civil society. All of these things increase the likelihood that states will respond to demands for regional solutions to problems such as the environment, refugees, trafficking in persons and migration, and allow regional institutions to address sensitive issues.

It remains to be answered why trafficking persists, in the face of what I argue is the apparent legitimacy of the regional anti-trafficking norm amongst both states and civil society actors in Southeast Asia, and despite a plethora of domestic legislation directed towards

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<sup>161</sup> See, for example, in relation to the Myanmar National Human Rights Commission (MNHRC), ‘Field and Investigation Trips’ <<http://mnhrc.org.mm/en/field-and-investigation-trips/>> [accessed 20 November 2013].

<sup>162</sup> Amitav Acharya, ‘Democratisation and the Prospects for Participatory Regionalism in Southeast Asia’ (2003) 24(2) *Third World Quarterly* 375; Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law* 503.

<sup>163</sup> *Ibid.*

ending the practice of trafficking that exists across the region. There are several explanations. First, and most obviously, there is limited state capacity and resources, and the underlying causes of trafficking (poverty, domestic instability and corruption) are intractable. Regional bodies such as the ASEAN Secretariat have only limited capacity and resources to coordinate member states' actions. Second, there is also the influence of non-state actors, such as the multinational companies that employ irregular migrants and trafficked persons.

Finally, there remain entrenched proclivities that augur against cooperative efforts. Concerns about state sovereignty and patterns of non-cooperative behaviour stymie the effectiveness of regional approaches. The 2004 ASEAN Declaration Against Trafficking in Persons, for example, which places the issue of trafficking within the context of ASEAN's efforts to address transnational crime, declares an urgent need for a 'comprehensive regional approach' to addressing the problem.<sup>164</sup> Yet it also contains a 'claw-back' provision relating to any cooperative efforts, in the form of a statement that only 'to the extent permitted by their respective domestic laws and policies need concerted efforts be taken to effectively address the problem.'<sup>165</sup>

What cannot be discounted, however, in answering why trafficking persists, is the distorting effect of the global regime to end trafficking, which undermines regional normative commitment and encourages states towards superficial and unilateral efforts to end trafficking. I contend that the global architecture to end trafficking in persons, particularly the TVPA, has made the progress of ASEAN states towards preventing trafficking in persons

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<sup>164</sup> ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children (2004), above n 114, Preamble: 'REAFFIRMING the Ha Noi Declaration of 1998 and the Ha Noi Plan of Action, which, among others, committed to intensify individual and collective efforts to address transnational crimes, including the trafficking in persons'. The ASEAN Declaration on trafficking also refers to 'ASEAN's unwavering desire to embrace the spirit behind the United Nations Convention against Transnational Organized Crime and its relevant protocols', even though at the time of signing, only Laos and the Philippines had ratified the Trafficking Protocol.

<sup>165</sup> *Ibid.*, 1.

slower and more uneven than it would otherwise have been,<sup>166</sup> and has undermined an inchoate, genuinely autochthonous regional approach to the human rights problem of trafficking in persons.

## 7.7 Conclusion

My central points about legitimacy are that it matters whether or not law reflects the social reality with which it is supposed to deal, and it matters how law is brought into being. My argument in this chapter has been that the global approach to human trafficking, applied in Southeast Asia, lacks legitimacy. In the first place, it does not adequately reflect the social reality of the practice of human trafficking in Southeast Asia. This is because both the Protocol and the TVPA are based on certain assumptions about the practice of trafficking that does not match the particularities of the practice in the region. One of these assumptions is that what defines trafficking and distinguishes it from practices such as migration and people smuggling is the element of *coercion*: trafficked men, women and children do not choose to move or be moved or would not so choose if they were apprised of the conditions that awaited them at their destination. This is partly tied to the idea that human trafficking is about sexual exploitation and that all sexual commerce involves exploitation.<sup>167</sup> The reality in Southeast Asia is that the circumstances of poverty and economic deprivation complicate notions of coercion in ways that law has difficulty responding to. Another assumption is that the perpetrators of trafficking are involved in large-scale criminal enterprises and that their victims are usually unknown to them. But there is no compelling evidence that this is the case

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<sup>166</sup> Ralf Emmers, 'The threat of transnational crime in Southeast Asia: drug trafficking, human smuggling and trafficking, and sea piracy' (2009), above n 37.

<sup>167</sup> Emmers, *ibid*; Julia O'Connell Davidson, 'New slavery, old binaries: human trafficking and the borders of 'freedom' (2010) 10(2) *Global Networks* 244; Ronald Skeldon, 'Trafficking: A Perspective from Asia' (2000); Reginald Appleyard and John Salt (eds) *Perspectives on Trafficking of Migrants* (2000) International Organisation for Migration, Geneva, 7-30, available at: <http://www.iom.int> [accessed 31 October 2013].

in Southeast Asia, and crime control measures designed to detect and prevent this kind of crime expend the scarce resources of states. A final assumption is that borders are logical political and geographical divides between states, and that policing borders is the best way to prevent trafficking. Again, this is not the case. Borders are not accepted as logical divides in many parts of Southeast Asia; nor are people within borders necessarily ‘citizens’ who enjoy the protection of the state.

Second, the global regime lacks legitimacy because of the unilateral actions of the United States under the TVPA, and the influence of the TIP. It is difficult (if not impossible) to distinguish which of a state’s anti-trafficking efforts flow from a commitment to fulfil obligations under the Trafficking Protocol, which flow from a state’s fear of reprisals from the US under the TVPA, or which flow from a genuine and principled commitment to ending the practice of trafficking. We cannot take what states say in this regard at face value. As we have seen, Indonesia, the Philippines and Thailand often explicitly explain domestic efforts to address trafficking in terms of a response to the US TIP reports. Singapore, in contrast, which has still not signed the Trafficking Protocol, but which has nonetheless put in place certain measures to combat trafficking, does not concede that its actions are in any way a response to its ranking in the TIP reports. What is clear is that the TIP confuses and distorts (public and self) perceptions about states’ responses to human trafficking.

Why is this a problem? After all, the approach to human trafficking promoted by the United Nations is a web of interlocking and complementary laws and policies at the domestic, regional and international levels.<sup>168</sup> Why could the coercive measures of the US not be complementing other processes (such as socialisation among states within the region)?

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<sup>168</sup> ‘United Nations Office on Drugs and Crime General Assembly Reviews Efforts to Combat Human Trafficking’ (13 May 2013) available at: <https://www.unodc.org/unodc/en/frontpage/2013/May/general-assembly-reviews-efforts-to-combat-human-trafficking.html> [accessed 28 October 2013].

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One answer to this is that explicit incentive-based policies in the TVPA suggest that preventing trafficking, and protecting the human rights of trafficked persons, is not self-evidently appropriate to ASEAN states. This directly affects the way the problem is perceived, the way responses are interpreted and the way that legislation is implemented and enforced on the ground. Another answer is that incentive-based policy suggests that the broader social environment does not adequately value self-motivated rule adherence. In any regard, the net effect is to diminish the value of principled pursuit of a policy. It is impossible to aggregate what proportion of the failure of trafficking policy in Southeast Asia can be attributed to the influence and effect of the TVPA, but I suggest that it is significant.

As well as sketching the contours of a global approach to a human rights issue lacking legitimacy, this chapter has charted the emergence of what I argue is a legitimate regional approach to addressing the issue of trafficking in persons. As we have seen, this is picture formed by multiple and somewhat conflicting patterns of response to the issue of trafficking in persons. The most obvious regional response focuses on trafficking in persons as a security issue of concern to states because it is a potential threat to national and regional stability. But I also plot out another response, generated bottom-up from the experience of actors (NHRIs) brought into contact with the issue of human trafficking in direct ways, which contributes to shaping a distinct human rights approach to the issue of trafficking in persons. Below these broad levels of response, there are other complexities and contradictions in the regional vision. For example, it is possible to distinguish between the approach and attitude of ASEAN's more democratic states, and those that are less so; and between the concerns and preoccupations of 'sending' as compared to 'receiving' states.

Nonetheless, I offer this chapter as evidence that, overall, supports my hypothesis about the particular legitimacy of a regional approach to particular human rights issues. In the end, this chapter argues that both a broad multilateral (UN) and a unilateral (US) approach

can be set against a regional approach. The argument is that given the nature and scope of the issue, and considerations of geography, socio-cultural understandings between states and levels of interaction between rule-makers and administrators in different states, the appropriate level for managing the issue of trafficking in persons is the regional one. Furthermore, we can see the emergence of a regionally based, multilateral response to the issue of human trafficking, where the parameters of the problem of human trafficking in Southeast Asia are defined not only as an issue of security, but also as an issue of the violation of individual rights. This is taking place incrementally, through a process that engages many domestic institutions and the regional networks that operate between them, and which through interaction and engagement, generates a shared regional understanding about the nature of the problem and the parameters of a solution.

## Chapter 8 Conclusion

Do regional systems for the promotion and protection of human rights possess a particular kind of legitimacy? My brief answer is no—at least, not when the region in question possesses a preponderance of states that are not democracies. This is because democracy, in both the deliberative sense, and in the sense of a system of government that represents the freely expressed will of the people, plays an essential role in creating and maintaining legitimacy in regional norms and institutions. In different ways, this is what has been demonstrated throughout the course of this dissertation.

In Chapter 2, I set out the link between democracy and human rights and showed the way this link is explicated in international human rights theory and law. Chapter 3 demonstrates the functional role played by democracy in international human rights regimes, in: (1) providing a ‘channel of accountability’ between the people and institutions of global governance; and (2) creating incentives for governments to respond to public demands for greater recognition of rights.

Chapter 3 shows how the indeterminacy of democracy in ASEAN instruments leads to (and justifies) multiple and contradictory understandings of democracy among different ASEAN states. This leads to non-compliance, which itself further undermines legitimacy.

Chapter 4, a case study of Myanmar, shows how the ‘regional effect’ of democratisation (diffusion or contagion) does not apply to the case of Myanmar and ASEAN. The argument is simple: A regional association that represents a number of non-democratic states, with a governing charter that does not set democracy as a condition of membership, does not possess the authority to shame a wayward state. Admittedly, I advance the

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arguments that Indonesia, as a powerful and new democracy in the region, carries some influence with Myanmar as an example of democratisation, and that ASEAN's withholding (and then later awarding) the chairmanship of ASEAN had a not insignificant effect in contributing to Myanmar's democratic consolidation. My overall argument is nonetheless that in Southeast Asia, there is no regional effect operating to engender or sustain democratic reform in individual member states.

Chapter 5 turns to democracy in the deliberative sense, showing how the absence of processes allowing discourse in the drafting of the ASEAN Human Rights Declaration constrain regional dialogue on the meaning and value of rights. The result is that the Declaration was dismissed by key stakeholders, on the basis of the unrepresentative and exclusive process that marked its creation (in short, its lack of legitimacy).

The final two chapters ask the central question of this dissertation: whether or not norms articulated at the regional level do in fact evidence a higher degree of legitimacy than norms articulated at the global level, in turn leading to greater commitment and greater compliance. The answer is both that they do not (in relation to the rights of women) but that they may (in relation to norms relating to trafficking in persons). I can explain the different results in relation to these two rights in the following way: First, in the case of women's rights, there exists a strong global norm, which is only weakly mirrored in regional understandings about the meaning and scope of women's rights (*despite* regional level commitment to the CEDAW). This has the effect of rendering the global norm the more powerful one as a dynamic in transnational legal processes. Second, in the case of human trafficking, there exist strong geographic, economic, political and security imperatives compelling state attention to the issue at the *regional* level.

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The hypothesis I set out at the beginning of this dissertation is that the regional level of governance in relation to human rights, has the potential to provide something unique and additional; a *via media* between the particularistic nature of rights violations in their local contexts, and the ideal of universalism. My suggestion was that regions represent more than merely a useful level for implementation of precepts formed at the global level, and that specifically *regional* interaction and dynamics around the meaning and value of rights could impart a particular sense of appropriateness (legitimacy) to human rights norms. As I have shown, the current democratic deficit in Southeast Asia undercuts this hypothesis.

It remains to be asked whether the findings of this dissertation can be extended to broader ideas about the current state and future direction of existing and future regional human rights regimes. What do my conclusions suggest about the future evolution of human rights in Southeast Asia? Do my findings have relevance beyond Southeast Asia? A number of areas would seem to warrant further exploration.

First, in relation to Southeast Asia, we should bear in mind that at the time of writing the first reports of AICHR have yet to be released. We do not know how ASEAN states will respond to them. A positive and coordinated response, which results in domestic policy and legislative reform, would have immediate effects on AICHR's legitimacy. So too would a positive response from the judiciary or the legislature to efforts to invoke the ASEAN Human Rights Declaration. As I mentioned in Chapter 1, legitimacy is not static. In circumstances where states are prepared to respect the rulings and reports of institutions (in the way that, for the most part, the states of Europe implement the judgements of the European Court of Human Rights) then legitimacy can accrue to an institution. This is the case, even if the circumstances of its birth are inauspicious.

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Second, I have made much in this dissertation about the primacy of democracy and the democratic deficit that exists in Southeast Asia. This, I argue, is what undergirds the lack of legitimacy that currently attaches to the region's human rights institutions. Yet democracy in Southeast Asia is in flux. There are both positive and negative currents at play. Both may influence the future development of a regional human rights regime. As I write this conclusion in February 2014, Myanmar's parliament is debating amendments to the Constitution to enable democratic elections to be held in 2015. At the same time, in Thailand, protestors are again marching in the streets, many of them demanding that the elected government of Yingluck Shinawatra be replaced with an unelected People's Council. Regional shifts towards or away from democracy (and the way that ASEAN responds to these shifts) have the potential to alter the democratic balance of power within the region. These shifts will certainly affect the relevance and potential of ASEAN's new human rights institutions.

Third, in assessing the power and legitimacy of ASEAN's human rights institutions, we should be alert to not only the behaviour and responses of states, but also to the rise and influence of informal institutions that coalesce around these institutions. Particularly important in this regard are networks of domestic and regional non-governmental organisations, such as the Working Group for an ASEAN Human Rights Mechanism and Solidarity for Asian People's Advocacy. These groups lobbied states about the establishment and the original TOR of AICHR, and later about the content of the ASEAN Human Rights Declaration. They are now involved in the review of AICHR's TOR, which will take place in 2014. The mere existence of ASEAN's human rights institutions has created new theatres for state/civil society discourse.

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Fourth, ASEAN's regional institutions have created new vectors for communication between the global level and the regional level. I have pointed out that AICHR's Commissioners remain 'accountable to their appointing governments' and that this is one of the factors that impugns the legitimacy of the institution. However, AICHR's commissioners might also find that they are subject to a new kind of accountability, which derives from their peers in the world of international human rights. The constructivist theories with which I began this dissertation hold that the experiences and standards shared in the course of transnational interactions between judicial and quasi-judicial members can have a significant effect on shaping the world-view of individuals. Those individuals in turn influence the direction of the institutions that they work for. It should be remembered that this kind of influence is not one-way. ASEAN and AICHR are also now in a position to influence the international human rights agenda. For example, AICHR has decided that its next thematic report will be on the right to peace, set out in Article 38 of the ASEAN Human Rights Declaration. As I discuss in Chapter 5, the scope of this right is unclear in international law. AICHR's study will be important beyond the borders of Southeast Asia.

Fifth, I have argued at several points that the legitimacy of regional human rights depends on the presence of shared concerns and commonalities. From this perspective, changes in the economic and security dynamic of Southeast Asia have the potential to hasten (or impede) the formation of a regional human rights regime. ASEAN, as I have mentioned, is committed to establishing a common economic market by 2015. Critics doubt that this can occur, and point to the different levels of economic development of ASEAN states and the lack of intra-regional trade. Nonetheless, even the existence of the goal may drive a greater degree of integration at government and societal levels, which might also (eventually) evolve into closer ties and interdependencies in the field of human rights. In relation to the security dynamic of Southeast Asia, this is highly uncertain. For example, at present, several ASEAN

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states have conflicting interests in the South China Sea. Disputes could splinter ASEAN cohesiveness and ultimately undermine stronger relationships in the field of human rights.

Is it possible to extend some of the conclusions about Southeast Asia's nascent human rights regime to other regions of the world? One would make this attempt very cautiously. The field of comparative regionalism is unsettled, largely because the particularities of each region are held to be unique and distinctive. Nonetheless, several paths for future research seem suggestive. It would be fruitful to study regions (or sub-regions) where no formal human rights system currently exists (East Asia, South Asia and the Pacific). On the basis of the findings in this dissertation, we would predict that democracy in (at least) the political system of the dominant regional member (China, India and Fiji respectively) would be a minimum prerequisite for the creation of a regional human rights system possessing even minimal legitimacy. We would also predict that even with a democratic regional hegemon (for example, Indonesia in the case of ASEAN), the regional organisation's ability to influence a 'pariah state' (Myanmar in the case of ASEAN) would be limited.

Second, it would be fruitful to consider the experience of another human rights system comprised of non-democratic states, such as the League of Arab States and its human rights institution, the Arab Human Rights Committee. In this dissertation, I suggest that in regions comprised of non-democratic states, rights unrelated to civil and political freedoms may gain more traction, as there is likely to be a greater degree of state-level consensus around these issues. It would be interesting to consider whether or not this has indeed been the experience of the League. It would also be interesting to consider the extent to which constraints placed on civil society in non-democratic societies in the Middle East have prevented state responsiveness to the work of the Arab Human Rights Committee.

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Finally, let me return to the intuition that prompted this investigation into regionalism and human rights in the first place. This was a sense that the global human rights regime had perhaps over-reached; that it lacked a necessary sense of accord about important beliefs and values, and that this accord might be more readily found at the more modest level of the region. In the end, it seems that a bifurcation along global/regional lines is too simplistic. This is what we might have expected in a complex and untidy world. The most we can say is that if there is potential for Southeast Asia's regional human rights system to positively shape the behaviour of states, it lies in the fact that the new institutions emanate from the region itself. No Southeast Asian government will ever again be able to deflect criticism on the basis that human rights are a 'western imposition'.

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