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## Regulatory arbitrage in relation to international human rights

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### ABSTRACT

The adoption of the United Nations (UN) Charter in 1945 marked the legalization of international human rights. Despite the legalized status of human rights, their violation by states is not uncommon. This article questions why a state might violate international human rights. Analyzing this issue from an economic perspective, this article advances regulatory arbitrage theory to rationalize a state's violation of human rights. It discusses regulatory arbitrage-type behaviors among state actors that derogate from the obligations to respect, protect, and fulfill human rights. Defending state sovereignty, minimizing regulatory or compliance costs, and prioritizing economic achievement are identified as rational arbitrage actions that circumvent international human rights. We call for competent and credible governance mechanisms that can increase the cost of arbitrage, to disincentivize state violation of international human rights.

Good governance encompasses full respect for human rights and the rule of law (UN Office of the High Commissioner for Human Rights [OHCHR] 2016). The adoption of the UN Charter in 1945 marked the legalization of international human rights, which govern the relationship between the state and the individual. It is commonly believed that “all states are bound to respect internationally recognized human rights” whether or not they have ratified the relevant treaties on human rights (De Schutter 2012: 39). This view is legally supported through the exercises of customary international law, *jus cogens* norms (universally applicable norms with no derogation permitted), and general principles of law (Chinkin 2014).

However, violation is not uncommon, despite the legalized status of international human rights (Between 1999; Schwarz 2004; Hafner-Burton and Tsutsui 2007; Cole 2012; Tapsell 2013; Davies 2014). The deterioration of human rights in Malaysia, for example, made international headlines when a motion for a resolution to the European Parliament (2015) urged the Malaysian authorities to repeal the state's Sedition Act and to bring all legislation (e.g., Prevention of Terrorism Act [2015], the Printing Presses and Publications Act, the Communications and Multimedia Act, the Peaceful Assembly Act, and other relevant provisions of the Penal Code) in line with international standards on freedom of expression and assembly and the protection of human rights.

Violation of human rights inspires an intriguing basic question: Why do states violate this international law? There can be a number of reasons; this article focuses on the economic rationale for violation by assuming that some states are likely driven by self-interested economic motives.<sup>1</sup> If a state is driven by economic motives, then its participation in regulatory arbitrage

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is not impossible. Based on this assumption, this article explores the possibility of regulatory arbitrage-type actions of a state that violates human rights, which has not been documented in prior studies on human rights law.

Previous studies (Koh 1999, 2004; Lepard, Koh, Tesón, and Charlesworth 2003) introduced a transnational legal process (i.e., interaction, interpretation, and internalization) to explain the process of a state's observance of international human rights. However, the process might take forever to complete, while arbitrage by the state during the transnational legal process is not impossible and may result in significant or permanent losses on the part of human rights victims. Compliance with international human rights law is also argued as a coincidence of a state's interest in law provisions, rather than norm internalization *per se* (Gauri 2011). Although economic self-interest is recognized as a reason for compliance (Koh 1999), it is not normally advanced as a reason for violation of the law. We enrich the existing literature by exploring the thesis that a violation of human rights yields benefits that are consistent with the interests of incumbent state actors.

Taking an economic perspective, we assume some states are driven by economic actors who are likely to pursue regulatory arbitrage. Regulatory arbitrageurs would take advantage of inefficiencies or limitations of laws to avoid or minimize compliance costs while maximizing economic gains (Schammo 2008; Fleischer 2010). This is a plausible assumption for some states that are more often than not influenced by economically driven interests, as shown in many studies (Koh 1999; Hafner-Burton and Tsutsui 2005; Monshipouri, Welch, and Egoávil 2011).

Our assumption can be applicable to economically driven states. This includes, but is not limited to, authoritarian states that privilege economic growth over political freedoms in their developmental paths, as acknowledged in many studies (Manan 1999; Monshipouri et al. 2011). Studies found that states in this category have the weakest incentives of any regime type to join human rights institutions that impose high sovereignty costs on member states (Hafner-Burton and Tsutsui 2005). It was also suggested in the literature that "carrots" in terms of trade benefits or other kinds of economic incentives have to be offered to encourage an undemocratic or dictatorial regime to obey international human rights norms (Koh 1999: 1407).

If protecting human rights is viewed as costly and limiting the economic progress of the states (and state actors), then the controversial nature of international human rights law, such as debatable universal legitimacy (von Bernstorff 2008; Mayerfeld 2009; Chan 2013; Tasioulas 2013), differing interpretations of provisions (Chinkin 2014; Mégret 2014), delayed intervention or selective international intervention (Habibi 2007; Walling 2015), and negligible reputational cost of violation (Lebovic and Voeten 2009; Wintour 2015), are likely to be exploited by states that violate human rights in pursuit of economic gains. Ineffective enforcement of international human rights policies and regulations means that the cost of regulatory arbitrage is negligible, which provides conditions that breed arbitrage actions among those economically driven states.

Building upon the assumption just described, regulatory arbitrage theory is advanced to explain why states violate international human rights. We further asked: How does a state behave during the probable regulatory arbitrage period that involves violation of international human rights law? To answer this question, three arbitrage actions are identified as consistent with the thesis on states' regulatory arbitrage. The arbitrage actions are (1) defending state sovereignty, (2) minimizing human rights compliance costs, and (3) prioritizing economic achievement that often coincides with alleged violation of human rights. These plausible actions are explored in the context of Malaysia as an exemplary case, coupled with empirical evidence from previous studies, to reinforce the arbitrage thesis introduced in this article.

This article proceeds as follows. The second section provides an overview of the sources of international law that set a legal basis for a state's international obligations to respect, protect, and fulfill human rights. This section also advances regulatory arbitrage theory and introduces the state as a plausible regulatory arbitrageur that is more likely driven by self-interested

economic motives than international concern for human rights. The third section introduces Malaysia's economic and human rights conditions, as an exemplary case. The fourth section unpacks some plausible arbitrage-type actions. In particular, this section shows how domestic values can be exploited to claim absolute sovereignty as a shield against violation of international human rights. This section also examines the inclination to minimize regulatory or compliance costs and maximize dominant state actors' economic gains during what is described as an arbitrage period that allegedly involves human rights violations. The fifth section concludes with some reflections and implications in relation to the rationality of states' arbitrage in the context of international human rights.

## Human rights, state's obligations, and regulatory arbitrage

This section provides an overview of international human rights law and the ensuing obligations of the states. Despite legal prohibitions, human rights violations are common. Regulatory arbitrage theory is then advanced to rationalize violations from an economic perspective.

### *Authoritative sources of international human rights law*

"International human rights law is a specialist regime within general public international law" (Chinkin 2014: 75). The authoritative sources are formally set out in Article 38(1), Statute of the International Court of Justice (ICJ: United Nations 1946). The ICJ affirms two components of customary international law: (1) an extensive and virtually uniform and consistent state practice, and (2) the belief that the practice is required by law (*opinio juris*) (Chinkin 2014).

The ICJ Statute is annexed to and forms an integral part of the UN Charter (United Nations 1945), which has established an international framework for the protection of international human rights. The UN Charter refers to human rights as a purpose to be achieved by the UN and its member states. The preamble to the UN Charter states that "the Peoples of the United Nations determined to reaffirm 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," and Article 55(c) of the UN Charter states that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

The internationally recognized human rights are made explicit in the Universal Declaration of Human Rights (UDHR: United Nations General Assembly 1948), which clarifies the meaning of the UN Charter's provisions on human rights and fundamental freedoms (De Schutter 2012). It governs the relationship between the state and the individual, and protection of basic human rights (Cassese 2005).

The UDHR provides a basis for human rights instruments subsequently adopted by the UN, and may be the only applicable international human rights instrument for many states that have not signed and/or ratified human rights covenants or treaties (Smith 2012). It is frequently referred to in international, regional, and national human rights instruments and jurisprudence and as a point of reference for constitutional questions and constitutive documents, especially in decolonized or emerging states (Smith 2012). For example, the Malaysian Federal Constitution's Article 10 on "freedom of speech, assembly and association"<sup>2</sup> is indeed consistent with Articles 19 and 20 of the UDHR. The legal basis of human rights was reinforced by Malaysian Parliament when the Human Rights Commission of Malaysia Act 1999 was introduced (Jayasooria 2019).

States are also bound by *jus cogens* norms whether or not they have expressly consented to them (Cassese 2005; Chinkin 2014). The application of *jus cogens* norms (such as the right of peoples to self-determination and prohibitions against torture, racial discrimination, genocide,

slavery, and slave trade) overrules the legitimacy of national legislative, administrative, or judicial acts against the norms (Cassese 2005; De Schutter 2012; Chinkin 2014). In theory, “a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed” (De Schutter 2012, 48). Therefore, derogation from *jus cogens* norms is unlikely to be permitted from a legal perspective.

### ***A state’s legal obligations***

Apparently, respecting internationally recognized human rights is deemed an obligation for all states, regardless of whether they have ratified the relevant human rights treaties (De Schutter 2012; Chinkin 2014). From a legal perspective, a state is a duty-bearer responsible for human rights holders.

The legitimacy of human rights is strengthened by the UN International Law Commission (ILC) consideration of human rights in the development of its Articles on State Responsibility, which are deemed to represent customary international law (McCorquodale 2009). Consistent with Articles 4 and 5 of the ILC (UN ILC 2001), a state is defined here as any state organ that includes any person or entity who has that status or is empowered by the state to exercise elements of governmental authority. This definition clearly includes state actors.

Article 12 of the ILC specifies that a state breaches its international obligation if it fails to act in conformity with such obligation. Article 56 of the UN Charter affirms states’ broad obligation, whereby all UN member states “pledge themselves to take joint and separate action” in cooperation with the UN to achieve the purposes set forth in Article 55 of the UN Charter, which include promoting “universal respect for, and observance of, human rights and fundamental freedoms for all.”

In terms of implementation, international human rights law is commonly interpreted as requiring positive and negative obligations of a state (Sepulveda 2003). UN treaty bodies have adopted a tripartite typology (Mégret 2014) that requires a state to respect, protect, and fulfill international human rights immediately and progressively in discharging its broad obligations (see, e.g., the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [1998]). This implies that a state’s undue delay in implementing its human rights duties is against the spirit of the law.

### ***The state as regulatory arbitrageur***

Despite the obligations legally imposed on states to respect, protect, and fulfill human rights in an immediate and progressive manner, human rights violations are widespread. This article takes an economic perspective in questioning why states violate international human rights. We suggest economic motives for such violation.<sup>3</sup> The economic reasons are plausible if the state is assumed to be motivated by economic self-interest; international human rights law imposes compliance costs (Cole 2005; Hafner-Burton, Mansfield, and Pevehouse 2015) or can impair economic agendas (Monshipouri et al. 2011), and reputational costs of noncompliance are economically negligible (Lebovic and Voten 2009).

If a state is driven rationally by economic motives, then it is not impossible for it to participate in regulatory arbitrage as the outcome of its calculative actions (or inactions). The theory of regulatory arbitrage refers to the behaviors of economic actors who engage in planned or engineered techniques “to reduce or avoid regulatory costs” but “undermine the rule of law” (Fleischer 2010: 227). Therefore, “regulatory arbitrage drives value creation” (Fleischer 2010: 242) or “can have beneficial effects” (Schammo 2008: 352). In brief, regulatory arbitrage may involve undermining the rule of law to maximize economic outcomes.

Previous studies use regulatory arbitrage theory to describe deliberate practices of nonstate economic actors (e.g., profit-making firms and tax planners) who “seek to take advantage of regulatory differences between jurisdictions in order to reduce costs or to gain an advantage” (Schammo 2008: 353). Studies commonly suggest that regulatory arbitrage is used “to avoid taxes, accounting rules, securities disclosure, and other regulatory costs” (Fleischer 2010: 229). This article suggests regulatory arbitrage is also applicable to avoid or minimize costs associated with human rights obligations.

Different from previous studies that examine the regulatory arbitrage behaviors of nonstate actors, this article explores the possibility of state actors implicating a state in regulatory arbitrage. Regulatory arbitrage is defined in this article as the calculative actions of a state (or state actors) that undermine international human rights law in favor of economic benefits. Arbitrage activity by nature should be known only to the arbitrageurs, because publicizing it will trigger external intervention that would limit or eliminate arbitrage opportunities. Sourcing hard evidence that can definitively suggest arbitrage behavior is, therefore, fraught with practical difficulties.

Nevertheless, the account of a state’s behavior can be a useful source of inference. If we assume the state is driven by economic motives, then its actions (or inactions) that violate human rights are more likely to be the consequence of an arbitrage-related calculative exercise than of a position of indifference. Similarly, a violation of human rights resulting from a lack of law enforcement can thus be viewed as a consequence of the state’s calculative exercise (i.e., cost-benefit comparison), given that the violation in this case may hardly result in material reputational cost to the state. Being economically driven, a state can also be expected to be more likely to take advantage of institutional inefficiencies, such as limitations of the laws, in the pursuit of economic motives.

Therefore, regulatory arbitrage in relation to human rights law is plausible because of negligible reputational costs due to inherent limitations of international human rights, such as debatable universal legitimacy (von Bernstorff 2008; Mayerfeld 2009; Chan 2013; Tasioulas 2013), differing interpretations of the provisions (Chinkin 2014; Mégret 2014), and selective or substantial delay in international intervention (Habibi 2007; Walling 2015), as acknowledged in many prior studies.<sup>4</sup> If the reputational cost of human rights violation is economically negligible (Lebovic and Voeten 2009; Wintour 2015), this would encourage arbitrage practices.<sup>5</sup> Inefficiency in the legal system may provide regulatory arbitrage opportunities that can only disappear over the long term when the law is enforced efficiently, which would then increase the cost of arbitrage. Although a state’s economic benefits resulting from its violence during the arbitrage period could be temporary, pending effective remedial action, losses and damage experienced by the victims of that violence are irreversible. Arbitrary detention, for example, can seriously diminish the dignity of victims (Mitchell and McCormick 1988), affecting their employment and future income prospects.

Because the consequences of the prescribed arbitrage are so profound, this article uses a case study to explore the issue. We further question: How does a state behave during a probable regulatory arbitrage period that involves violation of human rights? Our thesis suggests that a state arbitrageur would seek to defend its sovereignty, minimize compliance costs imposed by human rights law, and prioritize economic achievement during what we describe as a regulatory arbitrage period that violates human rights. In this article, the possibility of rational arbitrage is explored through Malaysia’s past experience as an exemplary case.

## Malaysia: Institutional background

Although Malaysia has not ratified the principal covenants (i.e., ICCPR or ICESCR; UNHRC 2013)<sup>6</sup>, an Aide Memoire affirms a voluntary commitment to uphold “the protection and promotion of all human rights as an indispensable aspect in the process of nation building,” and

guarantees an “individual’s fundamental rights and liberties” consistent with the spirit of the UDHR (UN Secretariat 2006: para. 2). This affirmation of the state’s practice is a credible source of customary law, with which Malaysia has an obligation to comply. In addition, Malaysia’s constitutional recognition of “fundamental liberties” (Articles 5 and 10, Part II, Federal Constitution) is likely influenced by Articles 3, 19, and 20 of the UDHR.

Malaysia is chosen as an exemplary case because human rights issues within the jurisdiction have been well documented, but are far from resolved.<sup>7</sup> Regulatory arbitrage is explored as a plausible factor since Malaysia had enjoyed unprecedented economic growth during the life of the longest serving ruling party that had entrenched itself in the nation for a period of more than 50 years, which coincided with alleged systemic erosion of human rights (Lent 1979; Manan 1999; Human Rights Watch [HRW] 2015, Thomas 2016)<sup>8</sup>. Malaysia’s gross domestic product (GDP) growth was in the region of 8 percent per annum in the decade before the 1997–1998 Asian financial crisis (Jomo 2001). Post crisis, Malaysia still experienced solid growth rates, averaging 5.5 percent per year during the 2000–2008 period (The World Bank 2015).

Many studies have suggested that those politically connected to the ruling elites were able to gain the lion’s share of the economic growth, while the rights of the general public to speak up against cronyism, misallocation of public resources, and corruption were frequently violated (Jomo 1989; Manan 1999; Johnson and Mitton 2003; Gul 2006; Case 2008; Tapsell 2013). In one of recent cases, more than USD \$3 billion was allegedly misappropriated from a Malaysian sovereign wealth fund by its high-level officials and their associates (US Department of Justice 2016). In addition, over €600 million was discovered in the country’s former prime minister’s private account without any justification of source or purpose (European Parliament 2015). Media outlets and publishers faced restrictions under the Printing Presses and Publications Act following their reporting of these allegations, and a local lawyer and a politician were arrested following their investigations into the allegations (European Parliament 2015).

Members of the public at large, especially those opposed to the ruling party of those days, had lost their freedom of speech and expression for many years with allegedly abusive applications of the pre-independence Sedition Act of 1948 and the Internal Security Act (ISA), which permitted arbitrary detention (Lent 1979; UNHRC 2011; Pak 2014; Thomas 2016). “The main thrust of criticism by these opposition elements has centred on alleged abuses of political power, especially growing corruption and increasing limitations of political rights and freedoms” (Jomo 1989: 50). Although the ISA was repealed in 2013, repressive domestic laws of the same nature (e.g., the Sedition Act of 1948, the Prevention of Terrorism Act 2015, and the National Security Council Act 2016) are in place that have continuously depressed Malaysians’ civil and political rights (HRW 2015). It became indeed an international concern that “the space for public debate and free speech in Malaysia is rapidly narrowing as the government resorts to vaguely worded criminal laws to silence its critics and quell public discontent and peaceful expression, including debates on matters of public interest” (European Parliament 2015: 4). For example, it was reported that around 100 people opposing or criticizing the government were arrested or charged under the Sedition Act during 2015 (European Parliament 2015).

During what was described as the authoritarian regime in Malaysia (Rodan 2009; Tapsell 2013), international scrutiny was evidenced despite the loss of opportunities experienced by the opposition to pursue a truly democratic state, and by academics to creatively take part in the transformation of their society (Manan 1999).<sup>9</sup> The previous inspection visits by UN rapporteurs, the recommendations received by Malaysia during the Universal Periodic Review (UPR), and the resolution to the European Parliament on the situation in Malaysia had generated a gradual impact at best. It was reported through the UPR (UNHRC 2013) that Malaysia did not adhere to periodic reporting deadlines to treaty bodies (i.e., CEDAW, CRC, and CRPD)<sup>10</sup> and had pending requests for visits by Special Procedures. The UPR also reported that Malaysia had responded to only 4 out of 22 communications sent to it (UNHRC 2013).

Noncompliance, nonresponse, and apparent delay in the process of ratifying core international human rights treaties (i.e., ICCPR, ICESCR, CAT, and ICERD)<sup>11</sup> as noted in the UPR are plausible outcomes of a calculative exercise that may fit the definition of arbitrage as prescribed in this article. Not ratifying the International Covenant on Civil and Political Rights (ICCPR), for example, is unlikely to be a random outcome, given Malaysia's poor history in protecting civil and political rights. Interestingly, Malaysia's criminalization of freedom of speech and expression in the past (HRW 2015) often worked in favor of the economic interests of dominant state actors who were allegedly implicated in corrupt enrichment (Mohamad 2016).

Not ratifying ICCPR while allegedly criminalizing freedom of speech and expression during the period in question might have been driven by calculative exercises that, intentionally or unintentionally, sacrificed human rights in favor of economic benefits for the state. This proposition is consistent with two arbitrage criteria: (1) undermining the rule of law (Fleischer 2010), and (2) having beneficial effects (Schammo 2008). The fourth section provides a further account of plausible arbitrage behaviors.

## State regulatory arbitrage behaviors

### *Capitalizing on sovereignty*

The controversial nature of international human rights casts doubt on the legitimacy, ability, and capacity to deter violation of human rights (von Bernstorff 2008; Mayerfeld 2009; Chan 2013; Tasioulas 2013). If a state is driven by a rational arbitrage strategy, then low compliance can be expected when laws have limitations that can be capitalized on to disguise crimes against humanity. One such limitation is differing interpretations of the status of state sovereignty and human rights (Men 2011), which can be exploited by state arbitrageurs who fail to prioritize human rights.

It is noted that "state sovereignty and human rights are two fundamental values in international relations" that are conventionally viewed as conflicting values (Men 2011: 535). Because sovereign status is valued as an important source of credibility, a state arbitrageur is likely to capitalize on the concept of absolute state sovereignty as a shield against international concern about human rights violations under its regimes (Men 2011; Pisanò 2014; Divakaran 2015). This behavior is mostly applicable to authoritarian regimes that value state sovereignty more than people's sovereignty. In such cases, a scholastic interpretation such as "humanized state sovereignty" (Peters 2009) tends to be regarded as a concept foreign to the local norm, particularly in some parts of Asia, where states advocate absolute sovereignty more explicitly (Men 2011; Pisanò 2014). Such states' behaviors are feared, undermining their people's fight for greater human rights.

We argue that a state arbitrageur would rationally prioritize its sovereignty over human rights. Legitimizing absolute sovereignty by citing national norms or values can be seen as a plausible strategy. The emancipation of national values may be interpreted as consistent with Article 2(1) of the declaration on minorities (UN General Assembly 1992), which says that "persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture." The line of argument here is that the reference to "national minorities" in the article may be taken to protect diversity within the world, in which a nation is deemed as a group of minorities that has the right to enjoy their own culture (i.e., national values). This line of interpretation is, however, debatable.

That said, it is not impossible for a state to emancipate national values to shield crimes against humanity. Citing domestic cultural values is indeed a convenient strategy, given the controversial nature of universal values, which is a limitation of international human rights. This is because "determining the content of customary international law is strewn with practical and theoretical difficulties" (Chinkin 2014: 82). It remains controversial whether the emergence of peremptory



norms (*jus cogens*), which are vaguely defined, could be regional, rather than universal, as certain values may be central to only a group of states of a particular region (De Schutter 2012). Human rights law is indeed argued by some to be “an instrument employed by Western powers to dominate and exploit non-Western societies” (Cassese 2005; Tasioulas 2013: 24). Consequently, if there are economic reasons to derogate from international norms, what are supposed to be universally accepted human rights may be abandoned by some economically motivated non-Western states.

The exceptionalism movement of the Associations of South-East Asian Nations (ASEAN) sets an exemplary case in which domestic values were perhaps exploited to advance state sovereignty as a primary principle. Absolute sovereignty and noninterference principles are trademarks of the ASEAN Human Rights Declaration (AHRD), which was formally launched in 2013 (Pisanò 2014). The roots of this axiological exceptionalism can be traced to the “Asian values” debate, which was launched at the end of the 1980s by two Prime Ministers during the time, Singapore’s Lee Kuan Yew and Malaysia’s Mahathir Mohammed (Pisanò 2014). Leveraging Confucian and Malay values was integral to formalizing the discourse of “Asian values” that inherit a top-down authoritarian model (Mohamad 1970; Reid 1995; Manan 1999).

Asian values are commonly defined in the literature as giving more weight to economic development and economic or social rights than to civil and political rights (Lent 1979; Men 2011; Pisanò 2014). Restricting people’s civil and political rights was claimed to be consistent with the practices of Malaysia’s ruling elites during the state’s authoritarian regime (Lent 1979). This was made possible through a legitimate channel such as the Sedition Act of 1948, which prohibits any act, speech, or publication that demonstrates contempt against the government, as specified in Section 3 of the act. The authoritarian practice can be traced back to the traditional Malay culture that was based on feudalism and restricted individual liberty (Mohamad 1970). Proponents have claimed that “there was no explicit concept of human rights in Malay culture” (Manan 1999: 364). Human rights are thus seen by some in Malaysia as reflective of Western values (Manan 1999; Pisanò 2014).

Malay society was traditionally divided into rulers and their chiefs, who enjoyed absolute rights and privileges, and a lower class of people, made up of peasants, slaves, and debt servants (Manan 1999). Abuse of power and violation of human rights by Malay rulers and their chiefs were common during the precolonial era (Manan 1999). British colonialism pre 1957 did not seem to detach the Malay rulers’ commitment to absolute sovereignty, while the post-colonial Constitution retains that sovereignty.

Although Article 10 (1) of the Federal Constitution guarantees the right to freedom of speech and expression, the right to assemble peaceably and without arms, and the right to form associations, these rights are not absolute. The rights are limited by Section 4 (1) of the Sedition Act of 1948 (see, e.g., *Public Prosecutor v. Azmi bin Sharom* [2015]).<sup>12</sup> The rights are also curtailed in Sections 2 and 3 of Article 10 itself, which specify that parliament may by law impose restrictions as it deems necessary (see, e.g., *Madhavan Nair & Anor v. Public Prosecutor* [1975]).<sup>13</sup> Until May 2018, there was no hope when two-thirds of the parliament was dominated by the same ruling coalition in most years. Such a condition rendered the parliament subservient to the executive body, passing laws that enhanced the executive’s sovereignty (Manan 1999). The same ruling coalition entrenched itself as a dominant actor of the state for more than half a century. Robust sovereignty enjoyed by the state under its longest serving premier (1981–2003) was perhaps a key force behind the movement to formalize absolute sovereignty as reflective of Asian values.

While dominant state actors continually enjoyed sovereignty, the independence of judicial bodies was often questioned during what is described as a regulatory arbitrage period that was perhaps masterminded over many years in Malaysia (Lent 1979; Manan 1999). During such a period, dominant state actors have intervened in what was supposed to be an independent investigation of alleged corruption involving a government-linked company and a key state actor

(European Parliament 2015; Sherwell 2015; Mohamad 2016). Media outlets, publishing houses, and journalists had faced pressure, in the form of harassment or litigation, which discouraged them from reporting about the alleged corruption (HRW 2005; European Parliament 2015). The mainstream press was controlled and dominated by a ruling coalition that had ruled Malaysia for more than 50 years since independence (Lent 1979; Manan 1999; Tapsell 2013).

On many occasions, the judiciary was described as facing great challenges to safeguard people's fundamental rights and freedoms. It was a difficult position for many when confronted with the might of the executive body or ruling elites in the absence of absolute protection by the Constitution, coupled with the draconian domestic laws that restricted human rights and fundamental freedoms (Manan 1999; Ali 2001; Thomas 2016). The nation was paralyzed when both the parliament and judiciary did not do enough every time key state actors capitalized on state sovereignty to protect economic interests at the expense of people's rights to freedom of speech and expression. If the resulting human rights violations were constitutionally rooted, and had curtailed freedoms during more than half a century, it can be argued that violence was not a random outcome, but rather the outcome of the entrenched ruling elites' calculated exercises. Sovereignty was taken as a credible defense in this strategy.

During such a regime, when Malaysia's Foreign Affairs Ministry was asked about the European Resolution (2015) on human rights violations in Malaysia, the response was: "The Government of Malaysia strongly believes that full respect must be provided to any sovereign country to decide on its internal affairs" (Divakaran 2015). If this response represents the arbitrage strategy that exploited sovereignty to shield violation of human rights, and if the new regime takes the same stance, the concept of humanized sovereignty (e.g., Peters 2009) will have a long way to go before it can gain practical weight and universal respect in Malaysia. Absolute sovereignty and noninterference principles were upheld in Malaysia, which was consistent with the practice of ASEAN countries where human rights violations are common (Davies 2014; Pisanò 2014). One may also argue that the emergence of Asian values or the exceptionalism movement was an arbitrage strategy to "legalize" the "campaign to diminish human rights" and "an excuse for authoritarianism and other abuses of government" in favor of economic achievement (Manan 1999: 359).

### ***Minimizing regulatory or compliance costs***

It is rational for an arbitrageur to avoid compliance with international human rights law if they perceive compliance as imposing unnecessary costs. Regulatory costs can manifest in the form of impingements on absolute sovereignty caused by international inspections or reporting, required resources to serve human rights, and resultant political instability that could restrain economic growth (Lent 1979; Mitchell and McCormick 1988; Cole 2005; von Bernstorff 2008; Gauri 2011; Monshipouri et al. 2011; Hafner-Burton et al. 2015).

While peremptory norms as a source of customary law remain vaguely credible in framing state violence (Chinkin 2014), violation of human rights treaties that the state has ratified can be more definitively determined due to the presence of these treaties. Because law sourced from treaty ratification can be more credibly enforced, it is likely to impose greater regulatory costs on a state. Even so, treaty ratification based on the state's consent is another key limitation of international human rights, because rational state arbitrageurs are more likely to opt for nonratification to avoid regulatory costs altogether. This is because a state would perceive that its sovereignty could be impinged upon by treaty members pressing for international inspections or by reporting requirements, which are viewed as unnecessary costs to take on board.

Hafner-Burton et al. (2015) attempt to quantify sovereignty cost and examine how this cost influences states' decisions to ratify human rights treaties.<sup>14</sup> Based on 36 treaties, they find no empirical evidence to suggest that autocratic states were willing to incur sovereignty costs.

This finding implies that autocratic states tend to neglect ratification of very costly treaties in order to minimize sovereignty costs associated with consenting to treaty-based human rights law.

Alternatively, a state might ratify only weakly enforced treaties that minimize sovereignty cost if there is a symbolic benefit to be gained from such ratification. Based on data gathered from more than 130 countries between 1966 and 1999, Cole (2005) finds that ratification of a human rights treaty for a state with a poor human rights record is very likely as long as enforcement of the treaty remains relatively weak. It seems that formal consent without proper legal enforcement “could become a smokescreen for further violations” (von Bernstorff 2008: 909). A weakly enforced treaty is thus not that costly to member states, and does not prevent the state’s violations of the law itself.

It was also reported that only 98 of 146 countries acceding to ICCPR between 1966 and 1999 did so without reservations (Cole 2005). Reservations are another limitation of treaty-based human rights law. Reservations are less likely if treaty enforcement is relatively weak. Indeed, “governments often took a selective approach to which binding commitments they would take on” (von Bernstorff 2008: 915). The state’s “cherry-picking” strategy in treaty ratification could be considered another arbitrage strategy plausibly adopted to minimize regulatory or compliance costs.

However, it is important to note that a nonratification of human rights treaties does not necessarily exempt states from their human rights duties enunciated in the UDHR. Nonratification only helps states avoid additional surveillance or regulatory costs imposed by the treaties (i.e., impingement on sovereignty due to periodic inspections, and reporting deadlines to treaty bodies). For example, ratifying the Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT) is viewed as imposing higher regulatory costs on a state as compared to ratifying the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), because the former establishes a system of regular visits by independent international and national bodies to investigate allegations of torture in member states (Hafner-Burton et al. 2015). Therefore, it is rational for Malaysia to delay the ratification of OPCAT but not CEDAW, which was ratified in 1995. The state’s delay in acceding to OPCAT (UNHRC 2011, 2013) is a plausible regulatory arbitrage strategy that condones arbitrary detention while avoiding a definitive liability associated with such action.

Minimizing spending for human rights’ causes is another plausible rationale for state violation. “In reality, of course, complying with a human rights treaty requires economic and organizational resources,” but the literature on human rights compliance usually relies on a “simplifying assumption that treaty compliance is costless for governments” (Gauri 2011: 36). Real-life cases demonstrate that ratification of the Convention on the Rights of the Child (CRC), for example, appeared to increase immunization rates only for high-income countries. Based on 1989–2007 data, Gauri (2011: 55) finds that “although immunization is itself not an expensive public health intervention ... building a primary health care delivery system, setting up and maintaining appropriate incentives, and monitoring performance require substantial bureaucratic capacity.”

Although Malaysia subscribes to Asian values that are commonly defined as giving more weight to economic development and economic or social rights than to civil and political rights (Lent 1979; Men 2011; Pisanò 2014), the state has hardly made a concrete move to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UNHRC 2014). This could be part of a rational arbitrage strategy to avoid definitive costly implications associated with its actions or omissions related to the treatment of migrant workers, were Malaysia to become a party to that treaty. Given that migrant workers account for nearly one-third of the country’s workforce (UNHRC 2014), ratifying and complying with the ICESCR would require additional spending by the state to fulfill the treaty’s provisions, such as to ensure the enjoyment of just and favorable conditions of work (Article 7), adequate living standards (including

food, clothing, housing, and continuous improvement of living conditions) (Article 11), and the enjoyment “of the highest attainable standard of physical and mental health” (Article 12) for migrants. Not ratifying the ICESCR may be viewed as a rational arbitrage strategy to avoid compliance costs, as the state left 15,000 Filipino children at risk of statelessness and denied them access to government schools and basic amenities (UNHRC 2013: 6).

If human rights and civil liberties are considered luxuries (Lent 1979; Manan 1999), a poor or even developing state would allocate resources more to matters related to economic development, whereas a rational state actor would prioritize spending to serve vested interests. For Malaysia during its allegedly violent regime, nonratification of the ICCPR had successfully served to minimize costs for years, which might have benefited the entrenched ruling elites. There was little economic rationale to formally consent to such a treaty, if doing so was seen as impinging on the sovereignty of the economically driven ruling elites and causing reallocation of resources to projects on freedom of expression, which runs counter to the ruling elites’ interests.

A Malaysian Prime Minister once remarked, “Too much freedom is dangerous” (Reid 1995: C02; Manan 1999: 362). Malaysia’s disregard of civil and political rights can also be evidenced by its reservation of Article 14 of the CRC, which obliges state parties “to respect the right of the child to freedom of thought, conscience and religion.” Peaceful expression among adults was criminalized for fear of destabilizing a political system, which, it was believed, could put state security at risk (HRW 2015). If security is at risk, then the state will have to cut its expenditure on economic development to meet increased expenditure on defence (Singh 2004). Although this argument promotes the idea that complying with international human rights is expensive, one can also view it as an arbitrage strategy to legitimize state violation of human rights.

### ***Prioritizing economic achievement***

Many studies have suggested that Malaysia’s development has privileged economic growth over political freedom (Jomo 1989; Manan 1999). The state’s violation of people’s political rights and freedoms had given way to both uninterrupted economic growth and corruption during what was described as a long regulatory arbitrage period. Such a period witnessed “obvious abuses of political power, especially growing corruption and increasing limitations of political rights and freedoms” (Jomo 1989: 50). The use of violence to counter opposition (Bohara, Mitchell, Nepal, and Raheem 2008) was often criticized for creating political stability in favor of corrupt enrichment of ruling elites. Violating human rights in this way is indeed a concern in the International Council on Human Rights Policy (ICHRP 2009: v): “Political actors have abused their entrusted powers to focus on gains for the few at great cost for the many.”

Political stability was regarded as important to protect the economic interests of international investors too. For this reason, it was suggested that “the greater the economic association with the United States or other advanced capitalist countries, the greater the degree of human rights violations” (Mitchell and McCormick 1988: 479). In Malaysia, the average net inflows of foreign direct investment (FDI) during 1981–2014 were about 4 percent of the country’s GDP (The World Bank 2016). The United States contributed the most new FDI in 2013 (US Department of State 2014). While political stability was important to serve the economic interests of international capitalists, there was often a greater need to safeguard the interests of leading state actors, who were frequently accused of enriching themselves through corruption since the institution of the New Economic Policy (NEP) in 1970.<sup>15</sup>

The alleged corrupt enrichment by the “nascent Malay bourgeoisie” in Malaysia was long highlighted by Jomo (1989: 42), well before his appointment as the UN Assistant Secretary-General for Economic Development in 2005:

The growing role of the state, especially since the NEP, has increased opportunities for various types of corruption. The phenomenon of money politics, for example, reflects the convergence of political and economic power, especially among the leadership of the major component parties of the ruling... coalition. It is now widely believed that most new opportunities for wealth accumulation are crucially determined by political access, rather than entrepreneurial. (Jomo 1989: 38)

Corruption and cronyism in Malaysia are acknowledged by many studies (Manan 1999; Johnson and Mitton 2003; Gul 2006; Case 2008; Tapsell 2013). Empirical evidence suggests that during the 1997–1998 financial crisis, firms with strong ties to the prime minister at the time economically benefited from the cronyism-favoring capital controls he instituted. The resultant benefit experienced by favored firms accounted for roughly 32 percent of the estimated \$5 billion gain in market value during September 1998 (Johnson and Mitton 2003). His deputy was fired in a way that was allegedly against human rights (Ali 2001). The deputy spoke out against the prime minister and was arrested for weakly substantiated allegations, and continued to struggle with unfair trials until he was finally pardoned in May 2018 (Tapsell 2013; European Parliament 2015; Ellis-Petersen 2018).

During the arbitrage period in question, there were also allegations involving another key state actor, who allegedly secured highly lucrative government contracts for an oil and gas company owned by his son and allowed his son-in-law to become involved with and benefit economically from dealings of several investment companies linked to the government (Gatsiounis 2007; Case 2008). The enrichment of a family business empire in this way (if any) remains uncontested due to a lack of transparency and public disclosure that can deter definitive legal actions, whereby people were constantly threatened by domestic laws that do not adequately protect political rights and freedoms.

Transparency and accountability can be impaired by frequent or abusive use of power and the Official Secrets Act (OSA) (1972) (HRW 2015). This act gives the government the right to classify as a state secret any document it deems to be sensitive to national security. Prior to May 2018, opposition politicians claimed that “the government has used the OSA in many instances to avoid scrutiny, including for deals it strikes without tender with politically connected private companies” (Gatsiounis 2007: 2; Lim 2018). While peaceful expressions of key political oppositions were criminalized, media reporting on alleged corruption involving ruling elites was always blocked (Lent 1979; Tapsell 2013; HRW 2015). Two Deputy Prime Ministers were ousted in 1998 and 2015, respectively, to silence their expressions against alleged corruptions involving key state actors. Fear of economic disruption was constantly used to justify violations of human rights during the period in question (Singh 2004).

Reinforcing a culture of fear, especially among ethnic Malays, who are already threatened by the economic superiority of ethnic Chinese, can be viewed as a rational arbitrage strategy of the longest serving ruling party in amplifying its status as the “protector” of Malays since 1957 until their historic defeat on 9 May 2018. This arguably genuine act of protection had conveniently served the economic interests and hegemony of connected elites, though it might have also involved condoning corruption at the expense of human rights. Such arbitrage actors will return to enjoy the arbitrage benefit if ethnic Malays continue to prioritize sovereignty blindly and believe in the unwarranted fear of Chinese economic power (Singh 2004).

## Conclusion

From the perspective of international human rights law, all states are bound to respect, protect, and fulfill internationally recognized human rights in an immediate and progressive manner. However, violations of human rights are not uncommon. There are several factors that may contribute to human rights violations and regulatory arbitrage is one of them. As a matter of

discourse, we explore the rationale of state violence from an economic perspective by using regulatory arbitrage theory.

To our knowledge, this is the first article to offer insights from regulatory arbitrage theory to explain human rights violation. This theory is used to explore the possibility of a state deriving economic benefit from its violence. Regulatory arbitrage refers to the behaviors of state actors, which may involve calculated actions (or inactions) to reduce or avoid regulatory costs, which tend to undermine international human rights in favor of economic interests. Plausible arbitrage behaviors were explored through an exemplary case of Malaysia and empirical evidence from human rights literature.

This article argues that leveraging local values to mount absolute sovereignty of the state against alleged violation of human rights can be viewed as a rational arbitrage strategy that was driven by pressing economic interests. This strategy coincided with economic growth to the benefit of ruling state actors as in Malaysia's past experience. The resultant violence on opponents was criticized by many as systemic with help from draconian domestic laws (HRW 2015; Ali 2001; Thomas 2016), seen as the outcome of calculated actions (or inactions) over more than half a century.

The status of international human rights was taken as controversial during such an arbitrage period. There were limitations such as a lack of universal legitimacy, differing interpretations of provisions, substantial delay or selective international intervention, and negligible reputational cost of violation. In addition, the Human Rights Commission of Malaysia Act 1999 and an official human rights watchdog, Suruhanjaya Hak Asasi Malaysia (SUHAKAM), were not necessarily regarded as effective instruments to limit arbitrage behaviors that violate human rights (Rodan 2009).<sup>16</sup>

During the period in question, it was perhaps ambitious for Malaysia to live up to its voluntary pledge and commitment to uphold the promotion and protection of all human rights. A formal declaration of human rights was criticized as a window-dressing act of little practical value (Manan 1999), or a "hypertrophy" or "textual façade" that "acts as a form of political manipulation to disguise a lack of commitment to implement them" (von Bernstorff 2008: 909). From an economic perspective, a formal declaration on human rights in this spirit can be seen as a rational regulatory arbitrage strategy that preserved and/or maximized the economic interests and hegemony of entrenched elites. One may argue that Malaysia would not have achieved its economic status as an "Asian Tiger" (Pisanò 2014) and "authoritarian" (Rodan 2009; Tapsell 2013) had it spent the maximum available resources on respecting, protecting, and fulfilling human rights obligations.

If Malaysia's past performance is judged based on the spirit of the UDHR (1948), violation of human rights (if any) would pose doubt about whether it has achieved the "common standard of achievement" that has been universally agreed upon "for all peoples and all nations." If the UDHR or other treaties are valued as genuinely respectable governing standards, Malaysia should have invested in human rights projects unconditionally, even at the cost of slowing down its economic progress. Also, if the European Parliament (2015) resolution about the situation in Malaysia is an effective instrument, then there is a hope for the future state of Malaysia. The alleged misappropriation of the nation's wealth by previous high-level officials and their associates, as reported by the US Department of Justice (2016), is now being dealt with according to the rule of law. Unfortunately, repressive domestic laws such as the Sedition Act of 1948 have not been repealed, and four persons have been allegedly detained under the act recently (Mering 2019). Ratification of ICERD was also refused of late (Pillai 2019).

To conclude, the controversiality of international human rights gives way to the state's regulatory arbitrage. If arbitrage should disappear with increased transaction costs or regulatory efficiency and effectiveness, we would advocate the imperative of competent and credible regulation and governance mechanisms to increase the transaction costs of arbitrage and disincentivizing human rights violation. If an outright international intervention is not a suitable form of

governance due to state-centric international level of order (Donnelly 2014), then an impactful and timely international scrutiny is imperative when a state fails to honor the rights of a weak nation. Delayed intervention would simply prolong the failing state's arbitrage period, increasing the loss and damage experienced by powerless victims of violence.

Therefore, robust international politics of human rights are needed to support domestic human rights advocates and impede backsliding (Donnelly 2014). In a practical sense, the merits of acceding to the Rome Statute of the International Criminal Court should not be downplayed in order to protect people from the most serious crimes of concern to the international community as a whole (Lim 2019). Further, the installation of the World Court of Human Rights should be supported and expedited, as this will allow rights holders or victims to seek remedy and legally binding judgments from a court that is independent of the state or duty bearer (Novak 2011).

In addition, providing support for "independent" domestic human rights advocates is crucial to enhance their effectiveness in educating and empowering people as competent governance agents to monitor and report states' violent behaviors. Domestic awareness and activism will make regulatory arbitrage costly as the ruling actors will be constantly pressured ("regulated" or monitored) to fulfill human rights obligations. Therefore, we advocate for people's power to discourage states' regulatory arbitrage.

Strengthening people's power is feasible and was indeed evident in the unprecedented outcome of the 2018 Malaysian general election, when an allegedly violent long-standing government lost its power to rule the people. Such progress can be advanced further by introducing human rights as a mainstream element of curriculum at schools, with its fundamental principles embedded in all students' activities. This will enlighten members of the future generation about their fundamental liberties as enshrined in the Constitution, and human rights as the common standard of achievement for all peoples and all nations.

## Notes

1. This assumption is commonly adopted in the literature; see, e.g., Koh (1999), Hafner-Burton and Tsutsui (2005), and Monshipouri, Welch, and Egoávil (2011).
2. The Constitution was first introduced as the Constitution of the Federation of Malaya (1957), and subsequently introduced as the Constitution of Malaysia (1963).
3. There are certainly noneconomic motives for violation that are beyond the scope of the present discussion.
4. The limitations of international human rights law are well recognized and have been discussed in prior studies. For the sake of brevity, this article is not intended to recapitulate discussions on this topic.
5. Human rights abusers were not really penalized by other states. Bilateral aid received by countries with poor human rights records was not affected by "shaming" through the UN's resolution (Lebovic and Voeten 2009). China has also secured £30 billion worth of bilateral trade with Britain despite its allegedly poor human rights record (Wintour 2015).
6. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).
7. Deterioration or violation of human rights in Malaysia was reported by nongovernmental organizations (NGOs) (HRW 2015), Special Rapporteurs (UNHRC 2011), Universal Periodic Review (UPR) 2013, and the resolution to the European Parliament (2015). For the sake of brevity, this article does not revisit all of the cases. At the time of writing, Malaysia has been experiencing a transition since a change in government in May 2018.
8. The longest serving party was finally defeated on 9 May 2018. There is hope for human rights in Malaysia if the Coalition of Hope does not pursue regulatory arbitrage that undermines human rights.
9. In *Public Prosecutor v. Azmi bin Sharom* (2015), an academic was prosecuted for a criminal offense under the Sedition Act of 1948 for his academic opinion on a political issue. Further details are available at: [https://www.cljlaw.com/ekehakiman/pdf/press\\_summary\\_pp\\_v\\_azmi\\_sharom.pdf](https://www.cljlaw.com/ekehakiman/pdf/press_summary_pp_v_azmi_sharom.pdf) [19 February 2016].
10. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), and Convention on the Rights of Persons with Disabilities (CRPD).
11. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

12. See note 9.
13. *Madhavan Nair & Anor v. Public Prosecutor* [1975] 2 MLJ 264. Available: <http://cijmalaysia.org/miniportal/2010/09/article-10-of-the-federal-constitution> [19 February 2016]
14. Some of the features of human rights instruments deemed to increase sovereignty costs are formal reporting, extensive coverage, annual and ad-hoc meetings on human rights issues and related issues, cooperation with NGOs, built-in enforcement mechanisms (e.g., removal of violent states, rules of courts or similar bodies), and democracy as membership criteria.
15. The NEP was introduced to alleviate poverty and eliminate the identification of ethnic Chinese with economic functions (Jomo 1989).
16. According to Rodan (1999), widespread skepticism about SUHAKAM's independence, resources, and investigative powers came shortly after its establishment. It was reported that concerns were raised by a coalition of 31 human rights NGOs, opposition parties, and the Malaysian Bar. SUHAKAM's financial problem has also emerged recently (Loheswar 2019).

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