



# Journal of Current Southeast Asian Affairs

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Gomez, James, and Robin Ramcharan (2014), Evaluating Competing “Democratic” Discourses: The Impact on Human Rights Protection in Southeast Asia, in: *Journal of Current Southeast Asian Affairs*, 33, 3, 49–77.

URN: <http://nbn-resolving.org/urn/resolver.pl?urn:nbn:de:gbv:18-4-8068>

ISSN: 1868-4882 (online), ISSN: 1868-1034 (print)

The online version of this article can be found at:

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Published by

GIGA German Institute of Global and Area Studies, Institute of Asian Studies and Hamburg University Press.

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# Evaluating Competing “Democratic” Discourses: The Impact on Human Rights Protection in Southeast Asia

James Gomez and Robin Ramcharan

**Abstract:** This paper evaluates the impact of competing “democratic” discourses on human rights protection in Southeast Asia. The authors identify three key discourses emanating from a set of national governmental policies, advocacy positions promoted by both global and local civil society and international standards and procedures adopted by members of inter-governmental organisations. These discourses, the authors argue, are collectively shaping the emerging ASEAN inter-governmental human rights regime. The political impact of these competing “democratic” discourses and their complex interactions bring a cultural dimension to regional human rights. The authors argue that observers seeking to understand the emergence of norms, the establishment of institutions and their capacity to collectively protect regional human rights, need to understand these competing discourses.

■ Manuscript received 8 October 2014; accepted 18 December 2014

**Keywords:** Southeast Asia, ASEAN, democracy, discourses, human rights, protection

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# 1 Introduction

The link between democracy and fundamental human rights protection is well established. With the “principles of democracy” firmly entrenched in the preamble of the 2006 ASEAN Charter, the relationship between democracy and human rights occasions careful scrutiny. In particular, the specific human rights regime ‘protection’ capacity in the ASEAN Intergovernmental Commission on Human Rights (AICHR) must be analysed.

This paper demonstrates that there are three levels of “democratic” discourse that are shaping a nascent human rights regime in Southeast Asia. These discourses are democratic in the sense that they seek to shape the values around which the human rights regime is to be built. Further, their partisan nature reflects a set of values drawn from their respective political cultures and traditions, particularly an elite dogmatic culture. The three discourses offer **two** essential approaches to human rights. National governments in Southeast Asia have advocated a promotional mechanism that builds awareness of human rights issues and institutions. This approach emanates from the local political culture across Southeast Asia and is possibly rooted in societal conflict resolution approaches. Such an approach has historically favoured face-saving approaches to reconciliation as reflected in the consensual ASEAN way of decision making, itself rooted in decision-making principles of *Musjawara* and *Mufakat*. *Musjawara* signifies a negotiation style the hallmark of which is for each leader not to impose his or her will, but to carefully consult everyone and simultaneously signify a path to communal unity. *Mufakat*, or “consensus”, is the disposition to uphold community interest (De Castro 1989: 106–107).

Hence the bulk of AICHR activities revolve around meetings, discussions and research that have a consensual approach. Regional civil society organisations (CSOs), largely excluded from the process that created the mechanism, have advocated, on the other hand, for the adoption of universally recognised standards and a credible protection regime akin to other regional mechanisms that include quasi-judicial processes, responsive governments and regional human rights courts (Gomez and Ramcharan 2012). Complementing this discourse is a set of international bodies, notably the United Nations Office of the High Commissioner for Human Rights (OHCHR), which also advocates a similar position. Both strains define a protection mechanism as one that monitors compliance with universal standards, and provides both a complaints procedure that is accessible to victims of human rights violations and a good quasi-judicial mechanism that seeks to provide redress

and remedies. A quasi-judicial approach is seen as a vital protection means for human rights norm-building.

In identifying these two approaches, “promotion” (building awareness) and “protection” (investigative and quasi-judicial processes), with the former more prominent in the region, this paper advances the thesis that the interaction of the three discourses engenders a cultural dimension to the Southeast Asia human rights regime. A regime with a ‘South-east Asian face’ is the ultimate result. The normative and institutional aspects of this regime are the ASEAN Intergovernmental Commission on Human Rights (AICHR), which is set to apply the ASEAN Declaration of Human Rights (ADHR), the National Human Rights institutions (NHRIs), regional and international civil society organisations (CSOs), and international institutions that advocate for universal human rights standards concerning the human rights protection, both normative and institutional. The Southeast Asian face is also encapsulated in the following: 1) the differing approaches to CSOs’ human rights bodies participation and in some cases in their lack of participation; 2) the very weak or non-existent regional ‘protection’ AICHR; and 3) regional NHRIs, which have tended to favour mostly consensual, non-confrontational, ‘face-saving’ approaches, referred to as the ASEAN way. This article examines these competing discourses emanating from Southeast Asian governments, regional CSOs and international institutions that are engaged in a competitive discursive process over normative and institutional aspects of the relationship between AICHR, the ADHR, NHRIs and CSOs. The competing discourses seem to be producing a ‘culture’ that is shaping the human rights regime in Southeast Asia.

## 2 Discourses in the Human Rights Arena

Discourse analysis (DA) as a “mode of analysis” is germane to this study, given the ongoing norm-formation and institution-building process, and the multiple levels of discourse. DA involves tracing the evolution of protection language and examining how that language, “both shapes and reflects dynamic social, cultural and political practices” (Starks and Trinidad 2007: 1374; see also Van Dijk 2001 and Gee 2005). The DA mode recognises that while there are universal human rights adopted by states under the International Bill of Human Rights, both the international and regional human rights regimes are socio-political spaces where different discourses produce culturally informed protection structures. In relation to American, European and universal protection systems’ emphases on individual rights, the adversarial nature of their enforcement through the

courts and the ability of individuals to petition the protection mechanisms are the product of Western European cultural practices and historical experiences that prevailed when drafting these three systems. Other analysis frameworks may not capture holistically the multiple regime formation influences. While states have created the regime, there are differences between ASEAN states over its protective capacity. Hence, realist approaches alone cannot explain the CSOs' historical influence and that of international institutions. Moreover, states had divergent reasons for creating AICHR. Liberal institutionalism has a limited application given the nature of ASEAN and, until recently, the largely secretarial or administrative function of the Secretary General. Constructivist DA approaches (Acharya 2001) may have a greater appeal in terms of explaining the influence of multiple actors and their competing human rights standards notions, as well as the competing notions between the states themselves. The ASEAN states adopted the AICHR for different reasons, not out of a sense of common human rights values. A DA perspective may prove more useful in tracing the rhetoric of "protection" in the Southeast Asian context and in understanding of the diminished meaning of protection (Gee and Green 1998).

DA constitutes one of the "Weberian ideal-types" among the four types of "schools" of human rights thought that have been mapped to identify the broad orientations that connect scholars from different disciplines (Dembour 2010). The four schools – natural, protest, deliberative and discourse – offer differing perspectives on human rights law, the foundations of human rights, the realisation of human rights and scholars' "faith/position" on human rights. The natural school identifies human rights as those inherent in being a human being and requires states to refrain from actions affecting the same, hence the negative character of the rights. The deliberative school conceives of them as political values that liberal societies choose and rejects the natural element since human rights, "come into existence through societal agreements" (Derschowitz 2005). This school seeks incremental human rights universalisation. Dembour ascribes an understanding to them that, "human rights are the best possible legal and political standards that can rule society and therefore, should be adopted" (Dembour 2005: 3). The "protest school" focuses on redressing injustice and articulating rightful claims by or on behalf of the poor, the underprivileged and the oppressed. These scholars, "look at human rights as claims and aspirations that allow the status quo to be contested in favour of the oppressed" and they are not interested in the premise that human rights are entitlements. They accept that, "the ultimate source of human rights lies on the tran-

scendental plane, but most are more concerned with human rights' concrete source in social struggles" (Dembour 2005: 3). While 'cooperating' with human rights law as a goal,

they nonetheless tend to view human rights law with suspicion as participating in a routinisation process that tends to favor the elite and thus may be far from embodying the true human rights idea (Dembour 2005: 3).

Protest school scholars are suspicious of human rights law and are wary of bureaucratisation as the law "may be hijacked by the elite" (Dembour 2005: 6). The discourse school diminishes human rights which such scholars argue, "exist only because people talk about them". Scholars in the discourse school,

are convinced neither that human rights are given nor that they constitute the right answer to the ills of the world, but they do recognise that the language surrounding human rights has become powerful language with which to express political claims (Dembour 2005: 4).

Such scholars, "fear the imperialism of human rights imposition and stress the limitations of an ethic based on individualistic human rights" (Dembour 2005: 4). Some recognise that human rights as a, "prominent political ethical discourse of our time" that does achieve some results. However, Dembour notes that they, "do not believe in human rights and often wish superior projects of emancipation could be imagined and put into practice" (2005: 4).

The DA mode operates on the following foundational premises. First, human rights cannot be 'plucked from a tree' as envisioned by the natural rights theories, though societies do exist where there is a match between the transcendental view of human rights and their actual practice as provided by law. Second, human rights are the product of converging understandings of justice across time and space, that credible human rights systems and laws embodied "in constitutional principles of deliberation" may "act as a guide on how to do things in the political sphere" and to provide remedies to those seeking justice (Dembour 2005: 6). Third, that there is undeniably a contest over how exactly to define human rights that places different social groups within and across nations in opposition to each other. Fourth, human rights are not mere 'speech acts' whose existence is dependent on related language. They are norms and values that structure individuals and collectives and as such are 'real'. While fundamental principles of equality and non-discrimination took generations to take root across societies, they are practiced to

varying degrees of imperfection across the world and are more of a reality – in belief, law and practice – than ever before.

On human rights in Southeast Asia, much ink has been spilled over the universality of human rights over the past two decades, with states in the region arguing in favour of culturally bound rights notions, popularly known as “Asian Values” (Zakaria 1994; Kim 1994). Singapore and Malaysia were at the forefront of this proposition, which was abated by the 1997 Asian financial crisis. Nonetheless, remnants of this debate still surfaced in deliberations over the setting up of a truly protection-oriented human rights regime. Collectivist notions of rights are pitted against western societies’ individualist framework. The human rights regime in Southeast Asia was finally adopted after concerted grassroots and international pressure and has brought the possibility of regional human rights protection based on universal normative standards closer to legal and political reality than ever before. These standards are now etched onto the foundational documents of ASEAN that contribute to human rights discourse.

Works employing human rights DA in Southeast Asia are virtually non-existent. Logically, the existing literature on Southeast Asia human rights forms part of the various regional rights discourses. These have been surveyed sufficiently in previous works (Ramcharan 2010). DA of the Southeast Asia protection regime aids understanding a culture-specific HR regime’s emergence by probing the struggle between the competing notions of ‘protection’. Various arguments claim that the effectiveness of such human rights mechanisms as, for example, NHRIs, must be gauged in terms of their acceptability in their specific community. DA is, thus, a useful and appropriate approach as it emphasises the dynamic relationship between competing actors and the regime’s evolving nature, such that it acknowledges the power of ideas and attendant language in shaping the identity of the Southeast Asia human rights regime. Thus a DA approach to human rights in Southeast Asia is timely. In this paper, the different discourses are gauged using official documents from ASEAN, its member states, statements by state officials, the AICHR, civil society actors as well as documents submitted to the Universal Periodic Review, OHCHR and the UN. Broadly these publicly available documents cover the key year of 1993 to the time of writing – 20 years.

### 3 The Three Discourses on ‘Protection’ in Southeast Asia

The language of protection varies across the three groups. **States** have a marked preference for the traditional ASEAN way of conflict resolution, that is, non-interference in internal affairs of States and the promotion of human rights, while gradually aspiring towards a more protective regime. Publicly, while some ASEAN states, such as Indonesia, privilege a more robust protection regime, others, such as Myanmar and Vietnam, are squarely against intrusive regimes. The differences in outlook are explained by a number of factors: 1) the comparatively non-democratic governance systems among the ASEAN 7 (Brunei, Cambodia, Laos, Malaysia, Myanmar, Singapore and Vietnam) in contrast to the ASEAN 3 (Indonesia, Philippines and Thailand); 2) the ongoing, fragile nation-building and state-building processes in ASEAN 7, especially in Cambodia, Laos, Myanmar and Vietnam; and 3) the advanced economic growth of some of the states that are seeking deeper regional and international integration. In the present global political and economic order, two of the three most influential power blocs – the EU and the US – have the protection of human rights ‘in their DNA’.

**Regional CSOs** have advocated for a comprehensive protection system that would link institutions not only for formative CSO participation, but also in the deliberation on norm-formation and in AICHR’s work. CSOs have argued that protection requires these elements and, critically, the ability to petition AICHR directly. It has been shown that this is a serious flaw in the current AICHR Terms of Reference (Ramcharan 2010). **International Institutions**, the UN OHCHR in particular, have called for CSOs’ inclusion as part of a protection mechanism and, buttressing CSOs, have called for adopting a regional human rights instrument that adheres to universal norms. They have argued that the ADHR, a non-binding instrument, includes some highly problematic language that protects states at the expense of individuals and vulnerable groups. This perception is reinforced by Thailand’s AICHR representative who has noted some ASEAN representatives’ tendency to view their roles as that of government defenders (Ashayagachat 2013). Indeed, the differing discourses on protection are being played out within the AICHR itself.

### 3.1 Statist “Promotion” Discourse

ASEAN states’ discourse on protection advances a ‘promotion as protection’ approach (Statist discourse), reflective of ASEAN foundation principles, irrespective of background differences between two sets of members. As far back as 1993, ASEAN states expressed human rights regime concerns. In a 1993 joint communiqué, they welcomed the international consensus achieved during that year’s World Conference on Human Rights, and reaffirmed ASEAN’s commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993 (Vienna Declaration 1993). ASEAN states also stressed the indivisibility of all human rights. However, the rights were to be addressed, “in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances.” They emphasized that the promotion and protection of human rights should not be politicised (ASEAN 1993).

It took another 14 years to agree, via the ASEAN Charter of 2007, upon the creation of a regional human rights body. In the context of ASEAN’s historical non-interference, including human rights on its agenda was nevertheless reflective of the Association’s willingness and ability to adapt gradually, meet new challenges and move towards greater cooperation. ASEAN’s Eminent Persons Group (EPG), mandated by leaders to provide guidance on the impending Charter, argued in a December 2006 report that the foundation principles that had served ASEAN well since 1967, nevertheless needed to be updated and brought “in line with the new realities confronting ASEAN, and to strengthen regional solidarity and resilience.” These principles and objectives were to be covered in the Charter which include, *inter alia*, the,

Promotion of ASEAN’s peace and stability through the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, the rule of law including international humanitarian law, and respect for human rights and fundamental freedoms (Eminent Persons Group 2006: 2).

The EPG recommended further that ASEAN needed, “to shed its image of being an elitist organisation comprising exclusively diplomats and government officials.” It had to do more “to strengthen people-to-people” ties among member states, and “to develop channels to consult ASEAN institutions, Parliamentarians in ASEAN Member States (AIPA) and the people of ASEAN in all sectors of society.” Their inputs can, “help strengthen cultural awareness, forge closer common ASEAN iden-

tity, and improve human social development in ASEAN.” The eventual ASEAN Charter would prove to be less progressive than envisioned. The drafting of AICHR’s terms of reference, its establishment and the drafting of the ADHR, was an elitist process undertaken by the state foreign affairs bureaucracies.

Article 1 of the ASEAN Charter proclaimed a number of goals, *inter alia*, “to promote and protect human rights and fundamental freedoms with due regard to the rights and responsibilities of the member-states of ASEAN.” Article 14, which deals with the establishment of an ASEAN human rights body, provided that it conforms with, “the Purposes and Principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms” and that this body, “shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers meeting.”

The weak ‘protective’ content in the AICHR TORs was inevitably influenced by the “ASEAN Way” – ASEAN’s diplomatic culture – and the underlying traditional principles: respect for the independence, sovereignty, equality territorial integrity and national identity of all ASEAN member states; reliance on peaceful dispute settlement; non-interference in ASEAN member states’ internal affairs; enhanced consultations on matters seriously affecting the common interest of ASEAN; adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms the promotion and protection of human rights, and social justice promotion; and upholding the UN Charter (Article 2) and, “international law, including international humanitarian law, subscribed to by ASEAN member states.”

While ostensibly paving the way for enhanced promotion and ‘protection’ by AICHR in line with this progressive call, the ASEAN Charter also provided states with powerful levers to prevent breakaway protection mechanisms. As Hao has noted,

In the ASEAN Charter, the non-intervention principle retains its supremacy and is placed above the adherence to human rights norms. The traditional decision making rule of consensus remains the working principle of the ASEAN. While the ASEAN Charter respects human rights and fundamental freedoms, it does not explicitly refer to any universally accepted human rights standards, such as the Universal Declaration of Human Rights and other major human rights treaties that have set expectations for state behaviors on human rights. This leaves a lot of room for ASEAN states to interpret the contents of human rights in a way that fits

with their interests. Moreover, the ASEAN Charter fails to provide any concrete guidelines regarding the setting up of the body or a timeframe for establishing a human rights body even if it calls for its creation (Hao 2009: 385).

The establishment of the AICHR by ASEAN's political elite, with no participation by CSOs, prompted some of the most divisive debates within the elite itself. The CLMV countries, with ongoing nation-building challenges and dictatorial communist regimes, clearly did not favour a strong regional protection body. In fact, the peer-review mechanism that exists currently is due to CLMV resistance to a real protection mechanism. Other countries, notably Indonesia, the Philippines and Thailand, favoured normative change and advocated for a stronger human rights body, in line with other regional mechanisms in the Americas, Africa and Europe (Ramcharan 2010). Singapore and Malaysia, which have not adopted many of the international human rights conventions, remained more restrained in their positions and the current weak peer review mechanism is to their advantage.

Hao has called attention to significant intra-ASEAN debates over regional human rights. These areas included domestic political security concerns, internal circumstances, debate on the human rights mechanism, discussion on the Asian values, the principle of non-interference, and the "ASEAN way". The first group comprises Indonesia, Malaysia, the Philippines and Thailand and the second group comprises Cambodia, Laos, Myanmar and Vietnam. The first group has attempted to rethink traditional norms and even calls for norm changes, while the second group tries to preserve the status quo. Impetus for change among some ASEAN original countries is countered by the cautious conservatism of new members. In the lead up to the TORs, Hao has noted that, "these divergent political orientations of ASEAN members in their approaches to human rights cooperation" did not favour an inclusive regional human rights body, as mandated in the Charter (Hao 2009: 386).

In the face of such a weak regional mechanism and the ineffectiveness of CSO actors to impact this system, can national human rights institutions (NHRIs) fill the protection gap? Regional NHRI discourse – principally from the four countries in Hao's first 'progressive group' – militates for a positive answer, but its practice suggests otherwise. Preliminary NHRI analysis reveals a distinct preference for 'protection' efforts that do not fully match the requirements of the CSO group or the IGO group.

The weak 'protection' mechanism is incongruent with ASEAN's previously demonstrated capacity to call upon Cambodia to bring former

Khmer Rouge officials to justice in a specially constituted hybrid (UN-Kampuchea) criminal court. In 2002, ASEAN issued a joint communiqué as follows:

45. We support the continued efforts of the Royal Government of Cambodia to bring the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by the Kingdom of Cambodia to trial in accordance with international standards of justice, fairness and due process of law. We recognised, in this connection, the need of the Royal Government of Cambodia and the United Nations to cooperate together and appeal to the international community, to provide assistance in this regard.

46. We noted the national efforts in dealing with any violation of international human rights and humanitarian law (ASEAN 2002).

### 3.2 Civil Society Organisations' "Protection" Discourse

The international standards approach to human rights protection is advanced by transnational rights entrepreneurs, such as regional civil society organisations, international non-governmental organisations (INGOs) and international organisations at the forefront of the protection of human rights, principally the OHCHR. The CSO discourse argues that protection requires at minimum a set of legally binding standards. In stark contrast to other major regional bodies (AU, EU and OAS), over the past 40 years or so, ASEAN has been able to produce only five non-binding declarations on human rights: the Declaration of the Advancement of Women in the ASEAN Region (1988), Declaration on the Commitments for Children in ASEAN (2001), Declaration against Trafficking in Persons Particularly Women and Children (2004), Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), and Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007). The normative instrument, that is, the ADHR, counter-intuitively adopted after the AICHR, remains equally non-binding and is the subject of unabated criticisms for its provision of significant safeguards for states at the expense of the beneficiaries of the rights proclaimed therein.

The specific notion of protection in the CSO discourse by Forum Asia and others is consistent with that advanced by Hao, who has noted that:

Protection of human rights in Southeast Asia needs more than a spokesperson agency with no real power. What the region needs is a strong mechanism that is composed of independent experts who are able to: investigate and evaluate reports of human rights violations; consider individual complaints free from outside interference; and make decisions that the concerned nations are obligated to follow (Hao 2009: 387).

The regional human rights regime in Southeast Asia clearly lacks such a protection mechanism. At the national level, there is also a reluctance to engage deeply with the strong protection system's inherent quasi-judicial process and there appears to be little in the way of redress to rights violations victims (Gomez and Ramcharan 2013). Moreover, CSOs who advocate for a robust protection system and who are part and parcel of such a system, have been excluded from the formative stages of this regime.

Regional and international CSOs have historically played a vital role in human rights advancement. The 1948 Universal Declaration on Human Rights (UDHR) was significantly influenced and enriched by the global CSO input. In UN mechanisms around the world, CSOs regularly provide their input on the relevant bodies' agenda. In the UN system for example, CSOs are given observer status and partake in the Human Rights Council's work by submitting position papers (see generally Mueller 2008). While accredited CSOs are selectively invited and engaged in AICHR activities, workshops, seminars and so on, a substantive and institutionalised role in the promotion and hoped-for protection work appears to be missing from the AICHR mechanism. This further underscores the necessity of a vibrant civil society presence in the new media environment.

Echoing calls by the UN High Commissioner for Human Rights for ASEAN to "set the bar high" (OHCHR 2012), CSOs submitted a document to the AICHR during the 22 June 2012 consultation which expressed concern over the following matters: 1) The need to ensure that the human rights protections in the impending Declaration would not be lower than those enshrined in universal standards, a concern also raised by the International Commission of Jurists; 2) The apparent inclusion in the draft of an overarching "General Principle" providing for "Balance between rights and responsibilities" and the call for the deletion of this phrase; 3) The apparent inclusion of an overarching principle providing for "Taking into account national and regional particularities"; 4) The need for the Declaration to address human rights abuses by non-state actors; 5) The need to ensure implementation and dissemination of the

Declaration; 6) The need to monitor and assess the impact and dissemination of the Declaration; and 7) The need for cooperation with civil society and the public as a whole in promoting and protecting human rights (FIDH 2012).

Regarding civil and political rights integral to a protective regime, the CSOs suggested including appropriate language in the universal instruments related to: the right to life, enforced disappearance, right to information, right to electronic privacy, political participation and voting, freedom of religion and belief, access to justice, access to remedy and the right to nationality. On social, economic and cultural rights, they suggested wording on the right to self-determination, an adequate standard of living, work, union membership, health, and education. They also made non-discrimination suggestions related to the rights of specific groups, and noted the lack of an indigenous peoples provision, as well as one on children and migrant workers. A joint open letter dated 8 July 2012 to ASEAN Foreign Ministers on the AHRD by reputable international human rights CSOs urged the following: removing any rights limitations; removing any provision subjecting the declaration to “national and regional peculiarities” that could be used to weaken human rights protections; removing any interference to the balancing of rights and responsibilities given that human rights are inalienable; and including a provision explicitly guaranteeing compliance with international standards (FIDH 2012). The Indonesian Permanent Representative to the AICHR, I Gede Ngurah Swajaya, sought in an interview with *The Jakarta Post* to reassure civil society that,

We have come to decide that the ADHR must not be less powerful than the Universal Declaration on Human Rights [...] the Declaration will also have added values to it.

Swajaya noted that,

Indonesia hopes that ASEAN will be a community that uses universal values and norms as the basis of its cooperation and emphasizes the protection of human rights (Sipahutar 2012).

A timely Expert’s Note on the ASEAN Human Rights Declaration from the US signalled strong support for Southeast Asian CSOs. The American Bar Association emerged in May 2012 as a useful guide to AICHR Permanent Representatives regarding ASEAN international human rights commitments and suggested pathways for drafting a relevant declaration. Among the rights that it noted could be developed further “due to the ASEAN’s unique context” included information on matters of public interest (American Bar Association 2012). The Southeast Asia

Press Alliance (SEAPA) in Bangkok argued that in advancing human rights protection, “the media has a critical role to play”, and in preparing a list of 10 questions to ask regional governments, SEAPA, “urge[d] friends in the media to use every opportunity to pose these questions to [the] national representatives and ASEAN officials” (SEAPA 2012).

The International Commission of Jurists and the International Federation of Human Rights jointly opposed adopting the declaration, citing that it “falls short of existing international standards and risks creating a sub-standard level of rights protection in the region” (Gill and Ye 2012). General Principles 6, 7 and 8 stipulated that the enjoyment of rights would be “balanced with the performance of duties” and subject to “national and regional contexts”. Rights could be restricted on a wide range of grounds, including “national security” and “public morality”. For Michael Bochenek, Director of Amnesty International’s Law and Policy Program,

Unless significant changes are made to the text, Asean will be adopting in 2012 a Human Rights Declaration that grants Asean Member States additional powers to violate human rights instead of providing the region’s people with additional safeguards against such violations (Phuket Wan 2012).

Marzuki Darusman, Chairman of the Human Rights Resource Centre for ASEAN, had sought to reassure civil society actors that the ADHR would not water down international standards along the lines of the ‘Asian values discourse’ that emerged from the region in the early 1990s, as it referenced the Universal Declaration of Human Rights. Darusman did acknowledge that some phrases on the declaration were “debatable” (*The Jakarta Post* 2012), and noted the desirability of including in the declaration a statement to the effect that a convention would be subsequently elaborated leading to binding undertakings and that an explicit statement of states’ responsibilities was needed as opposed to merely “promoting and protecting” (*The Jakarta Post* 2012).

Civil Society, a vital component in any protection regime, while consulted occasionally outside of formal meetings, continues to militate for greater AICHR engagement, unequivocal commitment to universal standards and greater human rights protection emphasis (Solidarity for the Asian People 2014). On the occasion of the 47<sup>th</sup> ASEAN Ministerial Meeting in August 2014, 58 CSOs sent an open letter to the AMM Chair inviting the ministers to accept,

broader contribution from human rights experts, NHRIs and CSOs with regard to their expertise and experience in the field of

human rights, notably in the set-up of any task force for the review of the ToR (Forum Asia 2014).

### 3.3 International Governmental Organisations' "Protection" Discourse

The International Governmental Organisation's (IGO) discourse, similar to the CSO discourse, features language about the need for international protection standards that are universally recognised. As noted earlier, the UN High Commissioner for Human Rights called upon ASEAN to "set the bar high" (Pillai 2012) in crafting its regional body.

The ASEAN mechanism was a step towards moving beyond, "mere words and towards the implementation of their human rights commitments on the ground" (OHCHR 2009b). As ASEAN was set to launch the AICHR in 2009, OHCHR noted that in the process of setting up other regional mechanisms in Africa, the Americas and Europe, "Leaders realised that focusing on relations between states was not enough, and that relations between states and the people within their borders also needed to be addressed" (OHCHR 2009b). OHCHR cautioned that credible and effective regional human rights mechanisms required,

the engagement of civil society and national human rights institutions from below, the initiative of the commissioners from within, and the political will of Member States from above (OHCHR 2009b).

In addition, it noted that while African, American and European mechanisms developed over time, common features included, *inter alia*, regional human rights instruments that reflect international standards; independent and impartial commissioners who are experts in human rights; mandates that enabled them to perform both promotion and protection work; their own rules of procedure, which include rules for interaction with both civil society and national human rights institutions; and cooperation with international human rights mechanisms (OHCHR 2009b). In a May 2009 *Report of Expert Dialogue With Civil Society and NHRIS on Regional Human Rights Mechanisms In Africa, The Americas And Europe*, publicised by OHCHR's Southeast Asia office and posted online, civil society's criticality vis-à-vis the protection capacity of each of these three mechanisms was repeatedly highlighted (OHCHR 2009c). OHCHR subsequently noted that the AICHR would, "have to work hard to establish itself as a credible regional mechanism and help close the gap between human rights rhetoric and the reality on the ground" (OHCHR 2009b).

The protection bar was clearly set low by the time the ADHR was adopted in November 2012. Reactions by the OHCHR, similar to those of regional CSOs, to the impending and leaked ASEAN Declaration on Human Rights confirmed that their voices had not been heeded and that a weak normative and institutional protection mechanism was being crafted. UN High Commissioner for Human Rights Navi Pillai noted that, “The number one concern is that AICHR – as a body – is not talking to civil society,” and that, “No discussion of human rights can be complete or credible without significant input from civil society and national human rights institutions” (Pillai 2011). Since only two consultations were held with CSOs in the drafting process, the High Commissioner opined:

This is not the hallmark of the democratic global governance to which ASEAN aspires, and it will only serve to undermine the respect and ownership that such an important declaration deserves (OHCHR 2012).

International organisations have been at the forefront of mediating a conflict between the principles of non-interference and those of respect for fundamental freedoms. While the UN Charter spoke only of ‘promotion’, IGOs have advanced both the promotion *and* protection of human rights, as well as the promotion of social justice and upholding international law. As the late Professor Henkin noted many years ago, a matter is exclusively within a state’s domestic jurisdiction only when it is not a matter of international law (Henkin 1977). Human rights protection is firmly entrenched in international law and may even constitute grounds for waging war in the international system under the responsibility to protect doctrine. Michael Reisman has noted that the United Nations Charter replicates the, “domestic jurisdiction-international concern” dichotomy,

but no serious scholar still supports the contention that internal human rights are essentially within the domestic jurisdiction of any state and hence insulated from international law. International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors (Reisman 1990).

IGO discourse on establishing high protection standards featured continuously throughout the regional human rights regime’s founding. Giv-

en that ASEAN members are also members of the UN, the OHCHR cajoled and nudged ASEAN along through official High Commissioner pronouncements and through advice on its regional office's website in Bangkok, as well as through seminars on other regional mechanisms. OHCHR's "Principles for Regional Human Rights Mechanisms (Non-Paper)" set forth the monitoring and investigative functions required of such a body including the following: observing the general regional human rights situation and publishing reports; recommending collective action at the regional level; requesting States Parties to provide it with information in relation to the promotion and protection of human rights, including information on specific human rights situations; and carrying out on-site visits to States Parties to investigate specific human rights concerns. Where violations are determined, remedies are recommended to the relevant State Party. These and follow-up reports are to be made public via media outlets, legislatures, academic institutions, public libraries, international institutions and the relevant government departments of all States Parties, as well as being placed on the Internet. The Principles should also develop an early warning system to help prevent gross violations of human rights, including crimes against humanity, war crimes and genocide (OHCHR 2009a). A critical aspect of this system, according to the 'non-paper' was the ability,

to receive, investigate, analyse and decide on communications from any person, group of persons or non-governmental organisation alleging human rights violation(s) by a State Party" (OHCHR 2009a).

In carrying out these investigations, the regional body required,

the power to obtain all necessary information (including unrestricted, confidential access to alleged victims, witnesses, and places of relevance) with a guarantee that the State Party will not engage in reprisals against those persons providing information to the mechanism.

If the regional body found there had been a violation, recommendations were to be made in the form of, "specific findings to the State Party concerned as well as the recommendation of appropriate remedies". Necessary witness protections were to be provided for and States Parties were to take necessary remedial measures within a specified period (OHCHR 2009a).

The IGO discourse regionally is reinforced by direct engagement with ASEAN states via international treaty bodies and via the Human Rights Council. At the United Nations, ASEAN member states partici-

pate in treaty-based or Charter-based human rights machineries: under specific universal rights conventions, ASEAN member states submit reports, may subscribe to individual petition procedures and inter-State complaints procedures, and may subscribe to procedures of country visits to places of detention under conventions, such as the Convention against Torture, and the Optional Protocol to the Convention (see Steiner and Alston 2008; Buergethal, Shelton, and Stewart 2002). Going beyond conventional procedures, ASEAN governments participate in the Human Rights Council under the system of Universal Periodic Reviews (UPR) whereby member states, around once every four and a half years, submit reports and participate in a dialogue with the Human Rights Council (Mueller 2008; UPR Info n.y.). Some ASEAN member states also cooperate with thematic global rapporteurs or working groups looking into the state of respect for different rights, economic and social as well as civil and political, and some ASEAN member states have also cooperated with rapporteurs examining particular country situations, Myanmar being a case in point.

Despite this engagement by the OHCHR and other UN bodies, notably the Human Rights Council, analysis shows that ASEAN states, “have been traditionally reluctant to engage with the international human rights treaty monitoring system” (Renshaw 2013: 578). Their commitment to core international treaties appears to be weak and, in relation to hard protection measures as called for by the IGO discourse, only the Philippines was party to the 1966 Optional Protocol to the International Covenant on Civil and Political Rights, which allows citizens the right of individual petition to the Human Rights Committee established under that treaty (Renshaw 2013: 578). Clearly regional governments are nervous about opening themselves up to external scrutiny.

## 4 Impact of “Democratic” Discourses’ on Human Rights Protection in Southeast Asia

From its regional origins in Western Europe, through the United States, there is now a global discourse on human rights, of which Asia, and Southeast Asia specifically, is a part. The discourse, as an expression of human progress, is an “unfinished project” and one that lacks East Asian state participation. Indeed, Chen argued that the future success or failure of the human rights project may well lie in Asia (Chen 2006).

There has undoubtedly been increased global consciousness and adoption of democracy, human rights and rule of law since the end of World War II, and especially in the post-Cold War geopolitical environ-

ment. Democratic forms of government and attendant liberal democratic constitutions, with the attendant rights, have proliferated. While the US and Europe are well-established liberal democratic polities, India is also a beacon of constitutional human rights values, current economic, political and social conditions notwithstanding. Liberal democracy is well grounded in Japan, South Korea and Taiwan, making a mockery of Malaysia and Singapore's "Asian Values" discourse.

It is noteworthy that China's discourse has differed from the latter two in that Beijing has stressed the need for economic development prior to greater civil and political rights. Indeed, China has embraced human rights as a worthy pursuit. Chen has noted that China and Vietnam have abandoned Marxist-Leninist hostility to the term "human rights". In China, a human rights White Paper was issued in 1991, the first of a series, which proclaimed that,

As a developing country, China has suffered from setbacks while safeguarding and developing human rights. Although much has been achieved in this regard, there is still much room for improvement.

A 2004 Chinese constitutional amendment stipulated the state shall respect and protect human rights, as opposed to an earlier formulation that referred to "citizen's rights" and not "human rights". That year, China made constitutional provisions as regards private property, while a 1999 amendment referred to "ruling the country according to law" (Chen 2006: 502–503). China surely responded to the new geo-political environment in which its economic growth and development, as well as post-Tiananmen domestic unrest, militated in favour of human rights discourse and practice.

While noting this, it is also true that for China, Malaysia and Singapore, as with other Southeast Asia states, regime security and power preservation are factors in this more accommodating approach. Neither the Communist Party of China, nor the ruling UMNO in Malaysia, nor the ruling PAP in Singapore, are ready to relinquish power anytime soon. Adopting a regional human rights body occurs in the context of the advent by January 2015 of a regional 'economic community', that is, a regional investment and production platform, for which it was necessary to put the 'human rights house' in order.

Southeast Asian people have been engaged in this discourse as a tool of social progress. In their social and political struggles, human rights discourse has been employed against imperialism and colonialism, Western economic domination, poverty and economic inequality, social injustice and discrimination, and the despotism of their governments by

claiming civil and political rights. The language of human rights has been adopted squarely as the,

language of the weak, the oppressed, the exploited, the disadvantaged, the marginalised, the minorities, those who are discriminated against, and those who have little power and wealth, a language which they and their sympathisers use to struggle for political, social and economic systems in which their human dignity, basic needs and welfare can be better recognized than before (Chen 2006: 505).

Rights discourse has been important for political mobilisation in Asia. Chen concluded that, generally, there has been an ascendancy of human rights discourse, practices and institutions in Southeast Asia. An expert seminar of the UN OHCHR, which included a former ASEAN Secretary General, noted that human rights standards must be seen to underpin any meaningful conception of democracy, which offers the best hope for the promotion and protection of all human rights (UN Commission on Human Rights 2003: para. 30).

The advancement of democracy and human rights discourse, however, does not necessarily correspond to any local reality. As Vitit Muntarbhorn has noted,

democracy does not necessarily guarantee human rights and the mere fact that an administration is democratically elected does not automatically imply that it will promote and protect human rights in a comprehensive manner (Muntarbhorn 2006: 343).

Thailand's "exemplary constitution" of 1997, drafted democratically with popular participation throughout the country, has not produced adequate reforms of the previous military regime's authoritarian laws: media are still 'shackled', minority groups are still disadvantaged, extra-judicial killings have taken place in the fight against drug-trafficking and martial law has been imposed by the government in dealing with the struggles against separatists in the south. Even in an increasingly prosperous Thailand, the government that won the popular vote in January 2014 was ousted by forces that favoured a non-elected panel to guide the country. Indeed, huge gaps exist between laws on books and practice.

Indeed, democracy goes beyond formal processes and institutions and requires effecting the principles, norms and standards and values on which it is based. This means providing a system of justice in which the rights of minorities, indigenous peoples, marginalised peoples, vulnerable groups, et al., are safeguarded. Effective application of the law and fair administration of justice are vital for democracy. The competing dis-

courses on the human rights protection are important to trace since a durable democracy requires justice for human rights violations victims. An accessible human rights body that would hold governments to account and ensure remedies and redress is vital to regional democracy. At present, CSOs have no institutional access; neither they nor individuals have any standing to petition the AICHR.

The competing “democratic” discourses in Southeast Asia, reveal that achieving the ‘high bar’ that is required to advance democratic governance is proceeding at a snail’s pace in the region and in an elitist process that excludes those that human rights norms and institutions are supposed to protect. The AICHR has thus far undertaken promotional activities, which may have some protection value, but fall far short of a body that might provide remedies to human rights violations victims.

Since its formation, AICHR has engaged in formal meetings, promotional activities, consultations and seminars or workshops on human rights topics (see generally AICHR 2012a). Its operational guidelines, adopted in March 2012, admonish all ASEAN agencies dealing with human rights to adhere to international human rights standards,

bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities (AICHR Guidelines 2012b).

Sixteen formal Commission meetings have been held so far, though behind closed doors. Unless otherwise decided, the Commission meets in plenary and, as per the operational guidelines,

The AICHR may agree to keep the public informed about the outcome of its meeting by way of a press release by the Chair as agreed by AICHR (AICHR Guidelines 2012b).

The AICHR is to,

work with all ASEAN sectoral bodies dealing with human rights through appropriate channels to determine the modalities for their ultimate alignment with the AICHR, pursuant to Article 6.8 of the AICHR’s TOR (AICHR Guidelines 2012b).

It can do so via the following: convening joint consultations with sectoral bodies; working jointly with such bodies to review their terms of reference to eliminate inconsistencies with the role of AICHR as the sole overarching human rights institution; attending, upon invitation, meetings of other relevant ASEAN sectoral bodies, or convening joint meetings, where necessary and appropriate, on the promotion and protection

of human rights; furnishing each other's reports and publications; conducting joint activities where possible; convening special meetings, if deemed necessary, to discuss human rights promotion and protection specifics; determining the sphere of activities in the event of duplication (AICHR Guidelines 2012b); AICHR

*may engage in dialogue and consultation* with entities associated with ASEAN, including accredited Civil Society Organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter, pursuant to Article 4.8 of the AICHR's TOR (AICHR Guidelines 2012b; emphasis added).

The AICHR,

*may consult, as may be appropriate,* with other national, regional and international institutions and entities concerned with the promotion and protection of human rights, pursuant to Article 4.9 of the AICHR's TOR (AICHR Guidelines 2012b; emphasis added).

At a special November 2014 AICHR session, a typical press release informed the public that, "the AICHR discussed and provided inputs to several concept papers for activities to be conducted under its priority programmes for 2015" (ASEAN Secretariat 2014c). At AICHR's 16th meeting, a press release informed the public that it adopted a "Concept Note on the Workshops for Strengthening AICHR's Protection Mandate by Exploring Strategies to Protect Women and Girls from Violence," an initiative led and sponsored by the Government of the Philippines. AICHR has adopted declarations on the elimination of violence against women and the elimination of violence against children in ASEAN and on strengthening social protection. AICHR has also undertaken a Thematic Study on CSR and Human Rights in ASEAN.

External dialogues were also held with the Inter-American Commission on Human Rights and the European Court of Human Rights. AICHR's website lists under "external relations", dialogue with UNDP and the UN OHCHR, UN Women and UNHCR.

AICHR has also held seminars and workshops on human rights and related topics, such as the environment and climate change, post-2015 millennium development goals and women's rights. For example, a two-day workshop on Regional Mechanisms: Best Practices on Implementation of Human Rights was held from 17–18 November 2014 in Bangkok, Thailand, aimed at "creating a platform of exchanging and sharing experiences, best practices and lessons learned among participants." It included participation of experts from other regional human rights systems, such as the Inter-American, Europe and Africa as well as representatives

from government agencies, National Human Rights Institutions/ bodies and Civil Society Organisations in ASEAN. Another workshop took place in September 2014 on the Sharing of Experiences on Universal Periodic Review Process among ASEAN Member State. The press release noted that,

The UPR process is seen from a holistic view: it is not just a report writing exercise but its fundamental objective is to make real improvement on human rights on the ground (AICHR 2014a).

Thailand's representative to the AICHR has observed that other states' AICHR representatives continue to act on behalf of their governments as opposed to advancing a credible peer review system.

Such observations do not bode well for the advancement of democracy. These largely consensus-building activities reveal AICHR's promotional approach and betrays how ASEAN states are not yet ready to grant a supra-national entity, even a regional one, with full internal affairs powers. The principle of non-interference seems to be intact as far as regional human rights protection is concerned, which is consistent with the Thai representative's suggestion to AICHR that his colleagues tend to view their job as one of protecting their governments. Collectively, AICHR's activities and promotional approach indicate that regional political elites are still nervous about external interference and that seek to insulate themselves.

The human rights regime in Southeast Asia reflects the dominance of an elitist "ASEAN-Way" conflict resolution approach, differing interpretations of minimum protection standards as reflected in the AHRD clauses, and a reluctance to move towards a harder protection regime (see generally Langlois 2012). The elitist AICHR construction at the expense of CSO participation was explained thusly by Dr. Termsak Chalermphanupap, ASEAN's Director of Political and Security Directorate. The new ASEAN Human Rights body was "not supposed to have teeth", but was to generate consensus (Salaveria 2009). Dr. Chalermphanupap, who felt it necessary to issue a document dispelling "misinformation" by the media, noted that the ASEAN human rights body was to be, "an organ inside the organization structure of ASEAN." Its direct mandate was in Article 14, which was part of ASEAN Charter Chapter IV, "Organs". As such, the human rights body was, "never intended to be any 'independent watchdog'. To moan on the human rights body's "lack of teeth" is to bark up the wrong tree" (Chalermphanupap n.y.; see also AICHR 2012a). Indeed, Article 40 of the AHRD places the human rights regime squarely at the mercy of ASEAN's non-interference princi-

ple. Clearly the drafters of the AHRD intended it to be a political instrument.

## Conclusion

The three discourses discussed in this paper represent Southeast Asia's engagement with global human rights discourse. Asian scholars have argued that the human rights concept and discourse, which emerged out of the Enlightenment era, was a "breakthrough" in Western Civilisation and represented an "intellectual breakthrough and a political revolution". This "invention of modern times" that could help alleviate human suffering "was a good idea" and it was a sign of "moral progress on the part of human kind" (Chen 2006: 488). This discourse has permeated societies globally.

The competing regional discourses on human rights protection and related matters – the institutional set-up of AICHR and its *modus operandi* – reveal Southeast Asia's slow march towards a more liberal democratic form of governance and the rule of law as enshrined in universal human rights standards.

As Southeast Asian states participate in global human rights discourse, it is fair to say that there has been some improvement of civil and political rights since transitions to democracy have taken place. It is also fair to point out that AHRD has provisions for the right to recognition before the law and the right to an enforceable remedy that are also found in the UDHR. However, while global and regional consensus may take place *vis-à-vis* human rights, local interpretations may differ, with different philosophical background justifications and differing mechanisms for enforcing such norms. Perhaps even the more pro-human rights countries in Southeast Asia are bearing out this proposition. Clearly, despite ASEAN's adoption of the AICHR and AHRD, the Statist discourse reveals resistance to harder forms protection, to universal standards of rights and to their implications for democratic governance within member states. Nevertheless, given that the AHRD and the AICHR are 'home grown', regional governments cannot in future claim that human rights are external impositions. The potential of the AHRD, according to Renshaw, lies not in its finer details, but in "the practices of interpretation that evolve as the Declaration is invoked by AICHR, CSOs and human rights activists" (Renshaw 2013: 579).

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